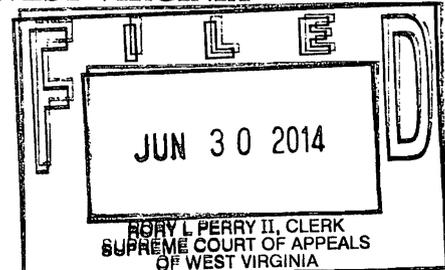


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

DOCKET NO. 14-0258



**DAVID RAGONESE,**

Petitioner,

V.)

Appeal from a final order  
Of the Circuit Court of Kanawha  
Cabell County (13-C-1092)

**RACING CORPORATION OF  
WEST VIRGINIA,  
d/b/a/ MARDI GRAS CASINO  
AND RESORT, A WEST VIRGINIA  
CORPORATION,**

Respondent.

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**PETITIONER'S BRIEF**

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## **ASSIGNMENT OF ERROR**

- I. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGEMENT FINDING THAT MR. RAGONESE WAS A TRESPASSER AT MARDI GRAS HOTEL AND CASINO RESORT WHEN MR. RAGONESE SIMPLY WALKED OFF OF THE SIDEWALK ONTO THE HOTEL'S LAWN, WHEN THERE WAS NO "NO TRESPASSING" SIGNS POSTED AND WHERE THERE WAS NO PHYSICAL BARRIER PREVENTING PASSAGE.**
- II. THE LOWER COURT ERRED BY FAILING TO CONSIDER OR ADDRESS MR. RAGONESE'S "TECHINICAL TRESPASSER" ARGUMENT.**
- III. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST MR. RAGONESE FINDING THAT THERE WAS NO EVIDENCE OF WILLFUL OR WANTON CONDUCT BY MARDI GRAS DESPITE THE FACT THAT THE RECORD SUPPORTS THAT THERE HAVE BEEN OTHER INCIDENTS OF PATRONS BEING INJURED BY THE RETAINING WALL.**
- IV. THE LOWER COURT ERRED IN GRANTING COMPLETE SUMMARY JUDGMENT WHEN MR. RAGONESE ASKED THE COURT TO CONTINUE THE CASE BECAUSE DISCOVERY HAD NOT YET BEEN COMPLETED.**

## **STATEMENT OF THE CASE**

David Ragonese ("Mr. Ragonese") and his wife arrived at the Mardi Gras Casino and Resort ("Mardi Gras") on the afternoon of July 6, 2011. At approximately 9:30 p.m. that evening, Mr. Ragonese exited the hotel through its main exit, turned left and walked down a grassy hill towards that casino. Because there were no warning signs or fencing, Mr. Ragonese walked off a six-foot high retaining wall. The ensuing fall resulted in a left leg spiral fracture requiring surgical implantation of screws to stabilize the bone. At the

time of Mr. Ragonese's fall, it was dark, the area was not illuminated, there were no visible protective barriers surrounding the wall, there were no signs warning of the walls existence or dangerousness, and significantly, there certainly weren't any "no trespass" signs informing the Mardi Gras guests that they would be considered trespassers if they left the sidewalks.

### **Complaint and Answer**

Mr. Ragonese filed a Complaint against the Respondent on June 6, 2013 alleging Mardi Gras was negligent in protecting its guest from the dangerousness of the retaining wall. (App. Vol. I 2-6). Mardi Gras filed its Answer on July 3, 2013 denying the allegations in the Complaint. (App. Vol. I 8-9). Importantly, the Court never issued any type of Scheduling Order or Discovery Deadlines to the parties; nevertheless, the case moved to the Discovery phase.

### **Discovery**

The Discovery phase of this case was abbreviated and inadequate prior to the Circuit Court's dismissal of Mr. Ragonese's Complaint. From the time the Complaint was filed on June 6, 2013 until the time the case was dismissed on December 16, 2013, a little over 6 months had gone by and the first month of that was waiting on Mardi Gras Answer to Mr. Ragonese's Complaint.

### **Summary Judgment Motion**

As stated above, Mardi Gras filed its first Motion for Summary Judgment on November 8, 2013 alleging that Mr. Ragonese was barred from recovery on his Complaint as a matter of law because 1) he was a trespasser on its property and 2) the retaining wall was open and obvious. (App. Vol. I 19-60). However, before Mr.

