NO. 23-ICA-31

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IN THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

JORDAN LINZY,

Plaintiff Below, Petitioner,

v.

Civil Action No.: 22-C-51
Honorable Darl Poling

MARQUEE CINEMAS, INC.;
MARQUEE CINEMAS-WV, INC.;
MARQUEE CINEMAS, HOLDINGS, INC.;
BECKLEY GALLERIA, LLC;
PARMOUNT DEVELOPMENT CORPORATION;
and, PARAMOUNT DEVELOPMENT PROPERTIES, LLC.,

Defendants Below, Respondents.

PETITIONER'S BRIEF

Counsel for Petitioner:

Stephen P. New, Esq. (#7756)
New, Taylor & Associates
430 Harper Park Drive
P.O. Box 5516
Beckley, WV 25801
Telephone: (304) 250-6017
Facsimile: (304) 250-6012
Email: steve@newlawoffice.com
Counsel for Jordan Linzy

Counsel for Respondents:

Jared Underwood, Esq. (#12141)
Pullin, Fowler, Flanagan, Brown & Poe, PLLC
252 George Street
Beckley, WV 25801
Telephone: (304) 254-9300
Facsimile: (304) 255-5519
Email: junderwood@pffwv.com
Counsel for Marquee Cinemas, Inc.,
Marquee Cinemas-WV, Inc., and
Marquee Cinemas Holdings, Inc.

Cy A. Hill, Jr. (WV Bar #8816)
Cipriani & Werner, P.C.
500 Lee Street, East, Suite 900
Charleston, WV 25301
Email: chill@c-wlaw.com
Counsel for Beckley Galleria, LLC,
Paramount Development Corporation,
and Paramount Development Properties, LLC.

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ASSIGNMENTS OF ERROR

I. The Circuit Court of Raleigh County erred in dismissing Plaintiff's Amended Complaint based upon a finding the Plaintiff has failed to identify any reasonably foreseeable duty of care that the Defendants violated. The Covid shut down order did not alter the allegation that Defendants were aware of the longstanding and ongoing use of the premises in a dangerous manner justifying the imposition of a duty.

II. The Circuit Court of Raleigh County erred in dismissing Plaintiff's Amended Complaint based upon an improper application of the standards regarding the determination of a Motion to Dismiss under Rule 12(b)(6). The Circuit Court failed to construe the allegations in the light most favorable to the Plaintiff by failing to consider the longstanding and ongoing use of the premises in a dangerous manner justifying the imposition of a duty.

III. The Circuit Court of Raleigh County erred in dismissing Plaintiff's Amended Complaint based upon consideration of whether Count II of the Amended Complaint stated a claim upon which relief can be granted when none of the Defendants raised the argument in their Motions. A Court violates the standards applicable to a Motion to Dismiss when the Court considers arguments not raised by the parties, which do not affect a Court's subject matter jurisdiction.

IV. The Circuit Court of Raleigh County erred in dismissing Plaintiff's Amended Complaint based upon a failure to consider all reasonable inferences that can be drawn from the allegations when analyzing Count II of the Amended Complaint, which alleged negligent hiring and negligent retention. The Plaintiff could not establish the contractual relationship between the parties prior to the drafting of the Amended Complaint and one or more of the

parties may have be the employee or agent of the other with a contractual obligation to provide security for the premises or that an independent security company may have been hired.

V. The Circuit Court of Raleigh County erred in dismissing Plaintiff's Amended Complaint based upon a failure to consider Count II as pleading in the alternative. Defendants may have in fact hired an independent security company and may have been negligent in the hiring and retention. Plaintiff may not have been aware of this fact prior to the drafting of the Complaint. Plaintiff is permitted to plead in the alternative.

VI. The Circuit Court of Raleigh County erred in dismissing Plaintiff's Amended Complaint and not allowing the Plaintiff to conduct discovery on the issues presented in Defendants' Motions.

STATEMENT OF THE CASE

This matter comes before the Intermediate Court of Appeals of West Virginia on appeal of Jordan Linzy, the Plaintiff below ("Petitioner" or "Linzy") from an *Order Granting Defendants' Motions to Dismiss* entered on January 5, 2023. (*Order Granting Defendants' Motions to Dismiss* ("*Order*"), Appendix Record ("A.R.") 173-189.)

