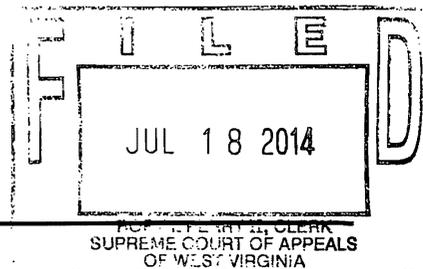


No. 14-0258



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

DAVID RAGONESE,

Petitioner, Plaintiff-Below,

vs.

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

Respondent, Defendant-Below.

From the Circuit Court of
Kanawha County, West Virginia
Civil Action No. 13-C-1092

**BRIEF OF RESPONDENT/DEFENDANT-BELOW RACING CORPORATION OF
WEST VIRGINIA, D/B/A MARDI GRAS CASINO AND RESORT**

William J. Cooper, Esq. (W. Va. Bar No. 5494)
Megan Fulcher Bosak, Esq. (W. Va. Bar No. 11955)
Kiersan Smith Lockard, Esq. (W. Va. Bar No. 11710)
FLAHERTY SENSABAUGH BONASSO PLLC
P. O. Box 3843
Charleston, WV 25338-3843
Telephone: (304) 345-0200
Fax: (304) 345-0260
mbosak@fsblaw.com
Counsel for Respondent/Defendant-Below

TABLE OF CONTENTS

INTRODUCTION.....1

STATEMENT OF THE CASE1

A. OVERVIEW OF THE CASE1

B. RELEVANT PROCEDURAL HISTORY4

SUMMARY OF ARGUMENT7

STATEMENT REGARDING ORAL ARGUMENT AND DECISION10

ARGUMENT10

1. The Circuit Court did not err when it ruled that Mr. Ragonese was a trespasser once he left the hotel’s approved paved walkway, walked through a landscaped visual barrier, and onto the steep hillside and retaining wall.10

2. The Circuit Court did not err in granting Mardi Gras’ Motion for Summary Judgment because, in explicitly classifying Mr. Ragonese as a trespasser, the Circuit Court rejected his “technical trespasser” argument.....16

3. The Circuit Court did not err in granting Mardi Gras’ Motion for Summary Judgment because there was no evidence in the record of willful and wanton conduct on the part of Mardi Gras.....22

4. The Circuit Court did not err in granting Mardi Gras’ Motion for Summary Judgment because it denied Mr. Ragonese’s request for a continuance of the case due to Mr. Ragonese’s failure to file either a formal or an informal Rule 56(f) motion, a motion to compel, and/or an affidavit as required by West Virginia law identifying specific discovery that would create a genuine issue of material fact as well as good cause for why such discovery could not have been completed sooner.25

CONCLUSION31

CERTIFICATE OF SERVICE33

VERIFICATION34

TABLE OF AUTHORITIES

CASES

West Virginia Supreme Court of Appeals Cases

Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of N.Y., 148 W.Va. 160, 133 S.E.2d 770 (1963)10

Aikens v. Debow, 208 W.Va. 486, 541 S.E.2d 576 (2000)23

Barr v. Curry, 137 W.Va. 364, 71 S.E.2d 313 (1952) 22-23

Brown v. Carvill, 206 W.Va. 605, 527 S.E.2d 149 (1998)8, 9, 11, 22

Crum v. Equity Inns, Inc., 224 W.Va. 246, 685 S.E.2d 219 (2009)30

Hersh v. E-T Enters., P’ship, 752 S.E.2d 336, 2013 W. Va. LEXIS 1271 (2013).....4

Huffman v. Appalachian Power Co., 187 W.Va. 1, 415 S.E.2d 145
(1991) 8, 11-12, 13, 16, 17, 18

Legg v. Felinton, 219 W.Va. 478, 637 S.E.2d 576 (2006)22

Mallet v. Pickens, 206 W.Va. 145, 522 S.E.2d 436 (1999)23

Miller v. Monongahela Power Co., 184 W.Va. 663, 403 S.E.2d 406 (1991)17

Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994)10

Powderidge Unit Owners Ass’n v. Highland Props., Ltd., 196 W.Va. 692, 474 S.E.2d 872
(1996).....9, 26, 27

Roberts v. State Farm, No. 13-0743 (W.Va. Supreme Court, May 30, 2014) (memorandum
decision).....26, 27

Williams v. Precision Coil, Inc., 194 W.Va. 52, 459 S.E.2d 329 (1995)10, 25

United States Circuit Court of Appeals Cases

Roland v. Langlois, 945 F.2d 956 (7th Cir. 1991) 11-12

United States District Court Cases

Addison v. Amonate Coal Co., 2008 U.S. Dist. LEXIS 54349 (S.D.W.Va. 2008)23, 24

Other Cases

Avery v. Moews Seed Corn Co., 268 N.E.2d 561 (Ill. App. Ct. 1971)12

OTHER

Rule 5 of the *West Virginia Revised Rules of Appellate Procedure*1

Rule 18(a) of the *West Virginia Revised Rules of Appellate Procedure*10

Rule 20 of the *West Virginia Revised Rules of Appellate Procedure*10

Rule 56(f) of the *West Virginia Rules of Civil Procedure*7, 9, 10, 25, 26, 31

Rule 59(e) of the *West Virginia Rules of Civil Procedure*1, 6, 7, 31

INTRODUCTION

This appeal involves a review of the Circuit Court of Kanawha County's ("Circuit Court's") finding that a business, Mardi Gras Casino and Resort, Respondent/Defendant-Below ("Mardi Gras"), did not breach its duty of care to a trespasser, David Ragonese, Petitioner/Plaintiff-Below ("Mr. Ragonese"). Although Mr. Ragonese indicates in his Notice of Appeal that he is seeking reversal of the Circuit Court's Order Granting Mardi Gras' Motion for Summary Judgment, Mr. Ragonese fails to specify in his brief whether he is appealing, pursuant to Rule 5 of the *West Virginia Revised Rules of Appellate Procedure*, solely from the Circuit Court's February 7, 2014 Order denying Mr. Ragonese's Rule 59(e) Motion to Alter or Amend the December 16, 2013 Order granting Mardi Gras' Motion for Summary Judgment, or also from the Circuit Court's December 16, 2013 Order granting Mardi Gras' Motion for Summary Judgment.¹ Regardless of which order Mr. Ragonese is appealing, the Circuit Court did not err when it ruled Mr. Ragonese was a trespasser to whom Mardi Gras did not breach its duty to refrain from willfully or wantonly injuring. Further, because the Circuit Court did not err when it denied Mr. Ragonese's request for a continuance of the case, the relief requested by Mr. Ragonese herein should be denied.

STATEMENT OF THE CASE

A. OVERVIEW OF THE CASE

On July 6, 2011, Mr. Ragonese and his wife, returning home to New York following a trip to North Carolina, decided to stop at the Mardi Gras Casino and Resort, located in Cross Lanes,

¹ The Order dated December 16, 2013 granted Mardi Gras' *Revised* Motion for Summary Judgment, which was filed November 21, 2013, rather than Mardi Gras original Motion for Summary Judgment, which was filed November 8, 2013. For purposes of uniformity and consistence with Petitioner's brief, which states that the Order dated December 16, 2013 granted Mardi Gras "Motion for Summary Judgment", Respondent refers to the Order dated December 16, 2013 as granting Mardi Gras "Motion for Summary Judgment" throughout the entirety of this brief.

West Virginia. (Vol. I-App. 209.) The hotel portion of Mardi Gras sits atop a steep hill but is connected to the casino portion below by a sky bridge. (Vol. I-App. 209, 210, 216, 233.) At the bottom of the steep hill and next to the road that runs beneath the sky bridge is a retaining wall made of brick. (Vol. I-App. 217, 233.) The subject retaining wall, which is over six feet tall, was constructed in 2002, and it has not been altered in any fashion since that time. (Vol. I-App. 24, 122, 127.)