Ragonese could file a response, this Court issued its opinion in *Hersh v. E-T Enters. P'ship*, 2013 W.Va. LEXIS 1271 (W.Va. 2013), which made the open and obvious nature of a hazard a question of fact. Thereafter, Mardi Gras revised its Motion for Summary Judgment and simply argued that Mr. Ragonese was a trespasser and because Mr. Ragonese could not prove Mardi Gras acted in a willful or wanton manner, he was barred from recovery. (App. Vol. I 61-100). In response, Mr. Ragonese argued 1) that genuine issues of material fact existed regarding his status as a trespasser; 2) that even if he was trespassing, he would be entitled to “technical trespasser” status which would entitle him to the same standard of care as a invitee; 3) that even if he was trespassing, genuine issues of fact existed as to Mardi Gras willful and wanton conduct; and 4) that the Mardi Gras’ Revised Motion for Summary Judgment was premature as discovery had not yet been completed. (App. Vol. I 101-152).

The parties appeared before the Circuit Court on December 16, 2013, for hearing on Mardi Gras’ Revised Motion for Summary Judgment and after argument the Circuit Court dismissed Mr. Ragonese Complaint in its entirety from the bench by simply ruling that Mr. Ragonese was a trespasser when he left the sidewalk and proceeded onto the lawn of the hotel. (App. Vol. I 153-155, App. Vol. II, 16, lines 18-24; 17, lines 1-15). The Circuit Court then asked Mardi Gras’ counsel to prepare and submit an Order. Mardi Gras did so immediately as it had been prepared prior to the hearing. Mr. Ragonese’s counsel signed with objection. This Order was entered by the Circuit Court on the same day as the hearing – December 16, 2013.

#### **Rule 59(e) Motion to Alter or Amend Judgment**

On December 27, 2013, Mr. Ragonese filed a Rule 59(e) Motion to Alter or Amend Judgment arguing that the Circuit Court erred in several respects. (App. Vol. 1 156-173). First, Mr. Ragonese argued that the Circuit Court misapplied the summary judgment standard in that the Circuit Court substituted its judgment that Mr. Ragonese was a trespasser rather than making the determination of whether there were “material facts” in the record that created a genuine issue as to Mr. Ragonese’s legal status. Second, Mr. Ragonese argued that the Circuit Court erred by failing to address Mr. Ragonese’s “technical trespasser” argument in its Order dismissing Mr. Ragonese Complaint in its entirety. Third, Mr. Ragonese argued that the Court erred by failing to apply the summary judgment standard analysis to determine whether there was a genuine issue of material fact as Mardi Gras willful or wanton conduct after the Circuit Court found Mr. Ragonese was a trespasser. Lastly, Mr. Ragonese argued that the Circuit Court erred by failing to address or acknowledge Mr. Ragonese’s request for a continuance to complete discovery in its dismissal Order.

On January 7, 2014, Mardi Gras served its response. (App. Vol. I 176-201). Therein Mardi Gras states that Mr. Ragonese’s Rule 59(e) Motion to Alter or Amend Judgment is without merit. It states that the Circuit Court properly applied the summary judgment standard; that the Circuit Court did not have to consider Mr. Ragonese’s “technical trespass” argument once it determined Mr. Ragonese was a trespasser on Mardi Gras property; that the Circuit Court did address the standard of care owed to trespassers with regard to willful and wanton conduct; and that the Circuit Court did not have to rule on Mr. Ragonese’s Motion for a Continuance because Mr. Ragonese never filed a Rule 56(f) Motion, and did not file a Motion to Compel or Affidavit.

The Court denied Mr. Ragonese's Rule 59(e) Motion to Alter or Amend Judgment by Order entered on February 7, 2014. (App. Vol. I 203-206).

### **SUMMARY OF ARGUMENT**

First, Mr. Ragonese argues that the Circuit Court improperly applied the summary judgment standard by improperly substituting the Court's judgment that Mr. Ragonese was a trespasser rather than reviewing the record to determine whether it contained facts that could allow a rational jury to believe that Mr. Ragonese was an invitee. The Circuit Court ignored or discounted the facts that Mr. Ragonese never left Mardi Gras property, was never warned not to walk onto to hotel's lawn, that it was dark when he walked past the shrubbery and that he truly believed that he had a right to be where he was. These facts, when considered in their entirety, would lead a rational person to believe that Mr. Ragonese was an invitee.

