

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**David Means, Plaintiff Below,**

**Appellant,**

vs.)

**No. 35506**

**Kanawha Pizza, LLC, et al., Defendants Below,**

**Appellees**

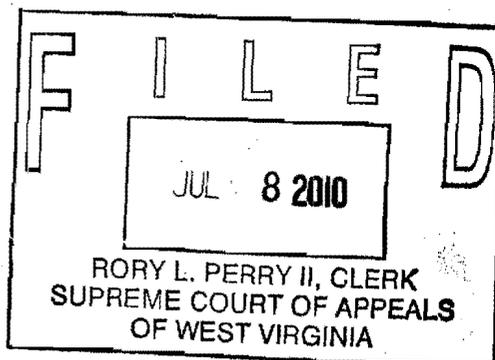
**BRIEF OF APPELLANT DAVID MEANS**

**Prepared by:**

**J. Kristofer Cormany  
West Virginia Bar # 7665  
Cormany Law, PLLC  
P.O. Box 11827  
Charleston, West Virginia 25339  
(304) 720-3566**

**and**

**John Kennedy Bailey  
West Virginia Bar #6857  
John Kennedy Bailey, PLLC  
P. O. Box 2505  
Charleston, WV 25329  
(304) 346-5646**



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## I. Kind of Proceeding and Nature of the Ruling in the Lower Tribunal

This appeal arises from the Kanawha County Circuit Court's entry of an Order granting a Motion to Dismiss against Appellant David Means, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. On December 24, 2006, Appellant Means was assaulted and shot as he exited the Domino's Pizza where he worked, by two assailants, who had been hiding next door at an Exxon gas station owned and operated by the appellees. The lower court dismissed appellant's case against the Exxon gas station defendants (appellees); the rest of the case has yet to be decided.

Specifically, the appellant in this case, David Means, was an employee of Domino's Pizza at 1631 Washington Street, East, in Charleston, West Virginia. The appellees in this case, referred to as the "Exxon appellees" and further described, *infra*, owned and operated an Exxon gas station adjacent and to the east of the Domino's Pizza where Appellant Means worked. As discussed below, the gas station was a magnet of violent and illegal activity, where numerous criminal acts occurred prior to the events giving rise to this appeal.

On December 19, 2008, appellant filed a negligence claim against the Exxon appellees and a deliberate intent claim against his employer, Kanawha Pizza LLC, to recover compensation for the injuries and damages he sustained as a result of the event.<sup>1</sup> On April 24, 2009, the appellees filed a Motion to Dismiss alleging that they owed no legal duty to the plaintiff. The

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<sup>1</sup> The lower court dismissed negligence claims against the Exxon appellees early in the litigation. Therefore, the deliberate intent claim against the appellant's employer is not the subject of this appeal, and remains pending in Kanawha County Circuit Court. However, the Circuit Court's order dismissing the appellant's claims against the Exxon appellees is ripe for appeal pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure because it is a final order adjudicating all claims against the appellees. Sisson v. Seneca Mental Health/Mental Retardation Council, (404 S.E.2d 425, 185 W. Va. 33 (1991)); Durm v. Heck's, Inc., 401 S.E.2d 908, 184 W. Va. 562 (1991).

appellant timely responded in opposition to the appellees' Motion to Dismiss and on July 14, 2009, the Circuit Court conducted a hearing on the Motion, which concluded with the Court requesting that the parties submit competing orders respectively granting and denying the Motion.

On August 31, 2009, the Circuit Court of Kanawha County entered an Order granting the appellees' Motion to Dismiss finding that the appellees owed no duty to the appellant. This Honorable Court granted the petition for appeal, and by Order dated June 9, 2010, ordered Appellant Means to submit his Brief of Appellant. Appellant prays for reversal of the Circuit Court's erroneous conclusion of law in dismissing this civil action.

## **II. Statement of the Facts of the Case**

Appellant filed suit for the injuries he sustained when he was assaulted and shot as he closed the Domino's Pizza store located near the Capitol on Washington Street, East, in Charleston. The parties that shot the appellant saw him enter the store alone and then secreted themselves on the gas station property next door, waiting to ambush the appellant when he exited the Domino's store. Although Appellant Means sued his employer and the owner of the land beneath the Domino's store as well as the Exxon appellees, because this is an appeal of the lower court's grant of summary judgment for the Exxon appellees, this statement of facts focuses primarily on the acts and omissions of the Exxon appellees. On December 19, 2008, the plaintiff filed this civil action, alleging, *inter alia*, that he was shot and seriously injured as a result of the Exxon appellees' negligence.

