

14-0258

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

DAVID RAGONESE,

Plaintiff,

v.

CIVIL ACTION NO. 13-C-1092
Honorable Paul Zakaib, Jr.

RACING CORPORATION OF WEST VIRGINIA,
d.b.a. MARDI GRAS CASINO AND RESORT,
a West Virginia corporation,

Defendant.

ORDER

On January 28, 2014, Plaintiff's Rule 59(e) Motion to Alter or Amend Judgment came on for hearing with the parties represented by their counsel of record. After reviewing the pleadings, hearing the arguments of counsel and mature consideration thereof, this Court denies Plaintiff's Rule 59(e) Motion and makes the following findings of fact and conclusions of law:

1. This Court entered an Order granting Defendant's Motion for Summary Judgment on December 16, 2013.
2. Under West Virginia law, a Motion to Alter or Amend Judgment should be granted only where (1) there is an intervening change in controlling law; (2) new evidence not previously available comes to light; (3) it becomes necessary to remedy a clear error of law; or (4) to prevent obvious injustice. *Mey v. Pep Boys-Manny*, 228 W. Va. 48, Syl Pt. 2 (W. Va. 2011).
3. There has been no intervening change in controlling law since entry of the Order granting Defendant's Motion for Summary Judgment on December 16, 2013.
4. Plaintiff has presented no new evidence which was not previously available to this Court on December 16, 2013. The facts of this case have not changed since Plaintiff injured himself on July 6, 2011.

5. Plaintiff has not presented any evidence and/or case precedent that this Court erred as a matter of law in granting Defendant's Motion for Summary Judgment.

- a. This Court did not misapply the summary judgment standard, as Plaintiff has not offered any evidence of a genuine factual dispute, beyond Plaintiff's assertions, regarding Plaintiff's legal status at the time of his injury. *See Powderidge Unit Owners Ass'n v. Highland Properties*, 196 W. Va. 692, 698 (W. Va. 1996). This Court ruled that Plaintiff exceeded the scope of his invitation and became a trespasser once he walked past the visual and physical barrier created by the shrubbery, and proceeded down the hillside.
 - b. This Court did not err as a matter of law when it ruled that Plaintiff was a trespasser at the time of his accident without separately addressing Plaintiff's "technical trespasser" argument. It was not necessary for this Court to separately address Plaintiff's argument that he was a "technical trespasser" once it was determined that Plaintiff was a trespasser as once a person becomes a trespasser they are, by definition, no longer an invitee or a "technical trespasser".
 - c. In order to hold a property owner liable to a trespasser, the owner's standard of care is one of willful and wanton misconduct. In order to defeat a motion for summary judgment involving a trespasser, Plaintiff has the burden of production and burden of proof to present some evidence that the Defendant acted in a willful and wanton manner and breached the duty of care owed to Plaintiff. Plaintiff has failed to present any such evidence to support such a claim; and no evidence exists in the record to support Plaintiff's allegation that Defendant breached the duty of care owed to Plaintiff.
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d. Plaintiff argument that his motion should be granted due to this Court's failure to grant additional time for discovery is without merit. Plaintiff failed to file a Rule 56(f) affidavit, never filed a Motion to Compel, and has failed to make any showing as to what specific facts additional discovery will produce. Plaintiff has similarly failed to comply with the requirements of *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. Va. 692 (W. Va. 1996), as he has failed to articulate exactly what "specified 'discoverable' material facts likely exist which have not yet become accessible to the party." *Id.* at Syl. Pt. 1.

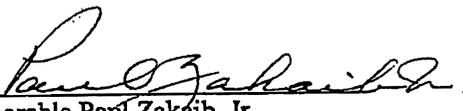
6. Plaintiff has not presented any evidence that this Court must grant Plaintiff's Rule 59(e) Motion to "prevent obvious injustice."
7. Therefore, for the above stated reasons, Plaintiff has not provided this Court with any basis upon which to alter or amend its previous Order granting summary judgment to Defendant.

THEREFORE, the Court ORDERS, ADJUDGES and DECREES that Plaintiff's Rule 59(e) Motion to Alter or Amend Judgment is hereby DENIED.

The objections and exceptions of the Plaintiff are hereby noted and preserved for the record.

The Clerk is directed to send a copy of this Order to all counsel of record.

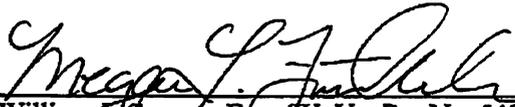
It is so ORDERED this 7th day of Feb., ~~2013~~ 2014.


Honorable Paul Zakaib, Jr.