During the course of his deposition, which took place on October 7, 2013, Mr. Ragonese testified that he and his wife arrived at Mardi Gras while it was still daylight. (Vol. I-App. 209.) After checking into the hotel, Mr. Ragonese returned to his vehicle, which was in a parking lot below the hotel, in order to get their luggage. (*Id.*) Shortly after unpacking, Mr. Ragonese and his wife returned to the hotel lobby and used the designated sky bridge walkway to access the casino. (*Id.*) Once they entered the casino, Mr. Ragonese and his wife played some table games and slots. (Vol. I-App. 210.) About ten minutes after entering the casino, Mr. Ragonese exited the casino through the front entrance in order to smoke a cigarette. (*Id.*) Less than an hour later, around 6:08 p.m., Mr. Ragonese and his wife exited the casino through the “side” or “bus stop entrance” to smoke another cigarette. (*Id.*) The “side” or “bus stop entrance” directly faces the over six-foot tall retaining wall that is located at the bottom of the steep hill upon which the hotel sits. As it became dusk, around 7:30 p.m., Mr. Ragonese and his wife again exited the “side” or “bus stop” entrance for their third smoke break. (Vol. I-App. 211.) Mr. Ragonese admitted during his deposition that he recalled walking out the side entrance and seeing the hotel above him, as well as the retaining wall directly across the street from him. (Vol. 1-App. 215.)

At approximately 9:29 p.m., Mr. Ragonese and his wife again exited the casino through the side entrance. (*Id.*) Mr. Ragonese walked across the street to the base of the retaining wall,

turned left, and walked approximately 125 feet with the retaining wall parallel to his right shoulder. (Vol. I-App. 215, 217.) Mr. Ragonese testified that he “remember[ed]” the retaining wall “being there when [he] exited [the bus stop entrance],” and that he “couldn’t have missed” it. (Vol. I-App. 217, 220.) Upon reaching the driveway to the hotel, Mr. Ragonese proceeded to walk up it, and then took a shortcut up the slope to the main entrance. (Vol. I-App. 215, 216.) Mr. Ragonese entered the hotel, where he spoke with a desk clerk for “a minute or two” in an effort to get a gambling discount or “comp” rate for his stay at the hotel. (Vol. I-App. 216.)

At 9:34 p.m., approximately five minutes after he exited the casino, Mr. Ragonese walked out the front door of the hotel. (Vol. I-App. 222.) When he looked left, Mr. Ragonese saw his wife at the bottom of the steep hill, across the road, standing by the “side” or “bus stop” entrance to the casino. (Vol. I-App. 216.) Despite the fact that Mr. Ragonese understood the sky bridge to be the designated walkway to access the casino from the hotel, and that there was a paved roadway he had just walked upon, and despite the fact that the hill was not lit, Mr. Ragonese turned left off the walkway, stepped through a line of bushes and other shrubbery, and proceeded down the steep hill towards where his wife was standing. (Vol. I-App. 216, 217, 235.) Upon reaching the bottom of the hill, Mr. Ragonese walked off the retaining wall, which caused him to fracture his left leg after landing on the roadway. (Vol. I-App. 3, 218.) Mr. Ragonese admitted that he was taking a “shortcut” down the hill and that he knew it was not an approved walkway, but claimed that by the time he exited the hotel at 9:34 p.m., less than five minutes after he walked next to the wall for approximately 125 feet, he had “forgot[ten]” about the existence of the retaining wall and that he “didn’t even think about it.” (Vol. I-App. 217, 221.)

B. RELEVANT PROCEDURAL HISTORY

On or about June 6, 2013, Mr. Ragonese filed his Complaint against Mardi Gras in the Circuit Court of Kanawha County, West Virginia, seeking damages for the leg fracture he sustained as a result of his “walk[ing] off a retaining wall ledge and f[alling] approximately six (6) feet down onto the asphalt and concrete below.” (Vol. I-App. 2-6.) Therein, Mr. Ragonese alleged that his “injuries were caused by the recklessness, carelessness, and negligence of [Mardi Gras],” and that Mardi Gras “breached their duty of care in not protecting their guests from a known and hidden hazards [sic] on their property.” (Vol. I-App. 3.)

On or about July 3, 2013, Mardi Gras filed its Answer to Mr. Ragonese’s Complaint, denying the allegations set forth therein. (Vol. I-App. 7-16.) Thereafter, oral and written discovery ensued, including the depositions of Mr. Ragonese and his wife. (Vol. I-App. 207-245.) Based upon this discovery, Mardi Gras filed a Motion for Summary Judgment and a Memorandum of Law in Support Thereof on November 8, 2013, as well as a Revised Motion for Summary Judgment and Memorandum of Law in Support thereof on November 21, 2013 after this Court’s decision in *Hersh v. E-T Enters., P’ship*, 752 S.E.2d 336, 2013 W. Va. LEXIS 1271 (2013).² (Vol. I-App. 17-100.) The crux of Mardi Gras’ Revised Motion was that Mr. Ragonese’s uncontradicted deposition testimony proved that he was a trespasser at the time he fell off the retaining wall, and that Mardi Gras did not breach the duty of care it owed to Mr. Ragonese as a trespasser to refrain from engaging in willful or wanton behavior. (Vol. I-App. 66-69.) Mr. Ragonese filed his Response to Mardi Gras’ Revised Motion for Summary Judgment on

² Mardi Gras does not dispute Mr. Ragonese’s contention that this Court’s decision in *Hersh* forecloses a circuit court from granting summary judgment under the “open and obvious” doctrine when a plaintiff is an invitee. Mardi Gras’ Revised Motion for Summary Judgment made clear that, based on *Hersh*, Mardi Gras was abandoning the branch of its motion arguing that, even if Mr. Ragonese was an invitee, Mardi Gras did not breach its duty of care due to the open and obvious nature of the hillside and retaining wall. Mardi Gras also notes that the *Hersh* decision does not preclude the granting of a motion for summary judgment in the event that the plaintiff is determined to be a trespasser.

December 11, 2013, wherein he maintained that he was an invitee or, at worst, a “technical trespasser;” that Mardi Gras owed him a “duty of reasonable care under the circumstances” at the time of his fall; that the facts and circumstances surrounding Mr. Ragonese’s fall created genuine issues of material fact as to whether Mardi Gras acted willfully or wantonly; and that Mardi Gras’ Motion for Summary Judgment was granted prematurely as Mr. Ragonese did not have an adequate opportunity to conduct discovery. (Vol. I-App. 101-119.) On or about December 12, 2013, Mardi Gras filed a Reply to Mr. Ragonese’s Response to specifically address Mr. Ragonese’s aforementioned claims. (Vol. I-App. 120-151.)

A hearing on Mardi Gras’ Motion for Summary Judgment was held before the Honorable Judge Paul Zakaib, Jr. of the Circuit Court of Kanawha County on December 16, 2013. (Vol. II-App. 1-20.) After reviewing the applicable pleadings and hearing the arguments of counsel, the Circuit Court granted Mardi Gras’ Motion for Summary Judgment by a similarly dated Order. (Vol. I-App. 153-155.) Therein, the Circuit Court found that Mr. Ragonese exceeded the scope of his invitation and became a trespasser upon Mardi Gras’ property when he walked past the bushes and shrubbery and proceeded down the steep hillside. (Vol. I-App. 154.) As a result, the Circuit Court concluded that Mardi Gras only owed Mr. Ragonese a duty to refrain from willfully and wantonly causing injury to him, and further that Mardi Gras did not breach the duty of care owed to Mr. Ragonese as there was no evidence in the record that Mardi Gras had engaged in any willful or wanton conduct that caused injury to Mr. Ragonese. (*Id.*) After finding that no genuine issues of material fact existed regarding the circumstances surrounding Mr. Ragonese’s fall, as well as Mardi Gras’ compliance with the duty of care it owed to Mr. Ragonese, the Circuit Court held that Mardi Gras was entitled to summary judgment as a matter of law as to the allegations asserted against it in Mr. Ragonese’s Complaint. (*Id.*)

In response to the Circuit Court's Order granting Mardi Gras' Motion for Summary Judgment, on or about December 27, 2013, Mr. Ragonese filed a Rule 59(e) Motion to Alter or Amend Judgment. (Vol. I-App. 156-173.) Mr. Ragonese argued that the Circuit Court misapplied the summary judgment standard in rendering its December 16, 2013 ruling because it relied upon its own judgment to determine that Mr. Ragonese was a trespasser rather than determining whether genuine issues of material fact existed as to Mr. Ragonese's legal status. (Vol. I-App. 158-160.) Second, Mr. Ragonese argued that the Circuit Court failed to address his "technical trespasser" argument prior to granting Mardi Gras' Motion. (Vol. I-App. 160-161.) Third, Mr. Ragonese maintained that the Circuit Court failed to determine whether genuine issues of material fact existed as to whether Mardi Gras met its duty of refraining willfully and wantonly toward Mr. Ragonese. (Vol. I-App. 161-162.1.) Finally, Mr. Ragonese advanced the argument that the Circuit Court erred in granting Mardi Gras' Motion for Summary Judgment because it failed to explicitly acknowledge his request for a continuance of the case until additional discovery could be completed in the matter. (Vol. I-App. 162.1-164.)