Consistent with West Virginia law, only matters contained in the pleadings were

considered in the Circuit Court's decision dismissing this action. The factual background contained in the appellant's complaint was the record upon which this civil action was dismissed and its relevant portions are contained herein.

The appellant's complaint alleges that the appellees, Darden Properties II, LLC and OSI, LLC were West Virginia limited liability companies and were the owners and operators of an Exxon branded gas station that is located adjacent to the Dominos's Pizza where the plaintiff was employed.<sup>2</sup>

On and before December 24, 2006, employees and management of the appellees, Darden Properties II, Inc. and OSI, LLC, observed or were made aware of numerous instances of illegal and/or violent activity, on their property, including, but not limited to fighting, robberies, panhandling, loitering, public intoxication, and acts of prostitution. (Complaint at ¶ 8).

In spite of their actual knowledge of these acts, on and before December 24, 2006, the appellees, Darden Properties II, LLC and OSI, LLC, failed to provide adequate security on their premises, failed to undertake reasonably prudent precautions for the safety and lives of workers and customers on their premises and failed to provide the plaintiff and others with adequate protective measures or safeguards against violent crime during the normal course of employment in the late evening and early morning hours when exposure to violent crime is greatest.

(Complaint at ¶ 9).

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<sup>2</sup> In his complaint, the appellant named Darden Properties, LLC and One Stop, Inc. as the owners and operators of the subject property, however, during initial pleading it was revealed that instead Darden Properties II, LLC and OSI, LLC were the proper parties that owned and operated the Exxon station. The appellant moved for leave to amend his complaint to substitute Darden Properties II, LLC for Darden Properties, LLC and to substitute OSI, LLC for One Stop, Inc. Appellant's motion was granted and the Circuit Court conducted the hearing on the Motion to Dismiss of the newly substituted proper parties.

Appellant Means suffered his injury as follows: on the night of December 24, 2006, Appellant David Means exited the rear of the Domino's Pizza location at 1631 Washington Street, East in Charleston, West Virginia, after completing his work related duties for the evening. (Complaint at ¶ 10-18). As the appellant moved from the rear door of the Domino's building and approached his vehicle in the rear of the Domino's property he was assaulted by two individuals from the Exxon appellees' property immediately next door. (Complaint at ¶ 17-19). From the Exxon appellees' property, the appellant was coerced by verbal force and visual display of a handgun by the two individuals, who he believed were going to rob him. (Complaint at ¶ 17-19). The two unknown individuals began their assault on the appellant from the adjacent Exxon property, owned and operated by the appellees, where they concealed themselves as they lay in wait for Mr. Means. (Complaint at ¶ 17-19).

The location on Exxon's property used by the two assailants to launch their assault was behind Exxon's outbuilding<sup>3</sup> and a short fence, which the appellees had erected on the property and which concealed the assailants from view from Washington Street. (Complaint at ¶ 13,15, 17). Even though coerced by verbal threat, the appellant attempted to flee to his vehicle, wherein the assailants began firing, without provocation, as they advanced from the Exxon appellees' premises to the Domino's premises, toward the appellant. (Complaint at ¶ 19). Several bullets struck the appellants car, and at least one of the bullets struck the appellant, entering his left buttock, passing through his lower body, and stopping in his right thigh, injuring him seriously. Another bullet passed through the material of his shirt, just missing his spine (Complaint at ¶ 20).

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<sup>3</sup>This outbuilding has since been demolished by the Exxon appellees, who have since constructed a new convenience store on this property, demolishing both the outbuilding and the former convenience store building, among other changes.

The assailants fled and were never apprehended.

