Case No. 17-6088

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARCIA W. DAVILLA, *ET AL.*,
Plaintiffs-Appellees,

v.

ENABLE MIDSTREAM PARTNERS, LP, *ET AL.*,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
HONORABLE VICKI MILES-LAGRANGE, DISTRICT JUDGE
CIV-15-1262

APPELLANTS' REPLY BRIEF

Barry L. Pickens, Esq.
Spencer Fane LLP
9401 Indian Creek Parkway
Suite 700
Overland Park, Kansas 66212
Telephone: 913.345.8100
Facsimile: 913.327.5129
Email: bpickens@spencerfane.com

Andrew W. Lester, Esq.
Spencer Fane LLP
9400 North Broadway Extension
Suite 600
Oklahoma City, Oklahoma 73114
Telephone: 405.844.9900
Facsimile: 405.844.9958
Email: alester@spencerfane.com

ATTORNEYS FOR APPELLANTS

Dated: January 16, 2018

ORAL ARGUMENT REQUESTED

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ARGUMENT

The district court erred in granting partial summary judgment for Plaintiffs by failing to require them to establish that they were entitled to judgment as a matter of law. The summary judgment motion failed to address elements required of a trespass claim – namely, that Plaintiffs had demanded removal of the pipeline and that Plaintiffs had not expressly or impliedly consented to the pipeline's continuation across their property.

The district court also erred by entering a permanent injunction by failing (i) to apply the required four-factor test, (ii) to exercise its discretion based on that test, and (iii) to comply with Rule 52 in entering the permanent injunction. The judgment entered below must be reversed.

I. Plaintiffs did not address a required element of their claim for trespass. The district court thus erred by granting Plaintiffs partial summary judgment on liability.

In their brief, Plaintiffs concede their motion for partial summary judgment did not address whether they made demand for Defendants to remove the previously-authorized structure erected by a third-party who had transferred the structure to Defendants' predecessor by 2000. Instead, Plaintiffs argue waiver and that federal law did not require them to make such a demand. They are wrong on both counts. Their summary judgment motion was defective and they were not

entitled to judgment as a matter of law. The district court erred in granting them partial summary judgment.

A. Defendants did not waive this defect. The district court was *required* to determine whether Plaintiffs' summary judgment motion established every required element of their affirmative claim for relief, whether or not raised by Defendants.

Plaintiffs acknowledge that where movants fail to demonstrate entitlement to judgment as a matter of law in their motion, then the non-movant has no obligation to respond at all and the district court must deny the motion. *Adickes v. S.H. Kress & Co*., 398 U.S. 144, 161 (1970); *Neal v. Lewis*, 414 F.3d 1244, 1248 (10th Cir. 2005); *Reed v. Bennett*, 312 F.3d 1190, 1195 (10th Cir. 2002). Nevertheless, Plaintiffs persist in arguing that the demand requirement was waived because neither party addressed it in the trial court.

Without citing apposite authority or offering any cogent explanation, however, Plaintiffs contend that the Court should adopt a different rule where the parties have addressed the remaining elements of plaintiffs' claims in their summary judgment papers. Yet, the leading treatise on federal procedure has rejected this view. Relying on the advisory committee notes to Rule 56, Professor Moore's treatise concludes that a "movant who fails to satisfy its initial summary judgment burden is not entitled to summary judgment regardless of the nonmovant's response or lack of response[]. The only way the court may render summary judgment in such circumstances is if it finds grounds to grant summary

judgment sua sponte ***and gives the parties notice of its intention and a reasonable time to respond***[].”11 James Wm. Moore, *et al*., *Moore's Federal Practice* ¶56.40 (3d ed. 2005) (emphasis supplied).

Unsurprisingly, the official notes to Rule 56 agree. They provide: “summary judgment cannot be granted by default even if there is a complete failure to respond to the motion, much less when an attempted response fails to comply with Rule 56(c) requirements.” Fed. R. Civ. P. 56, advisory committee note of 2010; *see also id*., advisory committee note of 2009 (“summary judgment cannot be granted merely because of procedural default—the court must be satisfied that the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to judgment”).