Mardi Gras filed its Response to Mr. Ragonese's Rule 59(e) Motion to Alter or Amend Judgment on January 7, 2014. (Vol. I-App. 176-184.) Therein, Mardi Gras asserted that Mr. Ragonese was unable to meet the requirements necessary to establish that an amendment or alteration of the Circuit Court's subject Order was warranted under Rule 59(e) of the *West Virginia Rules of Civil Procedure*. (Vol. I-App. 176-177.) Specifically, Mardi Gras argued that the Circuit Court's Order was not the result of the misapplication of the summary judgment standard; that the Circuit Court did not need to explicitly address Mr. Ragonese's "technical trespasser" argument once it found Mr. Ragonese to be a trespasser; that the Circuit Court appropriately addressed the relevant standard of care issues; and that the Circuit Court's ruling

did not constitute clear error of law with regard to Mr. Ragonese's alleged need for further discovery as Mr. Ragonese never filed a Rule 56(f) motion, motion to compel, motion to continue, or an affidavit as required by West Virginia law. (Vol. I-App. 177-183.) A hearing on Mr. Ragonese's Rule 59(e) Motion and Mardi Gras' corresponding Response ensued on January 28, 2014. (Vol. III-App. 1-15.)

After a review of the pleadings, hearing the arguments of counsel, and mature consideration thereof, by Order dated February 7, 2014, the Circuit Court acknowledged that, under West Virginia law, a Rule 59(e) Motion to Alter or Amend Judgment should only be granted when: 1) there has been—since the entry of the Order that is the subject of the motion to alter or amend—an intervening change in controlling law; 2) new evidence comes to light that was not previously available for the Court's consideration; 3) alteration or amendment is necessary to remedy a clear error of law; or 4) to prevent an obvious injustice. (Vol. I-App. 203-206.) Upon finding that Mr. Ragonese failed to provide evidence sufficient to establish the applicability of any of the aforementioned foregoing bases upon which it would be required to alter or amend its December 16, 2013 Order, the Circuit Court denied Mr. Ragonese's Rule 59(e) Motion. (Vol. I-App. 205.)

SUMMARY OF ARGUMENT

The Circuit Court did not err when it granted Mardi Gras' Motion for Summary Judgment; nor did the Circuit Court err when it denied Mr. Ragonese's Rule 59(e) Motion to Alter or Amend Judgment. Therefore, the relief sought by Mr. Ragonese in the instant appeal should be denied.

This Court has consistently held that 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 performance of any duty to the owner.” Syl. Pt. 3, *Brown v. Carvill*, 206 W.Va. 605, 527 S.E.2d 149 (1998). Moreover, an individual may **exceed the scope of his or her invitation** and become a trespasser **by going into or on an area not intended for the public**. See *Huffman v. Appalachian Power Co.*, 187 W.Va. 1, 6, 415 S.E.2d 145, 150 (1991). As demonstrated more fully below, Mr. Ragonese exceeded the scope of his invitation to the Mardi Gras casino and hotel when he went onto the steep hillside and retaining wall—areas clearly not intended for the public—for his own convenience, or, as characterized by Mr. Ragonese, to take a “shortcut.” Therefore, the Circuit Court did not err when it ruled that Mr. Ragonese was a trespasser once he left the hotel’s designated paved walkway, walked through a landscaped visual barrier, and onto the unlit steep hillside and retaining wall where there were no attractions, amenities, or other individuals present.

Second, contrary to Mr. Ragonese’s contention, the Circuit Court did not “ignore” the argument that he was a “technical trespasser” at the time he stepped onto the steep hillside and off the six-foot tall retaining wall. Instead, the Circuit Court specifically decreed in its December 16, 2013 Order that Mr. Ragonese’s legal status had changed from that of an invitee to that of a trespasser once he intentionally walked past shrubbery and onto the hillside considering his knowledge that the hillside did not constitute an approved walkway. The Circuit Court’s specific classification of Mr. Ragonese as trespasser obviated the need for the Circuit Court to explicitly include language in its Order to the effect that Mr. Ragonese had not been a “technical trespasser” since, by definition, Mr. Ragonese could not have been both at the time of his incident. Therefore, the Circuit Court did not err in granting Mardi Gras’ Motion for Summary Judgment by failing to unambiguously state in its Order that it had addressed and rejected Mr. Ragonese’s “technical trespasser” argument.

Third, it is a well-established tenet of West Virginia law that an owner of property does not owe a trespasser a duty of “ordinary care” and instead need only “refrain from willful or wanton injury.” *Brown*, 206 W.Va. at 608, 527 S.E.2d at 153. Therefore, the Circuit Court appropriately maintained that, because he was a trespasser, Mardi Gras only owed a duty to Mr. Ragonese to refrain from willfully or wantonly causing him injury. Contrary to Mr. Ragonese’s contention that the Circuit Court failed to consider or apply the summary judgment standard as to whether there was evidence in the record demonstrating that Mardi Gras acted willfully or wantonly toward Mr. Ragonese, the Court reviewed the record, heard arguments of counsel, and ruled that there was no evidence of any willful or wanton conduct on the part of Mardi Gras. As such, the Circuit Court did not err in granting Mardi Gras’ Motion for Summary Judgment after finding no evidence whatsoever that Mardi Gras breached the applicable standard of care it owed to Mr. Ragonese as a trespasser.

Last, the Circuit Court did not err in granting Mardi Gras’ Motion for Summary Judgment because it denied Mr. Ragonese’s request for a continuance of the case due to Mr. Ragonese’s failure to file a Rule 56(f) motion, a motion to compel, and/or an affidavit as required by West Virginia law identifying specific discovery that would create a genuine issue of material fact as well as good cause for why such discovery could not have been completed sooner. Nor did Mr. Ragonese comply with the minimum requirements for bringing an informal Rule 56(f) motion as set forth by this Court in the case of *Powderidge Unit Owners Ass’n v. Highland Props., Ltd.*, 196 W.Va. 692, 474 S.E.2d 872 (1996). The simple fact that Mr. Ragonese made the request for a continuance is not in and of itself sufficient. Furthermore, Mr. Ragonese has never articulated to the trial court or this Court any basis whatsoever for his belief that any specified material fact exists which has not yet become accessible to him, fails to demonstrate that any

purported “material facts” can be obtained within a reasonable additional time period, fails to demonstrate that these newly obtained material facts will create a genuine issue of material fact, and fails to demonstrate good cause for his failure to have conducted discovery to this end at an earlier point in time. Consequently, the relief requested by Mr. Ragonese in the instant appeal should be denied.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary under Rule 18(a) of the *West Virginia Revised Rules of Appellate Procedure*. This case involves issues of first impression, issues of fundamental public importance, and constitutional questions regarding the validity of a court ruling. Accordingly, it is appropriate for Rule 20 argument.