Petitioner filed his *Amended Complaint* on June 8, 2022 naming as Defendants Marquee Cinemas, Inc.; Marquee Cinemas-WV, Inc.; Marquee Cinemas, Holdings, Inc.; Beckley Galleria, LLC; Paramount Development Corporation; and, Paramount Development Properties, LLC ("Respondents"). (*Amended Complaint* ("*Am. Compl.*"), A.R. 19-27.) Linzy alleged that Respondents negligently caused injuries to Linzy while he was on Respondents' premises in Count I and were negligent in their hiring, training, supervision, and retention of their employees, agents, and representatives in Count II. (*Am. Compl*, A.R. 19-27.)

As a result of the alleged negligence, Linzy sustained horrific injuries including a traumatic brain injury; convulsive status epilepticus; collapsed lung; brain bleeds; permanent scarring; and MRSA. (*Am. Compl.* at ¶¶ 20 and 26, A.R. 22 and 24.) He was required to undergo various medical procedures including a cranioplasty; placement of a gastrostomy tube; tracheostomy; and craniotomy evacuation hematoma (right). (*Am. Compl.* at ¶ 20, A.R. 22.) Linzy was hospitalized for approximately 86 days at Charleston Area Medical Center, some of those days being spent in ICU, resulting in over $1 million dollars in medical expenses. (*Am. Compl.* at ¶ 21, A.R. 22-23.)

Linzy seeks compensation for his past and future serious permanent physical injuries, pain, suffering, and mental anguish; loss of earning capacity stemming from the traumatic brain injury; loss of enjoyment of life; and other expenses reasonably incurred as a result of the Respondents' wrongful conduct. (*Am. Compl.* at ¶ 22, A.R. 23.)

Linzy alleges that the Respondents operated the Marquee Cinemas, Galleria 14 in Beckley. (*Am. Compl.* at ¶ 11, A.R. 20.) In March of 2020, due to the Covid-19 pandemic, the Marquee Cinemas, Galleria was closed to customers per Covid restrictions imposed by the Governor of the State of West Virginia. (*Am. Compl.* at ¶ 12, A.R. 21.) Respondents did not employ security personnel or restrict individuals from accessing the premises' parking lot despite Respondents' knowledge that teenagers have utilized the parking lot as a local hang-out for many years and have engaged in activities such as cruising, burnouts, and other various loitering activities. (*Am. Compl.* at ¶ 14, A.R. 21.) These activities occurred because no uniformed security or security measures were engaged by Respondents to prevent the utilization of the premises for these purposes. (*Am. Compl.* at ¶ 14, A.R. 21.)

On May 30, 2020, Linzy, age 17, was at the Marquee Cinemas parking lot with friends

and acquaintances. (*Am. Compl.* at ¶ 15, A.R. 21.) Linzy alleges he was not trespassing and alleges Defendants did not on that day and have never posted no loitering and/or no trespassing signs. (*Am. Compl.* at ¶ 15, A.R. 21.)

Additionally, Linzy alleges that the premises was and, continues to be, the scene of frequent injuries and incidents regarding teenagers, both before and after Linzy was injured. (*Am. Compl.* at ¶ 16, A.R. 21.) Numerous calls were made to Raleigh County 911 to dispatch law enforcement to the premises for the actions at this premises that occurred due to the lack of security. (*Am. Compl.* at ¶ 16, A.R. 21.) Despite the history of the teenagers utilizing the premises to loiter, conduct burnouts, and engage in other mischievous acts, Respondents made the choice not to employ reasonable security measures, not adequately train or supervise its employees, and otherwise failed to provide security and exercise reasonable care to provide a reasonably safe premises for its patrons or others upon its premises, including Linzy. (*Am. Compl.* at ¶ 17, A.R. 21-22.)

More specifically, Linzy alleges that Respondents were aware of and complicit in the creation of security risks that resulted in personal injuries to individuals. (*Am. Compl.* at ¶ 18, A.R. 22.) Thus, the Respondents knew, were aware of, or should have known of the risks and danger to Linzy and other innocent visitors, customers, or patrons. (*Am. Compl.* at ¶ 18, A.R. 22.) Respondents, despite the known risks of injuries from conduct of individuals on the premises and in blatant disregard of the foreseeable consequences, failed to have adequate security safeguards in place. (*Am. Compl.* at ¶ 19, A.R. 22.)

Linzy alleges that he was injured on the premises on May 30, 2020, prior to midnight, when Linzy was standing on the rear of a Chevrolet Silverado pickup truck owned and operated by Torrey Anderson and was thrown off the vehicle when Anderson performed a burnout. (*Am.*

Compl. at ¶ 20, A.R. 22.) In Count I of the *Amended Complaint*, Linzy alleges that Respondents, jointly and severally, their agents, apparent agents, employees, servants, and/or any other personnel involved in providing services to its patrons/invitees and Respondents, by and through these individuals, knew that patrons/invitees would be at risk for injury and/or death from acts of their employees and/or third parties on or about their premises. (*Am. Compl.* at ¶¶ 24-25, A.R. 23.)