The appellant's complaint alleged that the Exxon appellees had a duty to exercise ordinary care to take adequate safety precautions to prevent violent criminal conduct on and around their premises because they knew or should have known that harm was likely to result to workers and persons on the adjacent Domino's property should they fail to take such safety precautions (Complaint at ¶ 35). The appellant's complaint further alleged that the Exxon appellees negligently, carelessly and recklessly breached this duty through their failure to provide a safe premises and through their failure to provide protective measures and safeguards to ensure the safety of all person near and therein, and to ensure that others could not use their premises to conduct illegal activities including, but not limited to laying in wait to attack persons such as the appellant, David Means (Complaint at ¶ 36).

Appellant Means alleged that the appellees knew or should have known that failure to provide a safe premises and failure to provide protective measures and safeguards to ensure the safety of all persons, including the appellant, created a substantial foreseeable danger of serious bodily injury or death (Complaint at ¶ 37). The appellant finally alleged that as a direct and proximate result of the foregoing actions, conduct and/or omissions by the appellees, he sustained severe permanent injuries (Complaint at ¶ 38).

### III. Assignments of Error

1. The Circuit Court erred in concluding that there was no set of facts under which the appellees owed a duty of care to the appellant, which is contrary to the facts alleged in the complaint and the West Virginia Supreme Court's holdings in Sewell v. Gregory, 179 W. Va. 585, 371 S.E.2d 82 (1988), Strahin v. Cleavenger, 216 W. Va. 175, 603 S.E.2d 197 (2004) and Miller v. Whitworth, 193 W. Va. 262, 455 S.E.2d 821 (1995).

### IV. Points and Authorities

Burch v. Nedpower Mount Storm, LLC, 220 W. Va. 443, 647 S.E.2d 879 (2007)

Durm v. Heck's, Inc., 184 W. Va. 562, 401 S.E.2d 908, (1991)

Holbrook v. Holbrook, 196 W. Va. 720, 474 S.E.2d 900 (1996)

Jack v. Fritts, 193 W. Va. 494, 498, 457 S.E.2d 431, 435 (1995)

Kessel v. Leavitt, 204 W. Va. 95, 511 S.E.2d, 720 (1998)

Miller v. Whitworth, 193 W. Va. 262, 455 S.E.2d 821 (1995)

Murphy v. Smallridge, 196 W. Va. 35, 468 S.E.2d 167 (1996)

Neely v. Belk, Inc., 668 S.E.2d 189 (2008)

Sewell v. Gregory, 179 W. Va. 585, 371 S.E.2d 82 (1988)

Sisson v. Seneca Mental Health/Mental Retardation Council,

185 W. Va. 33, 404 S.E.2d 425, (1991)

SER. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 461 S.E.2d 516 (1995)

Strahin v. Cleavenger, 216 W. Va. 175, 603 S.E.2d 197 (2004)

Wharton v. Malone, 209 W. Va. 384, 549 S.E.2d 57 (2002)

## V. Discussion of the Law

**THE CIRCUIT COURT'S DISMISSAL OF THIS CIVIL ACTION WAS PREMATURE AND ERRONEOUS BECAUSE THE FACTS SET FORTH IN APPELLANT'S COMPLAINT WERE SUFFICIENT TO IMPOSE A DUTY OF CARE UPON THE APPELLEES.**

### A. Standard of Review and Motions filed pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure

The Circuit Court's order granting the appellees' Motion to Dismiss under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is reviewed by this Court under a de novo standard of review. Kessel v. Leavitt, 204 W. Va. 95, 511 S.E.2d, 720 (1998); Murphy v. Smallridge, 196 W. Va. 35, 468 S.E.2d 167 (1996). In its review of the dismissal of this civil action, this Court is limited to the sufficiency of the complaint and must accept all facts as true and must draw all reasonable inferences in favor of the dismissed party. State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 461 S.E.2d 516 (1995). Additionally, this Court must view all facts alleged in the complaint in the light most favorable to the appellant and determine whether he can prove any set of facts that would entitle him to recovery. Holbrook v. Holbrook, 196 W. Va. 720, 474 S.E.2d 900 (1996).