ARGUMENT

- 1. The Circuit Court did not err when it ruled that Mr. Ragonese was a trespasser once he left the hotel’s approved paved walkway, walked through a landscaped visual barrier, and onto the steep hillside and retaining wall.**

Mardi Gras agrees with Mr. Ragonese that under Rule 56 of the *West Virginia Rules of Civil Procedure*, summary judgment is proper only 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. 52, 459 S.E.2d 329 (1995); *See also Painter v. Peavy*, 192 W.Va. 189, 192, 451 S.E.2d 755, 756 (1994). Therefore, as this Court has time and again held, “[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of N.Y.*, 148 W.Va. 160, 171, 133 S.E.2d 770, 777 (1963). However,

Mardi Gras disputes Mr. Ragonese's assertion that even one "material fact" or "trial worthy issue" was left unresolved as to whether his legal status as an invitee of the hotel and casino had been converted to that of a trespasser at the time of the incident at issue herein. Mardi Gras has not, at any point during this litigation, disputed the underlying facts of this case. In fact, Mardi Gras based its Motion for Summary Judgment on Mr. Ragonese's own testimony.

As this Court has made clear, 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 performance of any duty to the owner." Syl. Pt. 3, *Brown*, 206 W.Va. at 605, 527 S.E.2d at 149. This Court has also made clear that an individual may exceed the scope of his or her invitation and become a trespasser by going into or on an area not intended for the public. *See Huffman*, 187 W.Va. at 1, 6, 415 S.E.2d at 145, 150. As demonstrated below, Mr. Ragonese exceeded the scope of his invitation when he went onto the steep hillside and retaining wall—areas clearly not intended for the public—for his own convenience, or, as Mr. Ragonese classified it, to take a "shortcut."

Although there is seemingly no authoritative precedent directly on point with the precise issue at the heart of the instant appeal, it is important to note that various jurisdictions across the country have addressed this topic. For instance, in the case of *Roland v. Langlois*, the United States Court of Appeals for the Seventh Circuit held that the appellant-plaintiff, an invitee to a local carnival who entered an operational area of an amusement ride which was fenced off, exceeded the scope of the invitation and forfeited his invitee status. *Roland v. Langlois*, 945 F.2d 956 (7th Cir. 1991). Specifically, the plaintiff-appellant took a shortcut through a gap in a fenced-off area surrounding a carnival ride, entered the ride's operational area, and was consequently struck in the head by a ride component, causing him to sustain serious brain injuries. *Id.* at 958-

960. The applicable state law dictated that a premises owner only owed a trespasser a duty to refrain from willful and wanton conduct—the same standard of care a premises owner owes a trespasser in West Virginia (discussed in detail below). *Id.* at 959. The appellant-plaintiff argued that the gap in the fence constituted an invitation to enter. *Id.* at 961 n.8. The Seventh Circuit rejected this argument, however, stating that “this analysis is ultimately unpersuasive . . . because it ignores what is behind the opening. . . a reasonable person would have noticed the ‘large dangerous machine’ and would have taken that factor into consideration in deciding whether the operational area . . . was within the scope of his or her invitation.” *Id.* The court, holding that appellant-plaintiff was a trespasser, stated that “invitees can forfeit their protected [invitee] status by going to a portion of the premises to which the invitation does not extend” and also noted that “the mere fact that you invite people onto your property for a fee does not make them business invitees on the rest of the property.” *Id.* at 959 (citing *Avery v. Moews Seed Corn Co.*, 268 N.E.2d 561, 564 (Ill. App. Ct. 1971)).

In an effort to demonstrate that he was not a trespasser at the time of the incident, Mr. Ragonese directs the Court’s attention to the facts of this Court’s decision in the aforementioned case of *Huffman v. Appalachian Power Co.*, and attempts to distinguish its facts from those now present before this Court. *Huffman*, 187 W.Va. 1, 415 S.E.2d 145. Therein, the plaintiff, without invitation, entered the defendant power company’s property and climbed a high voltage transmission tower. *Id.* at 3-4, 415 S.E.2d at 147. In so doing, the plaintiff received an electrical shock, which resulted in substantial injuries. *Id.* at 4, 415 S.E.2d at 147. Thereafter, the plaintiff filed a cause of action against the defendant power company. *Id.* The trial court found for the plaintiff and denied a motion by the defendant to set aside the verdict. *Id.* On an appeal brought by the defendant, this Court reversed and remanded, directing the trial court to enter judgment

notwithstanding the verdict in favor of the defendant. *Id.* In so holding, this Court determined that the plaintiff was a trespasser as to the defendant power company's tower—despite the fact that the tower was located in a public park—because the plaintiff exceeded the scope of his invitation to be on the park's grounds when he ignored “Danger, High Voltage, Keep Off” signs and began climbing the tower. *Id.* at 6, 415 S.E.2d at 148.

Mr. Ragonese's reliance on the *Huffman* decision in support of his claim that he was not a trespasser at the time of his injury is seriously misguided. Just as the plaintiff in the *Huffman* case was initially an invitee of the public park, when Mr. Ragonese arrived at Mardi Gras on July 6, 2011, at approximately 3:51 pm, he was considered an invitee of the hotel and casino but only as to those areas where the public logically is invited (i.e., the casino, hotel, entrances, designated walkways, and the parking lot). Moreover, contrary to Mr. Ragonese's contention, just as the plaintiff in the *Huffman* case ignored the signs warning the plaintiff to stay away from the power transmission tower, so did Mr. Ragonese ignore clear indicators that the steep hillside and retaining wall were not a common area to which the public was invited. Specifically, Mr. Ragonese ignored the fact that, in order to step onto the hillside, he had to leave a paved walkway, walk through the landscaping consisting of a line of carefully placed shrubbery and bushes, and onto a steep hillside where no lighting, attractions, amenities, or other individuals were present. Mr. Ragonese also ignores the fact that patrons of the casino and hotel are specifically directed to use the sky bridge walkway to access the casino from the hotel, and that he had previously used this walkway to enter the casino from the hotel earlier in the evening. Neither the hillside nor the retaining wall has ever been designated as an approved walkway or pathway for patrons to use to walk from the casino to the hotel. In light of these considerations, common sense dictates that no reasonable person would believe that the scope of Mr. Ragonese's

invitation to enjoy the Mardi Gras casino and hotel extended to the subject steep hillside and retaining wall. Accordingly, any rational trier of fact would certainly classify Mr. Ragonese as a trespasser at the time of the incident at issue in this appeal.

Mr. Ragonese argues that he did not exceed the scope of his invitation by stepping off of the walkway, through the bushes, and onto the hillside because, if this were the case, then “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,” which is “absurd.” Pet’r’s Br. 13. What is truly absurd is Mr. Ragonese’s characterization of the steep hillside area upon which he trespassed as a “lawn.” Mr. Ragonese insists on calling the area in question a lawn, yet he does not cite to any photographs of the area that surfaced during the discovery process conducted with regard to the matter. As the old adage goes, “a picture is worth a thousand words.” One need only look at the photographs of the hillside to understand that it is far from a “lawn.” (Vol. I-App. 97, 98.) The hillside is not a flat area. It is not an area where one would attempt to play a game of cricket or croquet. It is a very steep hillside, much like the hills present all around the State of West Virginia. Walking down a steep hillside which is separated from a sidewalk by professionally-placed shrubbery, which Mr. Ragonese admitted to seeing, is in no way comparable to walking onto a lawn of a hotel to smoke a cigarette. Additionally, it is important to direct the Court’s attention to the fact that Mr. Ragonese did not make his way to the hillside in order to smoke a cigarette.

In support of his untenable position, Mr. Ragonese further posits that ruling in Mardi Gras’ favor would “create terrible precedent” standing for the proposition “that a person’s legal status can unknowingly change without any obligation to warn.” Pet’r’s Br. 13. Such an argument completely misses the mark. Mardi Gras only owed Mr. Ragonese the duty to warn of

hidden dangers—not a duty to warn of any change in his legal status.³ Acceptance of Mr. Ragonese’s flawed reasoning would inevitably create detrimental precedent as such would prevent a person from being classified as a trespasser so long as the person did not understand his *legal status* at the time of the incident in question—regardless of whether the individual knew and understood that he was not supposed to be upon that area of the property. Such a principle would “pave the way” for future plaintiffs to enter areas which common sense dictates that they should not be in, and then claim they should be afforded a higher standard of care than that of a trespasser merely because they did not understand that their legal status changed upon entering the “off limits” area. Simply put, it is not relevant whether an individual knows and understands his legal status as an invitee or a trespasser. The relevant inquiry is whether the individual knew that he was in a location where he should not have been.