Further, Linzy alleges that Respondents had a duty to exercise ordinary care to protect invitees against negligent and reckless acts of its own employees and third parties when Respondents knew of an unreasonable risk of harm present on the premises. (*Am. Compl.* at ¶ 27, A.R. 24.) Respondents failed to provide reasonable and adequate security measures to ensure the health, safety, and welfare of patrons, business invitees, or other individuals while on or about the premises. (*Am. Compl.* at ¶ 28, A.R. 24.) The security measures utilized by Respondents, if any, did not provide reasonable and adequate security measures to ensure the health, safety, and welfare of these individuals while on or about the premises. (*Am. Compl.* at ¶ 29, A.R. 24.)

Moreover, Linzy alleges that Respondents breached the duty of care they owed to Linzy and were thereby negligent, careless, and reckless through acts and omissions including, but not limited to, failing to devise, implement, and follow a proper security plan; failing to properly employ and deploy and adequate number of security personnel to reasonably protect persons on the premises; failing to utilize reasonable and appropriate measures to protect persons on the premises when it knew of a dangerous condition on the premises; failing to maintain a lookout or monitor for dangerous activity on the premises; failing protect patrons or invitees, including Linzy, from dangerous activity and injury; and various other acts and omissions which may be developed throughout the course of discovery. (*Am. Compl.* at ¶ 30, A.R. 24-25.) Linzy seeks

compensation for the damages suffered as a direct and proximate result of Respondents' wrongful acts. (*Am. Compl.* at ¶¶ 31-33, A.R. 25-26.)

Additionally, Linzy alleges that as a direct and proximate result of the Respondents' actions and the actions of their employees, agents and apparent agents, servants, and representatives, which show a conscious, reckless and outrageous indifference to the health, safety, and welfare of others, he is entitled to compensatory and punitive damages pursuant to West Virginia Code §55-7-29 in amounts to be determined at trial. (*Am. Compl.* at ¶ 34, A.R. 26.)

Count II of the *Amended Complaint* alleges that Respondents owed Linzy a duty to exercise reasonable care in the hiring, training, retention, and supervision of its employees, agents, and representatives. (*Am. Compl.* at ¶ 36, A.R. 26.) Linzy further alleges that Respondents were negligent, careless and reckless in one or more of the following ways: failing to provide reasonable and necessary training, education, and instruction to its employees/agents, for the adequate planning and implementation of an appropriate security plan and protocol and various other acts and omissions which may be developed throughout the course of discovery. (*Am. Compl.* at ¶ 37, A.R. 26.) Linzy seeks compensation for the damages suffered as a direct and proximate result of Respondents' negligence. (*Am. Compl.* at ¶¶ 39-40, A.R. 26-27.)

Respondents Marquee Cinemas, Inc.; Marquee Cinemas-WV, Inc.; Marquee Cinemas, Holdings, Inc. ("*Marquee*") filed *Defendants Marquee Cinemas, Inc., Marquee Cinemas-WV, Inc., and Marquee Cinemas Holdings, Inc.'s Joint Answer to Plaintiff's Amended Complaint* on July 12, 2022. (*Defendants Marquee Cinemas, Inc., Marquee Cinemas-WV, Inc., and Marquee Cinemas Holdings, Inc.'s Joint Answer to Plaintiff's Amended Complaint* ("*Marquee Answer*"), A.R. 57-67.) An amended answer was filed the same day. (*Defendants Marquee Cinemas, Inc., Marquee Cinemas-WV, Inc., and Marquee Cinemas Holdings, Inc.'s Joint Amended Answer to*

Plaintiff's Amended Complaint ("*Marquee Amended Answer*"), A.R. 71-81.)

Respondents *Marquee* also filed *Defendants Marquee Cinemas, Inc., Marquee Cinemas-WV, Inc., and Marquee Cinemas Holdings, Inc.'s Motion to Dismiss* on September 6, 2022, seeking dismissal on the bases that Linzy was a trespasser and that the open parking lot cannot reasonably be considered a dangerous condition. (*Defendants Marquee Cinemas, Inc., Marquee Cinemas-WV, Inc., and Marquee Cinemas Holdings, Inc.'s Motion to Dismiss* ("*Marquee Motion*"), A.R. 109-111.) Count II of the *Amended Complaint* was not addressed in the *Motion to Dismiss*.