Second, Mr. Ragonese argues that even if the Circuit Court considered him to be a trespasser, the Circuit Court improperly failed to consider his argument that he was a "technical trespasser." Under these circumstances, even if Mr. Ragonese wasn't supposed to be on the hotel's lawn, there are facts that support that he wouldn't have known that he wasn't supposed to be there and, therefore, would be entitled to the same standard of care.

Third, Mr. Ragonese argues that the Circuit Court made failed to consider whether there were facts on record that could lead a rational jury to believe that Mardi Gras was guilty of willful and wanton conduct. Once the Circuit Court determined that Mr. Ragonese was a trespasser, it dismissed his case without considering the lower

standard of care. Mr. Ragonese points to similar incident reports involving injuries on the very same retaining wall that occurred prior to his fall. However, in connection with the lack of consideration, Mr. Ragonese also argues that he was deprived of his opportunity to litigate this issue because at the time that summary judgment was granted, discovery had not yet been complete.

Finally, Mr. Ragonese argues that the Circuit Court's dismissal of his case was inappropriate because discovery was still being conducted.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Petitioner requests oral argument in this matter as he believes it proper under Rule 19 in that 1) this case involves assignments of error in the application of settled law and 2) this case claims an unsustainable exercise of discretion where the law governing the discretion is well settled.

### **ARGUMENT**

- I. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGEMENT FINDING THAT MR. RAGONESE WAS A TRESPASSER AT MARDI GRAS HOTEL AND CASINO RESORT WHEN MR. RAGONESE SIMPLY WALKED OFF OF THE SIDEWALK ONTO THE HOTEL'S LAWN, WHEN THERE WAS NO "NO TRESPASSING" SIGNS POSTED AND WHERE THERE WAS NO PHYSICAL BARRIER PREVENTING PASSAGE.**

#### **Standard of Review**

"A circuit court's entry of summary judgment is reviewed de novo." Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). "Summary Judgment is appropriate if, from the totality of the evidence presented, the record could not lead a

rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 189, 459 S.E. 2d 329 (1995). “Roughly stated, a “genuine issue” for purposes of West Virginia Rule of Civil Procedure 56(c) is simply on half of a trial worthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trial worthy issue is presented where the non-moving party can point to one or more disputed “material” facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.” Syl. Pt. 5, *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995).

### **Argument**

Mr. Ragonese arrived at the Mardi Gras Casino and Resort on July 6, 2011. At the time of his arrival his legal status was that of a business invitee. At approximately 9:30 p.m. that evening, Mr. Ragonese exited the hotel through its main exit walking on the sidewalk. He then turned left and walked off of the sidewalk, past some shrubbery<sup>1</sup> and onto the hotel’s lawn – later to be seriously injured. At the time Mr. Ragonese left the sidewalk, walked past the shrubbery and on to the lawn it was dark. Further, photographs of the shrubbery show, or at the very least could easily be interpreted by a jury as showing, that the shrubbery was not meant as a physical barrier preventing passage on to the lawn. At no time during his stay did Mr. Ragonese believe that he was not allowed on the Hotel’s lawn or that he would lose his legal status as an invitee if he did walk onto the

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<sup>1</sup> See photograph of shrubbery, (App. Vol. I 147).

lawn.<sup>2</sup> All of these facts, if believed, could certainly lead a reasonable jury to believe that Mr. Ragonese remained an invitee on Mardi Gras property and entitled to a “duty of reasonable care under the circumstances.” *Mallet v. Pikens*, 206 W.Va. 145; 522 S.E.2d 436 (1999). Instead, the Circuit Court summarily decided that simply because Mr. Ragonese walked off of the sidewalk and into the lawn that he was a trespasser only entitled to a duty of care to “refrain from willful or wanton injury.” *Id.* at 446. Essentially, the Circuit Court makes this determination as a matter of law, yet cites no authority to support its decision. There are no cases that support that someone is a trespasser simply by walking off of the sidewalk and onto the lawn of the same property as you were invited to enjoy.