In summary, Mr. Ragonese exceeded the scope of his invitation to utilize the Mardi Gras premises and became a trespasser once he decided to reach his wife by leaving the paved walkway, passing through the visual and physical barrier created by the bushes and other shrubbery lining the driveway, and proceeding down the steep, dark, grassy hill, which he knew had a six-foot retaining wall at the bottom. Any reasonable person would understand the probable consequence of gaining momentum going down a steep hill in the dark, at the bottom of which is a six-foot-high retaining wall. Despite this knowledge, Mr. Ragonese consciously chose to take what he felt to be the more convenient route to the casino—a self-described “shortcut”—to achieve his intended purpose of reaching his wife by using the hillside which he admittedly

³ Additionally, the acceptance of Mr. Ragonese’s view would result in the imposition of an excessive duty upon Mardi Gras to specifically warn patrons of the premises—despite the fact that such would be evident to reasonable individuals—that the subject hillside is steep, that the landscaped bushes and shrubbery symbolically constitute “no trespass” signs, and that the subject retaining wall at the bottom of the hillside is tall.

knew was not an “approved walkway.” (Vol. I-App. 216-217.) Therefore, at the time of the incident in question, Mr. Ragonese was a trespasser on the hillside and retaining wall located on Mardi Gras’ property. Thus, the Circuit Court did not err in granting Mardi Gras’ Motion for Summary Judgment when it ruled that Mr. Ragonese lost his legal status as an invitee of the property and became a trespasser when he walked off of the hotel’s approved paved walkway, through a landscaped barrier, and onto a steep hillside where no lighting, attractions, or other individuals were present.

2. The Circuit Court did not err in granting Mardi Gras’ Motion for Summary Judgment because, in explicitly classifying Mr. Ragonese as a trespasser, the Circuit Court rejected his “technical trespasser” argument.

Generally speaking, the phrase “technical trespasser” refers to “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.” *Huffman*, 187 W.Va. at 5, 415 S.E.2d at 149 (emphasis added). As such, a technical trespasser “has not committed such a trespass as will preclude him from recovering damages for injuries incurred on the premises as a result of the negligence of the owner or occupant.” *Id.* Mardi Gras does not dispute that the “technical trespasser” distinction provides an exception to a property owner’s general duty of merely having to refrain from willfully or wantonly causing injury to a trespasser. Specifically, this Court has acknowledged that “[w]here the trespass is merely technical, . . . the possessor of the property is not insulated from liability for his failure to exercise reasonable care.” *Huffman*, 187 W.Va. at 5, 415 S.E.2d at 149. However, Mr. Ragonese was not a technical trespasser because he did not mistakenly walk over shrubbery to access the steep hill, nor was he misled into doing so by Mardi Gras.

Mr. Ragonese relies on the *Huffman* case to support his technical trespasser argument. Pet'r's Br. 11-12. In *Huffman*, this Court referred to the analysis of cases it previously performed in *Miller v. Monongahela Power* wherein "unsuspecting victims committed a technical trespass by inadvertently coming into contact with uninsulated power lines located within the power company's easement." *Huffman*, 187 W.Va. at 5, 415 S.E.2d at 149 (citing *Miller v. Monongahela Power Co.*, 184 W.Va. 663, 403 S.E.2d 406 (1991)). As discussed in *Huffman*, in each of the cases considered by the Court in *Miller*, "the victim had a right to be where he was at the time of the injury." *Huffman*, 187 W.Va. at 5, 415 S.E.2d at 149. In *Miller*, the plaintiff was an electrician who had been employed by a chinaware producer. *Huffman*, 187 W.Va. at 5, 415 S.E.2d at 149. The plaintiff was seriously injured after he mistakenly accessed the defendant power company's unidentified substation, which was situated in an area with seven smaller substations owned by the plaintiff's employer. *Id.* Because the record demonstrated that the plaintiff had just recently become employed as an electrician, had never been to the substations prior to the occasion at issue, and had no experience with the level of voltage utilized in the defendant's substation, as well as the fact that the defendant intentionally did not identify its sole substation in order to prevent vandals from identifying its property, the Court concluded that the plaintiff's intrusion onto the power company's property was inadvertent. *Id.* Specifically, this Court found that, although the plaintiff did not have permission to enter the defendant's property, he believed that he was on his employer's property, which he did have permission to enter. *Id.* Moreover, this Court determined that the plaintiff's mistaken belief that he was on his employer's property was motivated, at least in part, by the power company's failure to distinguish its substation from those of the plaintiff's employer. *Id.* Therefore, the plaintiff was a

technical trespasser and, as such, the power company was not permitted “the benefit of the rule of nonliability to trespassers.” *Id.* at 6, 415 S.E.2d at 14.

In the *Huffman* case, however, this Court found to the contrary. Specifically, the Court acknowledged that the plaintiff intentionally climbed the transmission tower without invitation and for his own purposes, despite knowing that it was the property of another. *Huffman*, 187 W.Va. at 6, 415 S.E.2d at 14. Therefore, although the plaintiff’s contact with the electricity may have been unintentional, the plaintiff’s nearness to the source of the electricity was attributable exclusively to the fact that he was trespassing on the power company’s property in the first place. *Id.* Additionally, because he had to climb almost forty feet in order to come in contact with the electricity, this Court concluded that it could not be said that the power company encouraged, whether by action or omission, any belief on the part of the plaintiff that he had a right to be there. *Id.* As such, the plaintiff did not have the benefit of the technical trespass liability exception. *Id.*

In applying the aforementioned legal principles to the facts at issue herein, it becomes clear that Mr. Ragonese’s situation is more similar to that of the plaintiff in the *Huffman* case than that of the plaintiff in the *Miller* case. For example, although Mardi Gras admits that there were no signs warning Mr. Ragonese from entering the hillside at the time of Mr. Ragonese’s incident, just as in the *Huffman* case, there were clear indicators that Mr. Ragonese was not supposed to be on the hillside or retaining wall on July 6, 2011. As previously mentioned, Mr. Ragonese’s own deposition testimony clearly demonstrates that he intentionally—not inadvertently—left the paved walkway, passed through the visual and physical barrier created by the bushes and other shrubbery lining the driveway, and proceeded down the steep, unlighted grassy hill, which he knew to have a six-foot retaining wall at the bottom. (Vol. I-App. 216-217.)

Despite this knowledge, for his own purpose and convenience, Mr. Ragonese purposely chose to take what he referred to as a “shortcut” to the casino, using the hillside which he admittedly knew was not an “approved walkway.” (*Id.*) As such, Mr. Ragonese cannot seriously contend that he was in an area where he believed he had a right to be at the time of the incident in question. Consequently, because Mr. Ragonese has failed to demonstrate that he was on the hillside as a result of a mistake or accident, or that Mardi Gras misled him into believing that he had a right to be on the hillside at the time of his fall, Mardi Gras did not owe Mr. Ragonese the duty to exercise reasonable care. Instead, because Mr. Ragonese was clearly a trespasser, Mardi Gras merely owed him the duty to refrain from willfully or wantonly causing him injury.

Mr. Ragonese contends that, in granting Mardi Gras’ Motion for Summary Judgment, the Circuit Court “failed to address or mention in any way the technical trespasser argument raised by [him].” Pet’r’s Br. 14. The Circuit Court’s Order, however, explicitly decreed that Mr. Ragonese was a trespasser at the time of his incident by stating that “at the point [Mr. Ragonese] 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.” (Vol. I-App. 154.) Mr. Ragonese’s argument that the Circuit Court erred in such a manner is akin to claiming that the Circuit Court erred because it “ignored” his original argument that Mr. Ragonese was an invitee at the time of the incident simply because the Court ruled that Mr. Ragonese was a trespasser. The Circuit Court did not “ignore” Mr. Ragonese’s argument that he had been an invitee at the time of the incident in question; rather, it definitively ruled against him in concluding that Mr. Ragonese was instead a trespasser. Similarly, the Circuit Court did not “ignore” Mr. Ragonese’s argument that he had been a technical trespasser at the time of the incident; it simply disagreed with Mr. Ragonese’s argument and again, it decisively ruled against him. Plaintiff cannot now claim that the Circuit

Court erred when it granted Mardi Gras' Motion for Summary Judgment just because it made a decision he does not like.