Finally, "the Circuit Court, viewing all the facts in a light most favorable to the nonmoving party, may grant the motion only if it appears beyond doubt that the appellant can prove no set of facts in support of his[, her, or its] claim which would entitle him[, her, or it] to relief." State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 776, 461

S.E.2d 516, 522 (1995). In the instant case, the appellant's complaint alleged sufficient facts giving rise to a duty of care owed by the appellees to the appellant pursuant to Sewell v. Gregory, 179 W. Va. 585, 371 S.E.2d 82, (1988), Strahin v. Cleavenger, 216 W. Va. 175, 603 S.E.2d 197 (2004) and Miller v. Whitworth, 193 W. Va. 262, 455 S.E.2d 821 (1995).

**B. The facts alleged by the appellant impose a duty of care on the appellees.**

The appellees owed a duty of care to individuals on their premises and individuals on adjoining premises such as the appellant because they knew that violent criminal conduct was occurring on and from their premises creating a foreseeable risk of serious injury or death to these individuals and they chose not to employ adequate safety and security measures. The appellant alleges within the four corners of his complaint that the appellees had actual or constructive knowledge of continued and numerous instances of criminal activity being perpetrated on and from their land/business. Accordingly, the appellant's complaint is clear that it was foreseeable to the appellees that their failure to exercise reasonable security measures on their premises could cause harm to an individual such as the appellant on an adjoining property.

This Court has repeatedly explained that the foreseeability of harm is the test for deciding whether a duty of care exists for a defendant in any negligence case:

The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?

Syllabus point 3, Sewell v. Gregory, 179 W. Va. 585, 371 S.E.2d 82 (1988); Neely v. Belk, Inc., 668 S.E.2d 189 (2008); Strahin v. Cleavenger, 216 W. Va. 175, 603 S.E.2d 197 (2004).

This Court has held that the legal principles of duty and foreseeability are mixed questions of law and fact, with the Circuit Court and jury serving separate but important roles. In Strahin, a similar case involving a premises owner's liability for the criminal conduct of a third party, this Court explained the different roles the Circuit Court and jury inhabit when the facts concerning foreseeability are in dispute as follows:

[A] Court's overall purpose in its consideration of foreseeability in conjunction with the duty owed is to discern in general terms whether the type of conduct at issue is sufficiently likely to result in the kind of harm experienced based on the evidence presented. If the court determines that disputed facts related to foreseeability, viewed in the light most favorable to the plaintiff, are sufficient to support foreseeability, resolution of the disputed facts is a jury question. The jury has the more specific job of considering the likelihood or foreseeability of the injury sustained under the particular facts of the case in order to decide whether the defendant was negligent in that his or her conduct fell within the scope of the duty defined by the court. Questions of negligence . . . present issues of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions from them." (Citations omitted).

Essentially, the judge in cases such as the one before us has the responsibility of reviewing the evidence to see if it is sufficient for a jury to make a determination of whether or not it was foreseeable that the acts of the property owner or occupier could have under the facts of the case, disputed or not, created an unreasonable high risk of harm to the victim under the circumstances. When the facts are in dispute, the court identifies the existence of the duty conditioned upon the jury's possible evidentiary finding. Our review of the lower court's determination regarding the general finding of duty, as a matter of law, is reviewed de novo.

Strahin, 216 W. Va. at 184, 603 S.E.2d at 208.<sup>4</sup>

Consistent with the requirements of Sewell and its progeny, the facts alleged in the

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<sup>4</sup> Different from the appellant's claim which was dismissed by the Circuit Court on appellees' Rule 12(b)(6) Motion, in Strahin, the civil action went to trial with a jury verdict in the plaintiff's favor which the defendant then appealed.

appellant's complaint, clearly demonstrated that an "ordinary man in the defendant[s'] position, knowing what he knew or should have known" should have anticipated that harm of the general nature of that suffered by the appellant, namely a criminal assault, was likely to occur. Moreover, consistent with Strahin, the facts alleged in the appellant's complaint were plainly sufficient for the Circuit Court to find that a jury could make a determination of whether or not it was foreseeable that the acts of the appellees created an unreasonable high risk of harm to the appellant under the circumstances. Based upon West Virginia's principles of common law negligence, the Circuit Court erred in dismissing this claim because the facts pled in the appellant's complaint were sufficient to impose a duty of care upon the appellees.