In *Saab Cars USA, Inc. v. United States*, the Federal Circuit adopted the same rule advocated by Professor Moore, holding that a district court must determine whether a summary judgment movant is entitled to judgment as a matter of law based on his or her motion, even where a non-movant files a response that is “not adequate.” 434 F.3d 1359, 1368 (Fed. Cir. 2006). The *Saab* Court concluded: “As the leading commentator on federal procedure puts it, ‘if the motion is brought by a party with the ultimate burden of proof, the movant must still satisfy its burden by showing that it is entitled to judgment as a matter of law even in the absence of an adequate response by the nonmovant.’” *Id*. (citing 11 James Wm.

Moore, *et al.*, *Moore's Federal Practice* ¶56.13[1] (3d ed. 2005)). *Cf. Murray v. City of Tahlequah*, 312 F.3d 1196, 1200 (10th Cir. 2002) (citing *Adickes* and 1965 advisory committee note to conclude "the district court may not grant [a summary judgment] motion without first examining the moving party's submission to determine if it has met its initial burden of demonstrating that no material issues of fact remain for trial and the moving party is entitled to judgment as a matter of law," even if non-movant files no response).

Before granting partial summary judgment, the district court had a duty to determine first whether Plaintiffs' motion established their entitlement to judgment on liability. Plaintiffs' motion did not even address this requirement in their motion at all, let alone establish entitlement to judgment as a matter of law. The district court committed reversible error by granting Plaintiffs' defective summary judgment motion.

B. The federal law governing Plaintiffs' trespass claim required Plaintiffs to establish they demanded removal of the pipeline.

Despite Plaintiffs' belated efforts to parse the language of the Restatement (Second) of Torts, the Court in *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009) (addressing the required elements of a continuing trespass under federal law), recognized that the continued presence of a previously-built structure constitutes a trespass only on a showing that a plaintiff requested defendant to remove the encroaching structure and thus authorized defendant's entry to remove

it. *Id*. at 1190-91 (citing Restatement (Second) of Torts, § 161; 75 Am. Jur. 2d, Trespass, § 19 (2009)). *Milner* quoted approvingly from a district court decision, *Energy Research & Dev. Auth. v. Nuclear Fuel Servs., Inc.*, 561 F. Supp. 954, 974 (W.D.N.Y. 1983). After considering the Restatement (Second) provisions, the *Energy Research* court held:

> In the case of trespass through the continuing presence of chattels on another's land, the requisite intent does not arise until the duty to remove the chattels arises, which does not occur until a demand for removal has been made.

561 F. Supp. at 974.

Based on their selective references to comments to Section 161 of the Restatement (Second) of Torts, Plaintiffs nevertheless argue that this Court should not read the Restatement (Second) to impose a demand requirement. However, both the *Milner* and the *Energy Research* courts extensively considered the text of and the comments to Section 161 in concluding that demand is required.

In response to Defendants' argument and as a general criticism, Plaintiffs contend Defendants "gloss[] over" the fact that no deposition testimony was taken, and the district court proceeded on "stipulated facts and documentary evidence" that "constitute judicial admissions." Appellee's Brief at 3, 15. Plaintiffs do this to make it appear that Plaintiffs' evidence showed a demand was made. It does not. To the contrary, Plaintiffs' "undisputed facts" evidence shows they made no demand.

As set forth in Plaintiffs' Undisputed Fact ("UDF") No. 7, in 2002 Defendant Enable Oklahoma Intrastate Transmission, LLC (f/k/a Enogex, LLC) ("EOIT") submitted a right-of-way application to the Bureau of Indian Affairs ("BIA"). Aplt. App. 107. In 2008, the BIA approved a renewal of the easement for another 20 years. *See* UDF No. 8, Aplt. App. 108. In 2010, the BIA reversed its decision, and the matter was "remand[ed] for further negotiations" regarding the price EOIT should pay to Plaintiffs. *See* UDF No. 11, *id.* In connection with this remand, the BIA ordered that if an ultimate agreement was not reached on a price, then EOIT "should [in the future] be directed to move the pipeline off the subject property." *Id*.