Plaintiff filed his response in opposition to the *Marquee Motion* on September 9, 2022. (*Plaintiff Jordan Linzy's Response to Defendants Marquee Cinemas, Inc., Marquee Cinemas-WV, Inc., and Marquee Cinemas Holdings, Inc.'s Motion to Dismiss* ("*Response to Marquee*"), A.R. 112-126.) Plaintiff only addressed the issues of whether Linzy was a trespasser and whether the *Amended Complaint* sufficiently alleged willful or wanton conduct. (*Response to Marquee*, pp. 6-13 and 13-14, A.R. 87-94 and 94-95.)

Respondents Beckley Galleria, LLC, Paramount Development Corporation, and Paramount Development Properties, LLC ("*Paramount*") filed their *Motion to Dismiss* on June 30, 2022. (*Beckley Galleria, LLC, Development Corporation, and Paramount Development Properties, LLC's Motion to Dismiss and Integrated Memorandum of Law in Support* ("*Paramount Motion*"), A.R. 29-38.) *Paramount* sought dismissal on the basis that "Plaintiff owed no legal duty to Plaintiff Jordan Linzy because the Plaintiff was a trespasser on the property" and "Plaintiff has failed to plead any allegation that could be construed as willful or wanton conduct by these Defendants." (*Paramount Motion* at pp. 1 and 2, A.R. 29 and 30.) Thus, Respondent accepted that if Linzy was a trespasser, Respondent had a duty not to injure him by

willful or wanton conduct. Further, Respondent *Paramount* did not argue that dismissal was warranted with respect to Count II of the *Amended Complaint* regarding the allegations of negligent hiring, training, supervision, and retention.

Plaintiff filed his response in opposition to the *Paramount Motion* on August 1, 2022. (*Plaintiff Jordan Linzy's Response to Defendants Beckley Galleria, LLC, Paramount Development Corporation, and Paramount Development Properties, LLC's Motion to Dismiss and Integrated Memorandum of Law in Support* ("*Response to Paramount*"), A.R. 82-97.) Respondent *Paramount* filed a *Reply Brief* on August 15, 2022. (*Beckley Galleria, LLC, Development Corporation, and Paramount Development Properties, LLC's Reply to Plaintiff's Response to Motion to Dismiss* ("*Paramount Reply*"), A.R. 99-107.)

Judge Poling conducted a hearing on the motions on September 13, 2022. (*Transcript of Motions Hearing* ("*Transcript*"), A.R. 127-162.) Subsequent to the hearing, Respondents each filed "supplements" to their motions contending that Petitioner's allegation that he was not a trespasser does not have to be taken as true when considering the motions. (*Beckley Galleria, LLC, Development Corporation, and Paramount Development Properties, LLC's Supplement to Motion to Dismiss and Integrated Memorandum of Law in Support* ("*Paramount Supplement*") and A.R. 99-107.) and *Defendants Marquee Cinemas, Inc., Marquee Cinemas-WV, Inc., and Marquee Cinemas Holdings, Inc.'s Joinder in Beckley Galleria, LLC, Development Corporation, and Paramount Development Properties, LLC's Supplement to Motion to Dismiss and Integrated Memorandum of Law in Support* ("*Marquee Supplement*"), A.R. 164-167 and 169-171.)

In the *Order* dismissing the *Amended Complaint*, Judge Poling concluded that:

> [T]his Court will not adopt Defendants' position that the Plaintiff was a trespasser for other reasons. Specifically, in *Gable*, the WVSCA held that the determination of whether an entrant to property is a trespasser or not, is a question of fact for the jury. *Gable*, supra. at p. 853, Although there is evidence [sic] in this case that may

> allow the jury to determine that Plaintiff was trespassing at the time of the accident, the Court is not permitted to make that determination in a Rule 12(b)(6) analysis and is not allowed to substitute its judgment for that of the jury. Therefore, the Court will continue to analyze the duty owed to Plaintiff under Syllabus Point 3 of *Sewell v. Gregory* and the additional authority cited herein.
>
> (*Order*, A.R. 178.)

The Circuit Court ultimately concluded that the "Plaintiff has failed to identify any reasonably foreseeable duty of care that the Defendants violated," despite the fact that the Respondents' arguments only addressed whether Linzy was a trespasser, whether willful or wanton conduct was sufficiently alleged, and whether a dangerous condition existed on the premises. (*Order*, A.R. 183-184.)