As further support for the appellant's argument, this Court has repeatedly found that a defendant may be held responsible for the criminal acts of third parties where the defendant's affirmative actions or omissions expose a person to a foreseeable high risk of harm from the intentional conduct of another. Strahin v. Cleavenger, 216 W. Va. 175, 603 S.E.2d 197 (2004); Miller v. Whitworth, 193 W. Va. 262, 455 S.E.2d 821 (1995). In Whitworth, a tenant brought a negligence claim against his landlord when the tenant was assaulted by third parties at the landlord's trailer park. The Court later expounded upon its decision in that case:

In Whitworth, we stated that under common law "a person usually has no duty to protect others from the criminal activity of a third party because the foreseeability of risk is slight, and because of the social and economic consequences of placing such a duty on a person." Id. at 266, 455 S.E.2d at 825. However, we recognized that there are a couple of exceptions in which a person has an obligation to protect others from the criminal actions of another: "(1) when a person has a special relationship which gives rise to a duty to protect another person from intentional misconduct or (2) *when the person's affirmative actions or omissions have exposed another to a*

*foreseeable high risk of harm from the intentional misconduct.*” Id. at 266, 455 S.E.2d at 825, (citing Restatement (Second) of Torts §§ 302B cmt. e and 315).

Jack v. Fritts, 193 W. Va. 494, 498, 457 S.E.2d 431, 435 (1995)(emphasis added).

Based upon this Court’s reliance upon the Restatement of Torts in Whitworth, a number of differing factual scenarios exist where a premises owner has an obligation to protect others from the criminal actions of another. Consistent with the Restatement and Whitworth, the appellant’s complaint pled facts showing that the appellees’ “affirmative actions or omission exposed” the appellant “to a foreseeable high risk of harm from the intentional misconduct.” Specifically, the appellant’s complaint alleged that the appellees knew of repeated incidents of violent criminal conduct occurring on their premises, that they failed to take adequate safety and security precautions, and as a result they created a substantial foreseeable danger of serious bodily injury or death to the appellant. Pursuant to the Sewel, Whitworth and Strahin, this alone should have been enough to defeat the appellees’ Motion to Dismiss.

**C. The Circuit Court’s Order emphasized facts that were not dispositive of the appellees’ duty.**

The Circuit Court’s Order ignored the most important facts alleged in the appellant’s complaint in deciding whether, under Whitworth, the affirmative actions or omissions of the appellees exposed the appellant to a foreseeable high risk of harm from criminal misconduct. Instead, the Circuit Court’s analysis of whether the appellant alleged facts in his complaint sufficient to impose a duty upon the appellees under Whitworth, focused solely on allegations from the complaint that described that the appellees had constructed a fence and outbuilding

where the assailants lay concealed and in wait for the unsuspecting appellant (Order at p. 5).<sup>5</sup> While the appellant did allege that the fence and outbuilding did create an ideal location for the assailants to hide and launch their attack, these facts are not critical to the analysis of the appellees' duty.

The critical facts necessary for the Court to make a determination on whether a duty existed pursuant to the Restatement and Whitworth are the appellant's allegations that the appellees knew of repeated incidents of violent criminal conduct from their premises, that they failed to take adequate safety and security measures to prevent them, and that they knew such a failure created a substantial foreseeable danger of serious bodily injury or death. Many safety and security precautions were available to the appellees which they did not utilize such as security guards, surveillance cameras and adequate lighting. The Circuit Court's analysis of this civil action under Whitworth and the Restatement ignored these important facts and accordingly, the Circuit Court erred in dismissing this civil action.

Lastly, in the proceeding in the lower court, the appellees argued that they could not have any liability for the appellant's injuries because he was injured on an adjoining property and he had no relationship whatsoever with the appellees. This argument is inconsistent with the Restatement relied upon in Whitworth, and taken to its absurd extreme would allow a landlord to knowingly rent a home to violent gang members where violent activity occurred daily at the premises, but still escape liability when a stray bullet from the landlord's premises struck a child living in a home on an adjoining lot.

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<sup>5</sup> The appellant does not disagree with the Circuit Court's statement about public policy, but merely finds that the Circuit Court's sole focus on the outbuilding and fence are not dispositive of the issue of duty under a complete analysis of the facts of this case.