In granting Mardi Gras' Motion for Summary Judgment, the Circuit Court reviewed the pleadings, all deposition testimony, as well as the **undisputed facts** before it, and determined that Mr. Ragonese's legal status changed from that of a business invitee to that of a trespasser once he intentionally walked past the shrubbery onto the hillside. (Vol. I-App. 154.) Notably, the Circuit Court spelled out the details upon which its trespasser distinction was based. Specifically, the Circuit Court ruled that, prior to the incident in question herein, Mr. Ragonese knew of the existence of the hillside upon which the hotel sat, as well as the existence of the retaining wall located at the bottom of the hillside. (Vol. I-App. 153, 154.) Additionally, Mr. Ragonese's own clear and unambiguous testimony indicated that he knew that the hillside was not an approved walkway. (Vol. I-App. 217.) Despite this knowledge, Mr. Ragonese made the deliberate decision to depart from the paved walkway, walk through a line of professionally landscaped bushes and shrubs, and step onto a steep grassy hillside where no lighting, attractions, amenities, or other individuals were present. (Vol. I-App. 217, 218.) Mr. Ragonese's deposition testimony further made clear that Mr. Ragonese did so for his own convenience, as he thought this would be a "shortcut" to where his wife was standing. (Vol. I-App. 217.) Specifically, Mr. Ragonese testified during his deposition as follows:

Q: You knew you were walking on grass and not an approved walkway?

A: Right.

Q: As you walked down, tell me about after you passed the bushes and started walking down the hill, what happened? Give me as much detail as you can remember.

A: I was walking . . . taking a shortcut. . . .

(Vol. I-App. 217.) While Mr. Ragonese has since provided an affidavit to the effect that he did not “think [he] was trespassing” at the time of the incident in question, his knowledge of his legal status is irrelevant. (Vol. I-App. 113-114.) Regardless of whether Mr. Ragonese knew that his legal status would be converted to that of a trespasser, the simple fact remains that Mr. Ragonese knew he was not supposed to be walking on the hillside, and yet he deliberately did so solely for his own convenience.

As is also evident upon review of the above set of applicable facts, all of which the Circuit Court had before it in granting Mardi Gras’ Motion for Summary Judgment, the Circuit Court did not agree with Mr. Ragonese’s contention that “mitigating circumstances” were present to “forgive” Mr. Ragonese’s trespass. Pet’r’s Br. 15. In his brief, Mr. Ragonese specifically refers to one alleged “mitigating” factor—the fact that Mardi Gras had not posted “no trespassing” signs in the relevant area. (*Id.*) In arriving at its decision that Mr. Ragonese was a trespasser rather than a mere technical trespasser, however, the Circuit Court understood that no warning signs were posted in the area—a fact that undersigned counsel readily informed the Circuit Court of during the hearing. The Circuit Court was also aware of and took into account the fact that Mr. Ragonese disregarded the landscaped “barrier” of shrubs and bushes and a steep grassy hill uncharacterized by lighting, attractions, or other individuals, which were clear signs that he

should not venture down the hill and off the retaining wall. (Vol. I-App. 153, 154.) Therefore, after a review of the pleadings and hearing the arguments of counsel, the Circuit Court concluded, considering the aforementioned evidence in the light most favorable to Mr. Ragonese, not only that a reasonable person would find that Mr. Ragonese was a trespasser as to the hillside and retaining wall, but also that no mitigating circumstances were present to excuse his trespass.

“It is a paramount principle of jurisprudence that a court speaks only through its orders.” *Legg v. Felinton*, 219 W.Va. 478, 483, 637 S.E.2d 576, 581 (2006). Therefore, the Circuit Court’s specific classification of Mr. Ragonese as trespasser in the December 16, 2013 Order obviated the need for the Circuit Court to explicitly include language to the effect that Mr. Ragonese had not been a “technical trespasser” since, by definition, Mr. Ragonese could not have been both at the time of the incident at issue herein. Mr. Ragonese cannot now complain that the Circuit Court failed to consider his “technical trespasser” argument simply because the Circuit Court rejected his untenable argument and ruled as a matter of law that he was a trespasser at the time of his incident. Consequently, the Circuit Court did not err in granting Mardi Gras’ Motion for Summary Judgment because it did not unambiguously delineate in its Order that it had implicitly addressed and rejected Mr. Ragonese’s “technical trespasser” argument.

3. The Circuit Court did not err in granting Mardi Gras’ Motion for Summary Judgment because there was no evidence in the record of willful and wanton conduct on the part of Mardi Gras.

Under West Virginia law, an owner of property does not owe a trespasser a duty of “ordinary care” and instead only “need refrain from willful or wanton injury.” *Brown*, 206 W.Va. at 608, 527 S.E.2d at 153. In *Barr v. Curry*, this Court defined willfulness and wantonness as involving “premeditation or knowledge and consciousness that injury is likely to result from the

act done or from the omission to act.” *Barr v. Curry*, 137 W.Va. 364, 370, 71 S.E.2d 313, 316 (1952).

In the case of *Addison v. Amonate Coal Company*, the Southern District of West Virginia again made clear that landowners need only refrain from willful or wanton conduct towards a trespasser, and that a court may make the determination of whether such conduct exists. *Addison v. Amonate Coal Company*, 2008 U.S. Dist. LEXIS 54349, *10 (S.D.W.Va. 2008). In *Addison*, the plaintiff drove onto private property and got stuck in the mud. *Id.* at *1. When plaintiff went for help, he walked off a sixty to ninety foot wall and sustained serious injuries. *Id.* The District Court emphasized that “here in the Mountain State, it is clear that landowners and/or occupiers only owe trespassers the duty of refraining from willful or wanton injury . . . and that this determination may be made as a matter of law.” *Id.* at *7 (citing to *Mallet v. Pickens*, 206 W.Va. 145, 522 S.E.2d 436 (1999) and *Aikens v. Debow*, 208 W.Va. 486, 541 S.E.2d 576 (2000), respectively). The District Court further declared that “‘high cliffs’ or ‘high walls’ are almost ubiquitous in West Virginia” and agreed with defendant that there is “no duty to warn an invitee, much less a trespasser” of high cliffs or high walls. *Id.* at *10.

In the Order granting Mardi Gras’ Motion for Summary Judgment, the Circuit Court specifically held that, based upon Mr. Ragonese’s transformation from an invitee to a trespasser, Mardi Gras only owed Mr. Ragonese the duty to refrain from willfully and wantonly causing injury to him. (Vol. I-App. 154.) As such, similar to the outcome of the *Addison* case, Mardi Gras did not owe Mr. Ragonese, a clear trespasser, a duty to warn him of the retaining wall, particularly in light of the fact that Mr. Ragonese was aware of the existence of the wall prior to his fall. Moreover, there is absolutely nothing “inherently dangerous” about the wall. It is

merely an over six foot tall wall constructed out of brick and mortar. It has no switches, moving parts, or live wires, and is in no way a hidden danger. It is a typical retaining wall.

Mr. Ragonese complains that the Circuit Court “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” and that the Circuit Court “didn’t review the record.” Pet’r’s Br. 16, 17. As made clear in *Addison*, a court may, as a matter of law, make the determination of whether a landowner engaged in willful or wanton conduct with regards to a trespasser. 2008 U.S. Dist. LEXIS 54349 at *7. Despite this, it appears that Mr. Ragonese believes the Circuit Court should have, in its Order, specifically identified what factors in the record caused it to conclude that there was no willful or wanton conduct. Mr. Ragonese’s argument is akin to asking the Circuit Court to prove a negative. The Circuit Court’s ruling that there was no willful and wanton conduct speaks for itself—what factors could the Circuit Court possibly have specified to in order to demonstrate *why* it determined there was no willful and wanton conduct if no evidence of same exists? The Circuit Court reviewed the entire record, heard arguments of counsel, and ruled that there was no willful and wanton conduct. There was no further analysis to be done.