Plaintiffs never established they made demand for removal of Defendants' previously-authorized pipeline. Moreover, the Court never considered the issue. Even more importantly, Plaintiffs' evidence establishes EOIT was never directed to remove its pipeline or vacate the property. The evidence further establishes Plaintiffs never informed EOIT that Plaintiffs did not consent to the presence of the pipeline during this time.

Taking Plaintiffs' UDFs as a whole, and taking all inferences in favor of Defendants (the nonmoving parties), as Rule 56 requires, it is apparent the issue was never that EOIT should remove its pipeline or was demanded to do so by Plaintiffs. Rather, the issue was how much EOIT was going to pay to renew the

easement with the understanding of all parties that the pipeline would remain on the property.[1]

Plaintiffs' suggestion that they demanded removal of the pipeline but did not file suit for years — as opposed to permitting EOIT to hold over while negotiating a higher price for EOIT's continued presence — is not supported by the evidence. Indeed, it defies common sense. In any event, it was error for the district court not to consider an essential element of Plaintiffs' trespass claim, namely whether Plaintiffs had made demand for removal of Defendants' previously-authorized pipeline.

The demand requirement exists, among other reasons, to give Defendants an opportunity to remove their property. Without Plaintiffs' demand, Defendants' re-entry on Plaintiffs' property to remove the pipeline itself would have constituted a separate trespass. Plaintiffs' motion for summary judgment failed to address this *prima facie* element. Accordingly, the district court erred in granting partial summary judgment.

[1] Where, as here, it is undisputed the pipeline has been lawfully on the property for over several decades pursuant to a series of contractual easement agreements, the requirement of a demand to remove the pipeline has particular significance. Absent a demand, EOIT is a holdover liable for only contractual damages based on the prior easement terms, like a holdover tenant. *See*, *e.g.*, *Salt River Pima-Maricopa Indian Community v. United States*, 86 Fed. Cl. 607, 612 (2009) (finding that government's continued use of an easement past the decades-long term rendered the government a holdover liable for contractual damages).

II. Plaintiffs' summary judgment motion also failed to address the issue of consent under Oklahoma law, as required by this Court's decision in *Nahno-Lopez*.

In their brief, Plaintiffs chastise Defendants for their over-reliance on this Court's decision in *Nahno-Lopez v. Houser*, 625 F.3d 1279, 1282-83 (10th Cir. 2010). However, once this Court decided in *Nahno-Lopez* that state law provides the rule of decision for the issue of consent in an alleged trespass on Native American property, that decision became binding precedent. *Dubuc v. Johnson*, 314 F.3d 1205, 1209 (10th Cir. 2003). It is axiomatic that one panel may not overrule the decision of another panel, including the decision reached on this issue in *Nahno-Lopez*. *Dubuc*, 314 F.3d at 1209 ("[o]nly an *en banc* panel may overrule a prior panel's decision").

As noted in Defendants' opening brief, this Court held in *Nahno-Lopez* that for purposes of a federal common law claim of continuing trespass against a beneficial owner of an Indian allotment, Oklahoma state law provides "the rule of decision" for the affirmative defense of consent: "Oklahoma trespass law provides the rule of decision for this federal [trespass] claim." 625 F.3d at 1282-83 (citing *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 283 (1982); *United States v. Milner*, 583 F.3d 1174, 1182 n.6 (9th Cir. 2009); Felix S. Cohen, *Handbook of Federal Indian Law* § 16.03(3)(c) (5th ed. 2005)). *Cf. Gilmore v. Weatherford*, 694 F.3d 1160, 1164 (10th Cir. 2012) (applying Oklahoma law as the

rule of decision for conversion claim brought by Native American property owners). Further, the *Nahno-Lopez* Court held that "consent forms a complete defense to trespass" under Oklahoma law. *Id*. at 1284.