It is Mr. Ragonese’s position that the Circuit Court simply substituted its judgment as to Mr. Ragonese’s legal status rather than reviewing the record to determine whether a rational jury could find Mr. Ragonese remained an invitee. When the above-mentioned facts are viewed in a light most favorable to Mr. Ragonese, as they are required to be, common sense dictates a jury could believe Mr. Ragonese remained an invitee on the lawn of a casino where he was invited to enjoy and, therefore, summary judgment was improper.

Mr. Ragonese was not a trespasser because he was in a publicly accessible area of Mardi Gras’ premises which was not marked as being off limits. In West Virginia, “[a] trespasser is one who goes upon the property or premises of another without invitation express or implied, and does so out of curiosity, or for his own purpose or convenience, and not in the performance of any duty to the owner.” Syl. Pt. 1, *Huffman v. Appalachian*

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<sup>2</sup> (App. Vol. I 113).

*Power*, 187 W.Va. 1; 415 S.E.2d 145 (1992). A simple reading of this definition exemplifies why Mr. Ragonese was not a trespasser – he did not go “upon the property or premises of another without invitation” – he was invited to the casino and never told he couldn’t go onto the lawn. The plaintiff in *Huffman* climbed an electric company’s transmission tower that was alongside a hiking trail in a public park in South Charleston, West Virginia and was severely injured. *Id.* at 147. The Plaintiff alleged the power company negligently maintained the tower in an unsafe condition and that he was not a trespasser as he had a right to be in the public park where the transmission tower was located. *Id.* The power company argued that Plaintiff was a trespasser when he left the park’s property, ignored “keep off” signs and decided to climb the tower. *Id.* at 148. The *Huffman* decision ultimately held that the Plaintiff was owed no duty of reasonable care when he ignored the warning signs to keep off the tower because he was a trespasser. *Id.* at 150.

Several factors exist in the case at bar that clearly distinguish it from *Huffman* and prove Mr. Ragonese was an invitee in all areas. First, Mr. Ragonese did not go on the property of another, he at all times remained on Mardi Gras’ property. Second, Mr. Ragonese did not ignore warnings or directives to stay off the hotel’s lawn, whereas the Plaintiff in *Huffman* ignored the “stay off” warnings that were posted on the transmission tower. Third, it was obvious to the *Huffman* Court that a reasonable person could distinguish that a power company’s transmission tower was not an attraction to the public park and that the plaintiff ignored this distinction. *Id.* Again, this is not the case with Mr. Ragonese. No reasonable person would believe that he/she could not walk onto the lawn of the very hotel and casino that they were paying to enjoy. This defies common sense.

Under this theory, a patron of a hotel could not walk onto the lawn of a hotel to smoke a cigarette without a change in their legal status – this is absurd.

Mr. Ragonese did not exceed the scope of his invitation and this Court should reverse the Circuit Court’s summary judgment decision. If left standing, this case sets forth terrible precedent establishing that a person’s legal status can unknowingly change without any obligation to warn.

## **II. THE LOWER COURT ERRED BY FAILING TO CONSIDER OR ADDRESS MR. RAGONESE’S “TECHNICAL TRESPASSER” ARGUMENT.**

The *Huffman* case, *supra*, is also important in the context of this case because it sets forth an important exception to trespasser liability – the “technical trespass.” Even if it could be interpreted that Mr. Ragonese was not technically supposed to be on the lawn of the hotel, based on the facts of this case, the jury could easily conclude that he was a technical trespasser. This is especially so considering the fact that there is no dispute that Mr. Ragonese was not warned to stay off the lawn or prevented from walking on to the lawn. Like an invitee, a “technical trespasser” is entitled to a duty of care that is reasonable under the circumstances. *Id.* at 149.