It simply cannot be said that Mardi Gras acted with premeditation, knowledge, or consciousness that Mr. Ragonese would injure himself as a result of his own deliberate decision to deviate from a paved walkway (which patrons were directed to use for travel between the hotel and casino), to continue through an area partitioned off by professional landscaping, and to stroll down a steep unlit hillside devoid of attractions, amenities, or other individuals—particularly in light of the fact that Mr. Ragonese had previously acknowledged the presence of the retaining wall at the bottom of the hill. The fact that Mardi Gras had another patron who had experienced an injury in proximity to the retaining wall, something which Mardi Gras has never

disputed, does not change the above analysis.⁴ Moreover, prior to granting Mardi Gras' Motion for Summary Judgment, the Circuit Court was aware of this report both through the submissions of both parties as well as the oral argument of counsel. Upon consideration of the record, including evidence of this report, the Circuit Court determined that Mardi Gras did not engage in any willful and wanton conduct and "did not act with premeditation, knowledge, or consciousness that Mr. Ragonese would injure himself by trespassing and falling off the retaining wall." (Vol. I-App. 154.)

Consequently, the Circuit Court did not err in granting Mardi Gras' Motion for Summary Judgment after reviewing the record before it and determining that Mr. Ragonese was a trespasser, as no facts in the record existed upon which a reasonable jury could conclude that there existed genuine issues of material fact as to whether Mardi Gras acted willfully or wantonly in contributing to Mr. Ragonese's fall and resultant injury.

- 4. The Circuit Court did not err in granting Mardi Gras' Motion for Summary Judgment because it denied Mr. Ragonese's request for a continuance of the case due to Mr. Ragonese's failure to file either a formal or an informal Rule 56(f) motion, a motion to compel, and/or an affidavit as required by West Virginia law identifying specific discovery that would create a genuine issue of material fact as well as good cause for why such discovery could not have been completed sooner.**

Mardi Gras does not dispute Mr. Ragonese's assertion that summary judgment is appropriate only after the opposing party has an adequate time for discovery. *Williams*, 194 W.Va. at 61, 459 S.E.2d at 338. What Mardi Gras does dispute is Mr. Ragonese's contention that he did not have adequate opportunity to conduct sufficient discovery and that there was anything of relevance to discover that would be germane to Mardi Gras' Revised Motion for Summary Judgment. Further, Mardi Gras disagrees that Mr. Ragonese appropriately requested a

⁴ This prior incident involved an intoxicated individual who had exited a door marked "No Entry" on the sky bridge and was subsequently found to have suffered an injury near the base of the retaining wall.

continuance of the Circuit Court's decision on Mardi Gras' Motion for Summary Judgment in order to conduct additional discovery. Pet'r's Br. 12-19.

Under West Virginia Rule of Civil Procedure 56(f), continuance of a motion for summary judgment is only mandated when there has been a good faith showing by an affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion. Prior to the Circuit Court's granting of Mardi Gras' Motion for Summary Judgment, Mr. Ragonese never filed a motion to compel or a Rule 56(f) affidavit in opposition to the Motion for Summary Judgment on the grounds that sufficient discovery had not yet been completed. Pet'r's Br. 19. Mr. Ragonese concedes that he has not filed a Rule 56(f) affidavit as required by the *West Virginia Rules of Civil Procedure*, but argues that, pursuant to the holding in *Powderidge*, he is not "strictly required to follow the directives of [Rule 56]." (Vol. I-App. 108.) According to Syllabus Point 1 of the *Powderidge* decision, "[a]n 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*." Syl. Pt. 1, *Powderidge*, 196 W.Va. at 692, 474 S.E.2d at 872. At a minimum, however, a party "making an informal Rule 56(f) motion" must:

(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.

Id.

In the case of *Roberts v. State Farm*, No. 13-0743 (W.Va. Supreme Court, May 30, 2014) (memorandum decision), this Court encountered a factual scenario similar to that presented by the instant appeal. In the *Roberts* case, the petitioner/plaintiff-below claimed that the lower court

erred by granting a motion for summary judgment before discovery was completed.⁵ *Id.* at *9. The respondent/defendant-below had filed a motion for summary judgment in the Circuit Court of Kanawha County on the scheduling order's deadline for the filing of dispositive motions. *Id.* The petitioner/plaintiff-below then moved to continue the trial and extend the discovery timeline. *Id.* Simultaneously, the petitioner/plaintiff-below also served respondent/defendant-below with a notice of video deposition of the respondent/defendant-below's representatives. *Id.* Thereafter, the Circuit Court of Kanawha County granted the respondent/defendant-below's motion for summary judgment.⁶ *Id.* at *8.

On appeal, the petitioner/plaintiff-below alleged that the circuit court erred in granting the motion for summary judgment before discovery was completed, arguing that her motion to continue the trial and to extend the timeline for the completion of discovery satisfied the informal requirements as set forth in the *Powderidge* opinion. *Roberts* at *10. This Court disagreed, however, stating that:

[p]etitioner's brief fails to articulate any basis for the belief that any "specified discoverable material fact" exists and further fails to demonstrate that "material facts can be obtained within a reasonable additional time period." Furthermore, petitioner fails to demonstrate (or even argue) that newly-obtained material facts will suffice to create a genuine and material issue and also fails to show "good cause for failure to have conducted the discovery earlier." Given that the petitioner has failed to satisfy even the minimal requirements of *Powderidge*, this Court concludes that the circuit court did not err in considering respondent's timely motion for summary judgment."

Id. at *10-11.

⁵ The deadline for discovery set forth in the court's scheduling order had passed; however, plaintiff argued that discovery was not complete as the parties had experienced scheduling difficulties and delays in completing the fact discovery necessary for the development of the case.

⁶ It should be noted that well after the circuit court entered its order granting summary judgment, it also inadvertently entered an order granting petitioner's motion to continue trial and extend the discovery timeline.

In the case at hand, Mr. Ragonese maintains that he complied with the requirements of the *Powderidge* opinion 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*.” Pet’r’s Br. 19. As demonstrated by the *Roberts* decision, the simple fact that Mr. Ragonese made the request for a continuance is not in and of itself sufficient to satisfy the factors required by *Powderidge*. Furthermore, just as in the *Roberts* decision, Mr. Ragonese’s brief utterly fails to articulate any basis whatsoever for his belief that any specified material fact exists which has not yet become accessible to him, fails to demonstrate that any purported “material facts” can be obtained within a reasonable additional time period, fails to demonstrate that these newly obtained material facts will create a genuine issue of material fact, and fails to demonstrate good cause for his failure to have conducted discovery to this end at an earlier point in time.

In his latest attempt to demonstrate that specified “discoverable” material facts exist which will create a genuine issue of material fact, Mr. Ragonese simply refers this Court back to Plaintiff’s Response to Defendant’s Revised Motion for Summary Judgment, wherein he contends that his status as an invitee of the casino and hotel, the lack of “no trespassing” signs or other warnings, and subsequent remedial measures to the subject area at the very least created a genuine issue of material fact that his status had not transformed from an invitee to a trespasser at the time of the incident at issue herein. (Vol. I-App. 109.) To this end, Mr. Ragonese contends that there is a plausible basis that “discoverable material facts” exist, citing to his belief that “deposition testimony of a designated Corporate Representative would prove that [Mardi Gras] did not warn against or do anything to put [Mr. Ragonese] on notice that his status from an invitee would change to a trespasser . . .” (*Id.*) Why Mr. Ragonese insists on deposing a corporate

representative to prove what has already been admitted—that no warning signs had been posted—is not clear. Additionally, it is unclear why Mr. Ragonese is seeking to obtain information to prove that Mardi Gras did not warn Mr. Ragonese that his legal status would change when he walked through the shrubbery and onto the steep hillside, as Mardi Gras owed no duty to warn of legal status.

Mr. Ragonese also asserts that he needs additional time to depose valet employees to determine whether they ever warned patrons to stay off the hillside. (Vol. I-App. 109.) It is not clear why Mr. Ragonese desires to depose valet employees since Mardi Gras has never denied that its employees did not warn Mr. Ragonese of the existence of the retaining wall. In short, Mr. Ragonese has already discovered the facts that he now asserts he wishes to discover through the deposition testimony of valet employees.