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS.
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
7th DAY OF Feb., 2014

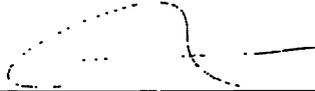
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

PREPARED BY:



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FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2013 DEC 16 AM 10:55

DAVID RAGONESE,

Plaintiff,

CLERK OF COURT
KANAWHA COUNTY CIRCUIT COURT

v.

CIVIL ACTION NO. 13-C-1092

Honorable Paul Zakaib, Jr.

RACING CORPORATION OF WEST VIRGINIA,
d.b.a. MARDI GRAS CASINO AND RESORT,
a West Virginia corporation,

Defendant.

ORDER

On December 16, 2013, Defendant's Motion for Summary Judgment came on for hearing with the parties represented by their counsel of record. The basis for Defendant's motion are: (1) that Plaintiff was a trespasser at the time of his accident; (2) that Defendant owed Plaintiff, a trespasser, a duty to refrain from willfully or wantonly injuring him; and (3) Defendant did not breach the duty of care owed to Plaintiff. After reviewing the pleadings, hearing the arguments of counsel and mature consideration thereof, this Court finds Defendant's motion to be well taken and grants the same and makes the following findings of fact and conclusions of law:

1. Plaintiff's deposition testimony is not disputed.
2. Plaintiff was a patron at Defendant's hotel and casino on July 6, 2011.
3. At approximately 9:29 p.m. Plaintiff exited the side or bus stop entrance of the casino walking across the street to a retaining wall and then walking approximately 125 feet past the retaining wall, cutting up the hillside to the hotel entrance, and entered the hotel.
4. At approximately 9:34 p.m. Plaintiff exited the hotel, turned left, walked past bushes and other shrubbery and walked down the hillside and walked off the retaining wall and falling to the road where he fractured his leg.
5. Plaintiff had actual knowledge of the existence of the retaining wall and hillside.

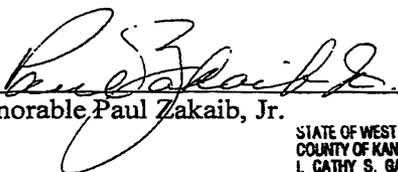
6. Plaintiff knew that the hillside was not an approved walkway.
7. At the point Plaintiff walked past the bushes and shrubbery and proceeded down the hillside, he exceeded the scope of his invitation as an invitee and became a trespasser. *Brown v. Carvill*, 206 W. Va. 605, 609-609 (W. Va. 1998); *Huffman v. Appalachian Power Co.*, 187 W. Va. 1, 6 (W. Va. 1991).
8. Defendant owed Plaintiff, as a trespasser, a duty to refrain from willfully and wantonly injuring him.
9. Defendant did not breach the duty of care owed to Plaintiff, as Defendant did not willfully or wantonly injure Mr. Ragonese; and Defendant did not act with premeditation, knowledge, or consciousness that Plaintiff would injure himself by trespassing and falling off the retaining wall. *Brown v. Carvill*, 206 W. Va. 605, 608-609 (W. Va. 1998); *Barr v. Curry*, 137 W. Va. 364, 370 (1952).
10. There exists no genuine issue of material fact and Defendant is entitled to summary judgment as a matter of law.

THEREFORE, the Court ORDERS, ADJUDGES and DECREES that Mardi Gras' Motion For Summary Judgment is hereby granted.

The objections and exceptions of the plaintiff are hereby noted and preserved for the record.

The Clerk is directed to send a copy of this Order to all counsel of record.

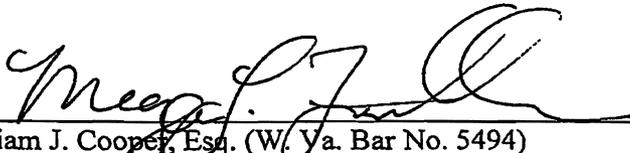
It is so ORDERED this 16th day of Dec, 2013.


 Honorable Paul Zakaib, Jr.

STATE OF WEST VIRGINIA
 COUNTY OF KANAWHA, SS
 I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
 AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
 IS A TRUE COPY FROM THE RECORDS OF SAID COURT
 GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 26
 DAY OF December 2013
Cathy S. Gatson CLERK
 CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

CC to W. R. Anderson 12/16/13 ms

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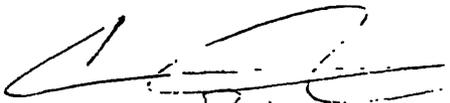
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Counsel for Racing Corporation of West Virginia,

d.b.a. Mardi Gras Casino and Resort



Connor Robertson 11460

Inspected by
with objection.