In *Huffman*, the court reviewed several cases making the distinction between a trespasser and a “technical trespasser.” The common thread is, “in each case, the victim had a right to be where he was at the time of injury. *Id.* For example, in *Miller v. Monongahela Power Co.*, 184 W.Va. 663; 403 S.E.2d 406 (1991), the plaintiff was still entitled to a duty of reasonable care under the circumstances even though he was considered to be a “technical trespasser.” In *Miller*, the defendant power company “failed

to mark its substation so as to prevent vandals and other trespassers from identifying its property.” *Id.* Like in *Miller*, Mardi Gras admit they did not mark the lawn as being off limits. Additionally, even though the Plaintiff did not have permission to be on the property, entering it inadvertently, he “believed he was on the property of his employer, where he had a right to be.” *Id.* Again like in *Miller*, if Mr. Ragonese did not have technical permission to be on the lawn, he certainly believed he had a right to be on the lawn of the property he paid money to stay and enjoy. Excusing the technical trespass, *Miller* stated “one who unlawfully enters onto the property of another by mistake or accident, particularly where he was misled into doing so by some conduct of the owner or occupant of the property, has not committed such a trespass as will preclude him from recovering damages.” *Id.* Mr. Ragonese was not a trespasser on Mardi Gras’ lawn; however, even if he wasn’t supposed to be walking on the lawn, he certainly wasn’t warned against it or given any substantive indication that he wasn’t allowed to be there and therefore, he would be entitled to the same standard of care as an invitee.

In granting Mardi Gras’ Revised Motion for Summary Judgment, the Circuit Court failed to address or mention in any way the technical trespasser argument raised by Mr. Ragonese. In asserting his argument, Mr. Ragonese cited case law and facts to support his position. (App. Vol. I 104-106). Specifically, Mr. Ragonese pointed out two factors that are important to deciding someone’s technical trespassing status: 1) whether or not the person subjectively believes that they have a right to be where they were at their time of injury and 2) whether or not the property owners took any action to warn against trespass. As to factor 1, Mr. Ragonese pointed to an *affidavit* in which he swore that he “did not think that [he] was trespassing on the hotel’s property at the time [he]

walked off the sidewalk and into the grass.” (App. Vol. I 113). As to factor 2, Mr. Ragonese pointed out that the hotel did not warn against trespassing on the lawn. These factors came out of the cases cited to the Circuit Court and the facts pointed to by Mr. Ragonese were on the record for consideration.

Mr. Ragonese raised this issue in his Rule 59(e) Motion to Alter or Amend Judgment. However, the Circuit Court stated that it had no obligation to address the argument because it was convinced that Mr. Ragonese was a Trespasser. Specifically, the Court ruled that “[i]t 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 a trespasser.” (App. Vol. I 204). This ruling is wrong. Under *Miller, supra*, the Court first had to find that the plaintiff was a trespasser before it could get to the determination of whether it was just a technical trespass. In other words, the analysis first requires the Court to determine whether the person has right to be where they are – whether they are a trespasser or not, then the Court considers factors as any mitigating circumstances that would forgive the trespass. That is what the Circuit Court should have, but did not do in this case. First it should have determined whether a rational jury could have found Mr. Ragonese was an invitee or a trespasser. Then, if it was convinced that no rational jury could find Mr. Ragonese was a trespasser, it should have then considered any mitigation factors which would have excused the trespass. For example, the fact that there were no “no trespass” signs posted.

Therefore, reviewing the facts on record listed above, the case law, and common sense in the favor of the non-moving party, Summary Judgment was inappropriate

because, at the very least, a rational jury could have found that Mr. Ragonese was a “technical trespasser” entitled to reasonable care under the circumstances.

**III. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST MR. RAGONESE FINDING THAT THERE WAS NO EVIDENCE OF WILLFUL OR WANTON CONDUCT BY MARDI GRAS DESPITE THE FACT THAT THE RECORD SUPPORTS THERE HAVE BEEN OTHER INCIDENTS OF PATRONS BEING INJURED BY THE RETAINING WALL.**

The Circuit Court’s decision to grant summary judgment against Mr. Ragonese because it believed that he was a trespasser failed to consider or apply the summary judgment standard to whether or not there was evidence that Mardi Gras acted in a willful or wanton manner. When the Court determined Mr. Ragonese was a trespasser the case was not over. This is because a defendant would then owe Mr. Ragonese the duty to refrain from “willful or wanton conduct” *Mallet* at 436. In other words, the Court next had to determine if there were material facts supporting Mr. Ragonese position that Mardi Gras acted in a “willful or wanton” manner towards Mr. Ragonese. None of this analysis was applied by the Circuit Court.