In *Nahno-Lopez*, the Court concluded that state law provided the relevant rule of decision on consent, despite an argument plaintiffs made there that is indistinguishable from the argument raised by Plaintiffs below – that a federal statute governs the effectiveness of any alleged consent. The *Nahno-Lopez* plaintiffs argued their purported consents to a lease were unauthorized and invalid under 25 U.S.C. § 348, which requires express approval by the Department of the Interior through its Bureau of Indian Affairs. *Id.* at 1280 ("Plaintiffs maintain that the Secretary of the Interior never approved the lease, as is required by 25 U.S.C. § 348").

Plaintiffs here make no attempt at all to distinguish their argument here from the argument raised in *Nahno-Lopez*. Instead, they merely drop a footnote to claim *Nahno-Lopez* "did not address this argument." Appellees' Brief at 30, n.9. However, in concluding that the *material* facts regarding consent were governed by Oklahoma law, not federal law, this Court rejected the plaintiffs' argument that 25 U.S.C. § 348 must be satisfied to establish effective consent. *Id.* at 1280. A panel of "this court must follow" both the Court's holding in *Nahno-Lopez* as well

as the court's underlying reasoning on the legal points raised until "otherwise modified by the *en banc* court." *Dubuc*, 314 F.3d at 1211.

For the first time on appeal, Plaintiffs belatedly make arguments regarding why none of them has effectively consented under Oklahoma law. However, they failed to address this issue in their summary judgment motion, and thus were not entitled to judgment as a matter of law. *See, e.g.*, *Adickes*, 398 U.S. at 161; *Neal v. Lewis*, 414 F.3d at 1248 (movants are not entitled to summary judgment unless they establish in their motion that all necessary facts are undisputed). In an attempt to avoid their Rule 56(c) burden of production, Plaintiffs suggest that once they submitted evidence regarding whether Plaintiffs' consent was effective (under the federal statute) for the first time in their reply brief below, Defendants had a duty to seek leave to file a sur-reply to respond to those facts. That argument is also wrong under well-established Tenth Circuit law.

Where a movant raises a factual issue for the first time in a reply brief, the district court has only "two permissible courses of action"; it must either permit a surreply "or, in granting summary judgment for the movant, it could" refrain "from relying on any new material contained in the reply brief." *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1139 n.13 (10th Cir. 2003) (applying *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1164 (10th Cir. 1998)). In *Doebele*, this Court concluded that even though the non-movant did not seek leave to file a sur-reply to

respond to new facts, the district court nevertheless had "abused its discretion to the extent it relied on new evidentiary materials presented for the first time in [movant's] reply brief." 342 F.3d at 1139 n.13. *See also Daneshvar v. Graphic Tech Inc.*, 237 Fed. Appx. 309, 318 (10th Cir. 2007); *Teran v. GB Int'l, S.P.A.*, 652 Fed. Appx. 660, 669 n.10 (10th Cir. 2016).

In any event, "permission or consent" for an alleged trespass under Oklahoma law may be express or may be "implied by the circumstances." *Antonio v. Gen. Outdoor Adver. Co.*, 414 P.2d 289, 291 (Okla. 1966). Under Oklahoma law, the trier of fact must consider both whether express consent was given and whether consent may be implied from all the relevant circumstances. Indeed, consent is a classic "fact issue" that should not have been decided on summary judgment.

III. The district court erred by entering an injunction under the wrong legal standard without ever exercising its discretion.

A federal district court must apply the traditional four-factor test before granting permanent injunctive relief. Yet, the district court here concluded Plaintiffs were entitled to entry of a mandatory injunction simply on prevailing on the trespass claim. It thus failed to exercise its discretion or to apply the four-factor test.

Plaintiffs first contend Defendants waived this issue by not raising it below. Yet, Defendants expressly relied on the four factors in their briefing. Plaintiffs next

rely on authority the Supreme Court rejected in its most recent decisions on this issue. The district court erred by failing to apply the four-factor test and by failing to exercise its discretion based on its application of the four-factor test.