**D. The Idea that a property owner may be liable for damages caused away from the landowner's property is not foreign to West Virginia law.**

The essential question raised by this appeal is whether a negligent tortfeasor may escape liability merely because the damage flowing from his/her negligence occurs yards away on a neighboring property. Or in terms perhaps more appealing to a layperson, if my property lines are the same as the endzone on a football field and I create a dangerous condition on the goal line that causes injury to a person - may I escape liability simply because the person is standing on the 20 yard line?

Similar questions arise in flood cases, and the Court has provided a clear answer: no, a landowner does not escape liability because the damage caused by his or her negligence occurs off of his or her property. In Wharton v. Malone, 209 W. Va. 384, 549 S.E.2d 57 (2002), downstream landowners sued for damages caused when upstream landowners improved a ditch, which increased the flow of water on the plaintiffs' property and damaged their house. This Court reversed the lower court's grant of summary judgment in favor of the upstream defendants.

We recognized that, even in 1895, well settled was the idea that one could not conduct activity on one's land that would result in damage to the lands of another:

That, though a work of improvement, like a railroad, is lawful and under authority, yet, if damage result to an individual by overflow of water by reason of negligent construction, he can recover, is well settled. *Gillison v. City of Charleston*, 16 W. VA. 282; *Knight v. Brown*, 25 W. VA. 808; *Taylor v. Railroad Co.*, 33 W. VA. 39, 10 S.E. 29. It is only an application of the maxim: "So use your own property or right that you do not injure another." *Id.*, 40 W. VA. at 245, 21 S.E. at 867 (1895). The passage of

over one hundred years has only served to reinforce the wisdom of this maxim.

Wharton v. Malone, 209 W. Va. 384, 388, 549 S.E.2d 57, 61. In the instant case, appellant argues that the Exxon appellees acted negligently when they (in spite of knowledge of earlier criminal activity) failed to correct conditions on their property that allowed the assailants to ambush the appellant. Similar to the flood waters in Wharton, the negligence of the appellees flowed next door, where it injured the appellant.

Perhaps another way to gain insight into the instant case is to consider the approach the Court has taken in nuisance cases. In a recent case regarding windmills, the Court engaged in a thorough review of nuisance law, and ultimately determined that off-site impacts of the windmills, namely noise and visual effects, could be cognizable as nuisance claims:

We begin our discussion with the recognition that our common law has always provided a remedy for a nuisance. This Court has explained that “nuisance is a flexible area of the law that is adaptable to a wide variety of factual situations.” *Sharon Steel Corp. v. City of Fairmont*, 175 W. VA. 479, 483, 334 S.E.2d 616, 621 (1985). In fact, “[i]t has been said that the term ‘nuisance’ is incapable of an exact and exhaustive definition which will fit all cases, because the controlling facts are seldom alike, and each case stands on its own footing.” *Harless v. Workman*, 145 W. VA. 266, 273-74, 114 S.E.2d 548, 552 (1960). Nonetheless, “the term [‘nuisance’] is generally ‘applied to that class of wrongs which arises from the unreasonable, unwarrantable or unlawful use by a person of his own property and produces such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage.’ ” *Harless*, 145 W. VA. at 274, 114 S.E.2d at 552 (citation omitted). Stated another way, “nuisance is the unreasonable, unusual, or unnatural use of one’s property so that it substantially impairs the right of another to peacefully enjoy his or her property.” 58

Am.Jur.2d *Nuisances* § 2 (2002). *Booker v. Foose*, 216 W. VA. 727, 730, 613 S.E.2d 94, 97 (2005).

Burch v. Nedpower Mount Storm, LLC, 220 W. Va. 443, 647 S.E.2d 879 (2007). The point of this reference is not necessarily to argue that the Exxon appellees' were creating a nuisance (though an argument for this exists), but to highlight that the Court has long accepted the notion that one can perform an act on his or her own land (like build a windmill or knowingly allow criminals to congregate) and be responsible for the damages this act causes to another, on the land of another. In Nedpower, the windmills' noise or "strobe effect" (of the blades at sunset) were created on Nedpower's land, but the *damage* was sustained on the land of the neighbors. Again, like the noise of the windmill, the fact that the negligence of the Exxon appellees damaged the appellant on a neighboring property should not allow the appellees to escape liability.