Mr. Ragonese primary argument concerning Mardi Gras’ conduct is that he did not have an adequate opportunity to litigate this portion of the case. For example, in a letter dated November 22, 2013, Mardi Gras admits that there was another patron that went off the wall and ended up in the road prior to Mr. Ragonese. (App. Vol I 172). It is stated in this letter that the patron walked out a “no-entry” door in the skybridge area of the casino. *Id.* This previous incident report was not turned over as requested in discovery, but was simply offered for inspection. If a prior patron walked off this wall and was injured, it would support Mr. Ragonese’s position that Mardi Gras would have

been on notice of the wall's dangerousness and whether they took steps to prevent a subsequent fall. However, because discovery was cut off by the Summary Judgment dismissal, Mr. Ragonese was unable to litigate this portion of his case.

Despite the need for additional time to conduct discovery, Mr. Ragonese points to his deposition testimony wherein he states he remembers a hotel employee, Floyd Sorrel, saying that “[Mr. Ragonese] was not the only one that fell off that wall. [Mr. Sorrel] said that there were three other people before me.” (App. Vol. I 198). Mr. Ragonese's testimony at his deposition predates his knowledge of the incident report identified in defense counsel's letter on November 22, 2013. Therefore, it seems that there is truth to what Mr. Sorrel told Mr. Ragonese on the date of his fall – that Mr. Ragonese was not the only one to be injured on this retaining wall. If this fact is reviewed by a rational jury, it could easily be concluded that Mardi Gras was guilty of willful and wanton conduct by not fixing or warning of the danger the wall poses.

The Court didn't properly consider this part of the analysis after it determined that Mr. Ragonese was a trespasser. In other words, the Court didn't review the record to determine whether a rational jury, viewing the facts in a light most favorable to Mr. Ragonese, could have found Mardi Gras acted in a willful wanton manner.

**IV. THE LOWER COURT ERRED IN GRANTING COMPLETE SUMMARY JUDGMENT WHEN MR. RAGONESE ASKED THE COURT TO CONTINUE THE CASE BECAUSE DISCOVERY HAD NOT YET BEEN COMPLETED.**

**Standard of Review**

Both the West Virginia Supreme Court and the United States Supreme Court have stated “summary judgment is appropriate only after the opposing party has had an adequate time for discovery.” *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 61; 459

S.E.2d 329, 338 (1995); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, (1986). “A decision for summary judgment before the completion of discovery is “precipitous.” *Board of Educ. Of the County of Ohio v. Van Buren and Firestone, Arch., Inc.*, 156 W.Va. 140, 144; 267 S.E.2d 440, 443 (1980). Additionally, Rule 56(f) of the West Virginia Rules of Civil Procedure provides “appropriate relief when a party needs additional time to respond to a motion for summary judgment.” *Williams v. Precision Coil, Inc.*, 194 W.Va. at 61; 459 S.E.2d at 338. Finally, in discussing Rule 56(f)’s application when a non-moving party is asking for additional time for discovery to be completed, the West Virginia Supreme Court states that “a continuance of a summary judgment motion is mandatory upon a good faith showing by an affidavit that the continuance is needed to obtain facts essential to justify opposition to the motion.” *Id.* at 62; 459 S.E.2d at 339.

Additionally, Syllabus Point 1 of *Powderidge Unit Owners Ass’n v. Highland Properties, Ltd.*, 196 W.Va. 692; 474 S.E.2d 872 (1996) states as follows:

“An opponent of a summary judgment motion requesting a continuance for further discovery need not follow the exact letter of Rule 56(f) of the West Virginia Rules of Civil Procedure in order to obtain it. When a departure from the rule occurs, it should be made in written form and in a timely manner. The statement must be made, if not by affidavit, in some authoritative manner by the party under penalty of perjury or by written representations of counsel. At a minimum, the party making an informal Rule 56(f) motion must satisfy four requirements. It should (1) articulate some plausible basis for the party's belief that specified "discoverable" material facts likely exist which have not yet become accessible to the party; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier.”