The record below belies Plaintiffs' argument. Defendants expressly argued against entry of a permanent injunction by asking the district court to conclude Plaintiffs were not entitled under the traditional four-factor test. *E.g.*, App. 168 ("A party requesting a permanent injunction bears the burden of showing: (1) actual success on merits; (2) irreparable harm to the Plaintiffs unless an injunction is issued; (3) the threatened injury outweighs harm which an injunction may cause to the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest").

Furthermore, the parties may not waive the court's power or duty to apply the correct construction of the governing legal standard for issuance of a permanent injunction. This Court has held it is "not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Planned Parenthood of Kan. & Mid-Mo. v. Moser*, 747 F.3d 814, 837 (10th Cir. 2014); *see also Mitchell v. Comm'r of Internal Rev.*, 775 F.3d 1243, 1250 n.4 (10th Cir. 2015); *Holmes v. Colo. Coalition for the Homeless Long Term Disability Plan*, 762 F.3d 1195, 1200 n.2 (10th Cir. 2014).

In their brief, Plaintiffs again ask this Court to conclude they were "automatically" entitled to a permanent injunction if they succeeded on their federal continuing trespass claim by citing Oklahoma state law or federal decisions that predate the Supreme Court's most recent decisions – *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392-93 (2006); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157-58 (2010) ("An injunction should issue only if the traditional four-factor test is satisfied"); *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Wyoming v. Dep't of Agric.*, 661 F.3d 1209, 1272 (10th Cir. 2011). In light of this unambiguous Supreme Court precedent, the cases cited by Plaintiffs do not and cannot justify the district court's failures to apply the four-factor test or to exercise its discretion.

Finally, Plaintiffs contend that this Court may affirm by conducting the four-factor balancing test and exercising the district court's discretion for it in the first instance. The cases relied on by Plaintiffs, however, stand only for the general proposition that an appellate court may affirm a judgment on any sufficient basis.

Plaintiffs' suggestion that this Court may affirm the district court's order granting the injunction based on any argument that may sustain it now, even if the district court did not rule on the issue below, ignores the import of the district court's discretion on this issue. With respect to a ruling on a "matter committed to the district court's discretion," this Court "may not affirm" the ruling "based on an

alternative legal rationale not relied on by the district court" unless it could conclude "as a matter of law that it would have been an abuse of discretion for the trial court to rule otherwise." *Conkle v. Potter*, 352 F.3d 1333, 1337 (10th Cir. 2003); *see also Ashby v. McKenna*, 331 F.3d 1148, 1149 (10th Cir. 2003) (remanding sanctions order, concluding "it is not for this appellate court to decide in the first instance" issues over which a district court has "discretionary authority"; citing *Orner v. Shalala*, 30 F.3d 1307, 1309-10 (10th Cir. 1994); *True Temper Corp. v. CF&I Steel Corp.*, 601 F.2d 495, 509 (10th Cir. 1979)). Moreover, in such circumstances, this Court will "ordinarily remand to allow the district court to make a determination" on a discretionary issue on which the decision is "entrusted in the first instance to the discretion of the district court." *Benton v. Town of S. Fork & Police Dep't*, 553 F. App'x 772, 782 (10th Cir. 2014).

Thus, even if Plaintiffs had offered sufficient proof of each of the four factors, the district court's failure to exercise its equitable discretion requires reversal. Its erroneous conclusion that Plaintiffs were automatically entitled to the injunction if they prevailed on their trespass claim requires this Court to reverse the district court's injunction.

IV. The district court erred by failing to comply with Rule 52(a)(1).

Effectively conceding the district court's March 28 Order did not comply with Rule 52(a)(1) (requiring that a court "must find the facts specially and state its

conclusions of law separately"), Plaintiffs argue that Rule 52(a)(1) does not apply to summary judgment orders, and that this Court may excuse and ignore a district court's failure to comply with Rule 52 in appropriate circumstances. Neither argument excuses the district court's non-compliance with the rule.