Next, Mr. Ragonese maintains that he has “requested access to” incident reports relating to “prior incidents” involving the subject hillside and retaining wall, but that he has not been provided copies of same. (Vol. I-App. 110.) Mardi Gras has, on multiple occasions, offered counsel for Mr. Ragonese the opportunity to review and inspect a redacted copy of the incident report of the patron who exited the no-entry door on the sky bridge at undersigned counsel’s office at a mutually agreeable time. (Vol. I-App. 126.) Mr. Ragonese had ample time between the disclosure of and offer regarding this incident report and the filing of Mardi Gras’ Motion for Summary Judgment to make arrangements to inspect the document; however, he has never availed himself of such opportunity. As counsel for Mr. Ragonese stated at the hearing on the Motion for Summary Judgment, he did not feel that should have to make a trip to undersigned counsel’s office just to “look at some of the things” he “would legitimately be allowed to have in the course of discovery.” (Vol. II-App. 13.)

Also as asserted in Plaintiff's Response to Defendant's Revised Motion for Summary Judgment, Mr. Ragonese generally contends that he requires additional time to conduct discovery as to the "dangerousness" of the wall. (Vol. I-App. 110.) Contrary to this Court's mandate that a request for a continuance based upon discovery grounds include "specified discoverable material facts [that] likely exist which have not yet become accessible to the party," Mr. Ragonese never once attempts to enunciate what specific "inherently hazardous characteristics of the wall" he believes further investigation may unveil. *See Crum v. Equity Inns, Inc.*, 224 W.Va. 246, 685 S.E.2d 219 (2009). Moreover, based on discovery, Mr. Ragonese is already aware that the subject retaining wall is over six feet tall and made of brick and mortar. The retaining wall was constructed of brick and mortar in 2002 and has not moved since that time. It is nothing more than an ordinary retaining wall. In short, there is nothing inherently dangerous about the wall for Mr. Ragonese to discover.

Last, Mr. Ragonese maintains that he did not have sufficient time to conduct complete discovery in this matter as the "case [was] less than 6 months old with outstanding discovery" at the time Mardi Gras' Motion for Summary Judgment was granted. (Vol. I- App. 111.) To this end, Mr. Ragonese's chief complaint is that up to the filing of Mardi Gras' Motion for Summary Judgment only his deposition had been taken.⁷ (*Id.*) The immediately aforementioned proposition, however, is in no way connected to any lack of cooperation on the part of Mardi Gras. To the contrary, Mr. Ragonese has never attempted to schedule, let alone request, depositions of any Mardi Gras employees until now. Nor did Mr. Ragonese accept Mardi Gras' offer to visit undersigned counsel's office to inspect and copy the formal incident report he had previously requested. (Vol. II-App. 13.) It is equally important to note that, although Mr.

⁷ It should also be noted that Mardi Gras took the deposition of Mr. Ragonese's wife, and further that written discovery was conducted by both parties.

Ragonese now complains that no scheduling order or other discovery deadlines were ever set by the Circuit Court, Mr. Ragonese never attempted to contact the Circuit Court Clerk to secure a date for a scheduling conference.

Mardi Gras has not, any time during this litigation, disputed the underlying facts relevant to Mr. Ragonese's incident. In fact, Mardi Gras has built its case on Mr. Ragonese's own deposition testimony. Mardi Gras has, at all times during this litigation, been cooperative with any discovery requests. Additionally, Mr. Ragonese did not, and still has not, specified exactly what discoverable material facts he believes he is going to find which would engender an issue both genuine and material.

Therefore, the Circuit Court of Kanawha County did not err in granting Mardi Gras' Motion for Summary Judgment because it denied Mr. Ragonese's request for a continuance of the case based upon Mr. Ragonese's failure to file a Rule 56(f) motion, a motion to compel, and/or an affidavit as required by West Virginia law identifying specific discovery that would create a genuine issue of material fact as well as good cause for why such discovery could not have been completed sooner.

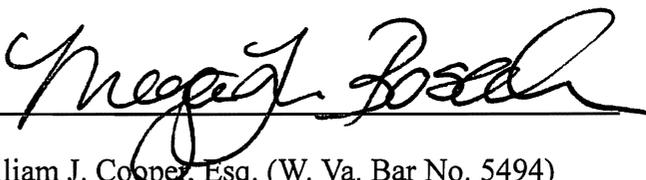
CONCLUSION

In summary, the Circuit Court did not err when it granted Mardi Gras' Motion for Summary Judgment after it explicitly ruled in its December 16, 2013 Order that Mr. Ragonese was a trespasser at the time of the incident at issue herein, that Mardi Gras did not breach the duty it owed to Mr. Ragonese to refrain from willful or wanton conduct, and that a continuance of the case pending further discovery was not warranted. Nor did the Circuit Court err in denying Plaintiff's Rule 59(e) Motion to Alter or Amend Judgment. Consequently, the relief sought by Mr. Ragonese in the instant appeal should be denied.

WHEREFORE, based upon the foregoing reasons, Respondent/Defendant-Below Racing Corporation of West Virginia, d/b/a Mardi Gras Casino and Resort respectfully requests that this Honorable Court deny Petitioner/Plaintiff-Below David Ragonese's appeal and enter an Order to that effect, along with such other and further relief as this Court deems just and proper.

**RACING CORPORATION OF WEST VIRGINIA,
D/B/A MARDI GRAS CASINO AND RESORT**

By Counsel

A handwritten signature in black ink, appearing to read "Megan Fulcher Bosak", written over a horizontal line.

William J. Cooper, Esq. (W. Va. Bar No. 5494)
Megan Fulcher Bosak, Esq. (W. Va. Bar No. 11955)
Kiersan Smith Lockard, Esq. (W. Va. Bar No. 11710)
FLAHERTY SENSABAUGH BONASSO PLLC
P. O. Box 3843
Charleston, WV 25338-3843
Telephone: (304) 345-0200
Fax: (304) 345-0260
mbosak@fsblaw.com
Counsel for Respondent/Defendant-Below

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DAVID RAGONESE,

Petitioner, Plaintiff-Below,

vs.)

Appeal No.: 14-0258

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

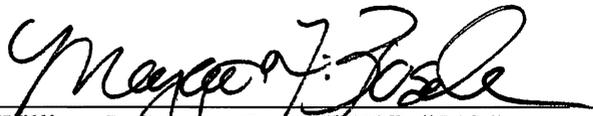
Respondent, Defendant-Below.

CERTIFICATE OF SERVICE

I, Megan Fulcher Bosak, counsel for the Defendant Racing Corporation of West Virginia, d/b/a Mardi Gras Casino and Resort, do hereby certify that I have served the foregoing **Brief of Defendant-Below/Respondent Racing Corporation of West Virginia, d/b/a Mardi Gras Casino and Resort** upon counsel of record this 18th day of July, 2014, by depositing true and correct copies in the United States mail, postage prepaid, addressed as follows:

Richard Weston, Esq.
Connor Robertson, Esq.
Weston Law Office
621 Sixth Avenue
Huntington, WV 25701

Counsel for Petitioner/Plaintiff-Below



William J. Cooper, Esq. (WVSB #5494)
Megan Fulcher Bosak, Esq. (WVSB #11955)
Kiersan Smith Lockard, Esq. (WVSB #11710)
Flaherty Sensabaugh Bonasso PLLC
200 Capitol Street
P.O. Box 3843
Charleston, WV 25338-3843
(304) 347-4233

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DAVID RAGONESE,

Petitioner, Plaintiff-Below,

vs.)

Appeal No.: 14-0258

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

Respondent, Defendant-Below.

VERIFICATION

STATE OF West Virginia.
COUNTY OF Kanawha, to wit:

The undersigned, after being first duly sworn, states that the information contained in the foregoing *Brief of Respondent/Defendant-Below Racing Corporation of West Virginia, d/b/a Mardi Gras Casino and Resort* is true, except insofar as it is stated to be based upon information and belief. To the extent that any information is based upon information provided to me or on my behalf, it is believed to be true.


Megan Fulcher Bosak

Taken, subscribed, and sworn to before the undersigned authority, this 18th day of

July, 2014.

My commission expires: May 28, 2020




Notary Public