### **Argument**

Mr. Ragonese raised concerns regarding the inadequate time for discovery in both his response to the Defendant's Revised Motion for Summary Judgment and before the Circuit Court in oral arguments on December 16, 2013. (App. Vol. I 102-111) Mr. Ragonese cited appropriate case law stating Summary Judgment is inappropriate prior to the completion of discovery just as he has done above in this brief. Mr. Ragonese admits that he did not file a Rule 56(f) affidavit; however, he did comply with the mandate of *Powderidge, supra*, by making the request for a continuance within his Response to Defendant's Revised Motion for Summary Judgment and by addressing each one of the factors required by *Powderidge*. Despite this well recorded request, the Circuit Court failed to even address the Mr. Ragonese's request. The Court did so in error because the discovery timeline and record in this case reveals that a continuance should have been granted.

The following timeline displays the premature nature of the Circuit Court's dismissal:

- **June 6, 2013** – Mr. Ragonese files his Complaint; (App. Vol. I 2-6)
- **July 3, 2013** – Mardi Gras files its Answer and serves Mr. Ragonese with Mardi Gras' First Request for Interrogatories and Production of Documents; (App. Vol. I 7-16).
- **August 8, 2013** – Mr. Ragonese provides responses to Mardi Gras' First Request for Interrogatories and Production of Documents; (App. Vol. I 1).
- **September 25, 2013** – Mr. Ragonese serves his First Set of Discovery Requests on Mardi Gras; (App. Vol. I 1).

- **October 7, 2013** – Mardi Gras takes Mr. Ragonese Deposition; (App. Vol. I 207-235).
- **October 21, 2013** – Mardi Gras provides responses to Mr. Ragonese First Set of Discovery Requests with largely blanket objections; (App. Vol. I 1).
- **November 8, 2013** – Mardi Gras files its first Motion for Summary Judgment; (App. Vol. I 17-58).
- **November 13, 2013** – Mr. Ragonese sent Mardi Gras a good faith meet and confer letter pursuant to Rule 37(d) of the West Virginia Rules of Civil Procedure informing Mardi Gras of Mr. Ragonese belief that Mardi Gras Discovery responses were either inadequate or insufficient and asking Mardi Gras to supplement its response. Mr. Ragonese also served Mardi Gras with his Second Set of Discovery Requests; (App. Vol. I 11, 68-170).
- **November 21, 2013** – Mardi Gras files its Revised Motion for Summary Judgment; (App. Vol. I 59-100).
- **November 22, 2013** – Mardi Gras replies to Mr. Ragonese November 13, 2013 good faith letter. (App. Vol. I 171-172).
- **December 11, 2013** - Mr. Ragonese files his Response to Mardi Gras' Revised Motion for Summary Judgment; (App. Vol. I 101-119).
- **December 16, 2013** – The Circuit Court enters Order Dismissing Mr. Ragonese Complaint in its entirety. (App. Vol. I 153-155).

This case, at the time it was dismissed, was a little over six months old. As displayed above, Mr. Ragonese actively participated in discovery and did not have a legitimate opportunity to litigate his case. Additionally, it is important to note that the

Circuit Court did not provide or issue the parties with any scheduling order. At the time the case was dismissed written discovery remained outstanding. For the reasons outlined in Mr. Ragonese's Response to Defendant's Revised Motion for Summary Judgment, which are incorporated herein, Mr. Ragonese ask this Court for the opportunity to litigate his case.

**CONCLUSION**

Based on the arguments set forth above, the Petitioner respectfully requests that his appeal be granted and the case be remanded back to Circuit Court.

**David Ragonese,  
Petitioner,**

By Counsel:



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

DOCKET NO. 14-0258

**DAVID RAGONESE,**

Petitioner,

V.)

Appeal from a final order  
Of the Circuit Court of Kanawha  
Cabell County (13-C-1092)

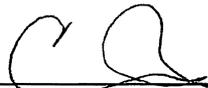
**RACING CORPORATION OF  
WEST VIRGINIA,  
d/b/a/ MARDI GRAS CASINO  
AND RESORT, A WEST VIRGINIA  
CORPORATION,**

Respondent.

**CERTIFICATE OF SERVICE**

I, Connor D. Robertson, do hereby verify that I served the "PETITIONER'S BRIEF" this 24 day of June, 2014, by sending it U.S. Postal Service postage pre-paid and addressed to:

William Cooper, Esq.  
Megan L. Fulcher, Esq.  
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