Plaintiffs first contend Rule 52 may not apply to the summary judgment portion of the district court's order. Yet, Plaintiffs cite no authority for the proposition that an order approving entry of the permanent injunction need not comply with Rule 52. In contrast, Defendants cited unanimous authority holding that Rule 52 does apply to a permanent injunction order. 9-52 James W. Moore, *et al*., *Moore's Federal Practice - Civil* § 52.10 ("Rule 52 extends to all actions tried upon the facts without a jury and therefore extends to actions seeking permanent injunctions"); *see also S.E.C. v. Management Dynamics, Inc.*, 515 F.2d 801, 814 (2d Cir. 1975); *United States v. Rohm & Haas Co.*, 500 F.2d 167, 176 (5th Cir. 1974); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 556 (9th Cir. 1990).

Plaintiffs also contend this Court should excuse the district court's failure in the circumstances presented here. However, Plaintiffs completely ignore the discretionary nature of injunction orders. Without compliance with Rule 52, this Court can at best only guess whether the district court applied the four factors or exercised its inherent discretion in matters regarding injunctions. This Court's inability to provide meaningful review of the district court's order is the reason the

Supreme Court has held compliance with Rule 52 "is of the highest importance to a proper review of the action of a court in granting or refusing" injunctions. *E.g.*, *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316 (1940) (discussing preliminary injunction); *Sampson v. Murray*, 415 U.S. 61, 62 (1974) (quoting *Mayo*).

The district court's failure to comply with Rule 52 renders "meaningful review [] well-nigh impossible." *Sampson*, 415 U.S. at 62. Accordingly, this Court should reverse the permanent injunction for this reason as well.

CONCLUSION

Plaintiffs' defective summary judgment motion failed even to address a *prima facie* element of their trespass claim – a demand for Defendants to remove the pipeline – and failed to address the consents five of the Plaintiffs had provided for Defendants' continued use of the pipeline. Granting summary judgment on this issue was erroneous.

The district court also erred by granting Plaintiffs' motion for a permanent injunction. It failed to exercise its equitable discretion and failed to apply the four-factor test required for entry of a permanent injunction. It erroneously concluded Plaintiffs were automatically entitled to a permanent injunction if they prevailed on their trespass claim.

Further, the district court failed to make specific findings of fact and separate conclusions of law as required by Rule 52(a)(1). That failure prevents this Court from providing meaningful review of the Court's exercise of its discretion.

As set forth in Appellants' opening brief, the district court also erred by dismissing Defendants' counterclaim seeking condemnation of an easement in Plaintiffs' property under Section 357 and Oklahoma state law. As plaintiffs acknowledged, Defendants' right to condemn an easement would have justified their continued use of the pipeline and should have precluded entry of partial summary judgment and a permanent injunction based on that partial summary judgment.

For each of the reasons set forth in Appellants' Opening Brief and in this Reply, Defendants request this Court to reverse the district court's entry of partial summary judgment and a permanent injunction and remand the case to the district court for further proceedings.

Respectfully Submitted,

SPENCER FANE LLP

/s/ Andrew W. Lester

Andrew W. Lester
9400 North Broadway Extension
Suite 600
Oklahoma City, Oklahoma 73114
Tel. 405.844.9900
Fax 405.844.9958
Email: alester@spencerfane.com

Barry L. Pickens
9401 Indian Creek Parkway, Suite 700
Overland Park, Kansas 66212
Tel. 913.345.8100
Fax 913.327.5129
Email: bpickens@spencerfane.com

ATTORNEYS FOR DEFENDANTS/APPELLANTS

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/s/ Barry L. Pickens
Attorney for Defendants/Appellants

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I hereby certify that with respect to the foregoing:

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/s/ Barry L. Pickens
Attorney for Defendants/Appellants

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2018, I electronically filed the foregoing **APPELLANTS' REPLY BRIEF** with the Clerk of Court using the CM/ECF System. Counsel for all parties are registered CM/ECF users and will be served with the foregoing document by the Court's CM/ECF System.

/s/ Andrew W. Lester
Andrew W. Lester