Finally, appellees argued in their Response to the Petition for Appeal, that, taking appellant's argument to its conclusion, one would have to remove every fence, outbuilding and tree from one's property to protect from a claim like the appellant's claim. This is simply not true; this case, like any negligence case, still turns upon the duty owed the appellant. The test in this case remains the standard test of Sewell v. Gregory and its progeny - namely foreseeability:

The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?

Syllabus point 3, Sewell v. Gregory, 179 W. Va. 585, 371 S.E.2d 82 (1988); Neely v. Belk,

Inc., 668 S.E.2d 189 (2008); Strahin v. Cleavenger, 216 W. VA. 175, 603 S.E.2d 197 (2004).

In the instant case, the appellees *DID* owe a duty to the appellant. But the duty owed appellant is not a duty to not have a fence or not have an outbuilding; the duty is to take some action to prevent criminal activity when you already have actual knowledge that criminal activity is taking place behind your fence and your outbuilding, because it is foreseeable to a reasonable person that this activity might: A. occur again, and B. injure someone.

Appellees want to distract the court over the issue of the appellant's location, because the appellant happened to sustain injury several yards from appellee's property, but that is not the question before the court. The question, which is a jury question, is whether the appellees, knowing what they knew about criminal activity on their lot, behind this outbuilding, could have foreseen that additional criminal activity might occur behind that same outbuilding and injure someone. Whether that someone is yards away and on the Exxon lot, or yards away and on the Domino's lot should be immaterial. Therefore, the lower court's dismissal should be overturned.

#### **E. Conclusion**

It is clear that, viewing all the facts in a light most favorable to the appellant, the nonmoving party, the Circuit Court should have denied the appellees' Motion to Dismiss. As noted above, this Honorable Court, "may grant the motion only if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his[, her, or its] claim which would entitle him[, her, or it] to relief.'" State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995). As demonstrated herein, the controlling

law and the fact alleged in the appellant's complaint make it plain and simple that the lower court erred when it granted the appellee's Motion to Dismiss .

#### **VI. Relief Prayed For**

The appellant prays that this Honorable Court reverse the Order of the Circuit Court dismissing the appellees from this civil action and reinstate appellant's claims for discovery and trial upon the facts alleged in the appellant's complaint.

**Respectfully Submitted,  
David Means,  
By Counsel**



**John Kennedy Bailey (WV Bar #6857)  
John Kennedy Bailey, PLLC  
P. O. Box 2505  
Charleston, WV 25329  
(304) 346-5646**

**and**

**J. Kristofer Cormany (W. Va. Bar #7665)  
Cormany Law, PLLC  
P.O. Box 11827  
Charleston, West Virginia 25339  
(304) 720-3566**

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CERTIFICATE OF SERVICE

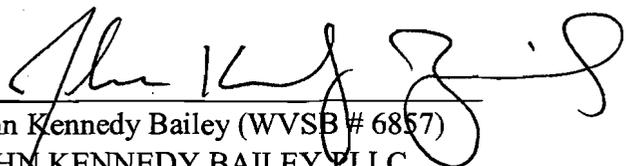
I, John Kennedy Bailey, counsel for Appellant, hereby certify that the foregoing "Appellant's Brief" was served upon the Appellees, on this the 8<sup>th</sup> day of July, 2010, by depositing a true and correct copy in the United States mail, postage prepaid, in an envelope addressed as follows:

Edgar A. Poe, Jr., Esquire  
Mark A. Glover, Esquire  
Pullin, Fowler, Flanagan, Brown & Poe, PLLC  
Jamesmark Building  
901 Quarrier Street  
Charleston, WV 25301

John R. Fowler, Esquire  
Andrea Marano King, Esquire  
John R. Fowler, PLLC  
Suite 1190, United Center  
500 Virginia Street East  
Charleston, WV 25301-2156

Thomas S. Sweeney, Esquire  
Lisa L. Lilly, Esquire  
MacCorkle, Lavender & Sweeney, PLLC  
PO Box 3283  
Charleston, WV 25332-3282

David Means  
By counsel

  
\_\_\_\_\_  
John Kennedy Bailey (WVSB # 6857)  
JOHN KENNEDY BAILEY PLLC  
P.O. Box 2505  
Charleston, West Virginia 25329  
(304) 346-5646  
(304) 346-2626 fax