Having dismissed Count I of the *Amended Complaint*, the Circuit Court proceeded to consider "the Defendants' motions to dismiss as they relate to Count II of the *Amended Complaint*." (*Order*, A.R. 184.) However, none of Respondents' arguments or Petitioner's responses addressed Court II of the *Amended Complaint*, which alleged negligent hiring, training, retention, and supervision. Thus, under the Circuit Court's procedure, if appears that defendants are required only to file a single sentence motion under Rule 12(b)(6) that simply states "plaintiff failed to state a claim upon which relief can be granted."

The Circuit Court concluded that Linzy "failed to identify any specific employee or agent that was negligently hired" and "to assert any irregularity or improper action associated with the hiring." (*Order*, A.R. 185.) With respect to the claim for negligent retention, the Circuit Court rejected this claim on the basis that Linzy failed to allege his "injuries were caused by any specific act of any employee" or the retention of any known unfit employee whose act could reasonably cause injury in the future. (*Order*, A.R. 187.) The Circuit Court dismissed the negligent supervision claim based upon the determination that Linzy did not identify any hired

employee that went unsupervised and negligently caused Linzy's injuries. (*Order*, A.R. 188.)

Ultimately, the Circuit Court found that "based upon the undisputed **evidence** as set forth by the Plaintiff, there is **no genuine issue of fact** associated with Count II which would support any legal theory upon which any of the issues should be presented to the jury." (*Order*, A.R. 189 (**emphasis added)**.)

Petitioner contends that the Circuit Court erred in dismissing Petitioner's *Amended Complaint* and seeks reversal and remand.

SUMMARY OF ARGUMENT

The Circuit Court of Raleigh County failed to follow the proper procedure in determining whether Respondents were entitled to dismissal of Petitioner's *Amended Complaint.* The Court disregarded various allegations; decided factual issues; and relied upon inapplicable case law that did not support its conclusion.

Initially, the Circuit Court interpreted the allegations as limited to the time that the Executive Order was in place, rather than considering the allegations of the prior injuries that occurred on the premises. Respondents' duty of care existed prior to the pandemic and continues to this day. Teenagers had been using the premises as a hang-out for many years, not just during the pandemic.

Further, the Circuit Court erred by deciding factual issues underlying the duty of care. The Executive Order does not conclusively prohibit the type of activities that were occurring on the outdoor parking lot near food establishments. Further, the Circuit Court concludes that the pandemic was not foreseeable and then proceeds to make factual determinations as to what an ordinary person would expect during a pandemic. Moreover, the only issues argued in support of the motions to dismiss were whether Petitioner was a trespasser; whether willful and wanton

conduct was alleged; and whether a dangerous condition existed on the premises. The Circuit Court correctly determined that whether Petitioner was a trespasser was an issue to be decided by a jury. That determination addressed all of the arguments made by the Respondents and the Circuit Court should have denied the *Motions*. A court is not required or permitted to review a complaint for allegations that support dismissal in favor of a defendant.

Moreover, the Circuit Court addressed Count II of the *Amended Complaint* despite the fact that Respondents made no arguments supporting the dismissal of those claims and the parties did not direct any arguments to Count II in the hearing. Therefore, Petitioner was not given notice and an opportunity to be heard with respect to Count II.

The Circuit Court also failed to consider every reasonable inference that could be drawn in when considering the dismissal of Count II. Petitioner does not have knowledge of the Respondents' business operations and could not provide more detailed allegations. The Circuit Court also erred in not permitting Petitioner to plead in the alternative, that is, either Respondents had no security personnel or Respondents were negligent in the hiring, retention, training, and supervision of their security personnel.

The errors by the Circuit Court resulted in the decision not to permit discovery before deciding the *Motions*. Petitioner's counsel identified various subjects for discovery to be conducted that would address the issues raised in the *Motions*. The Circuit Court, having reached an erroneous conclusion, did not permit discovery.

The numerous errors committed by the Circuit Court require that the *Order Granting Defendants' Motions to Dismiss* be reversed and the case remanded.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The issues in this Appeal involve assignments of error addressing the standards that a

Circuit Court must apply when considering a motion to dismiss for failure to state a claim upon which relief can be granted. The Circuit Court of Raleigh County failed to apply the proper standards to the allegations in Petitioner's *Amended Complaint*. Further, the Court misapplied the applicable precedent relating to foreseeability in determining the existence of the duties related to maintaining a reasonably safe premises. A Circuit Court is not required to limit the analysis only to the time that the injury occurred, but must also consider the historical factual allegations to determine if a legal duty exists. Therefore, the case *sub judice* presents issues that require clarification under West Virginia Law. Thus, a memorandum decision is not appropriate and oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure is appropriate.

ARGUMENT

I. The Circuit Court of Raleigh County erred in dismissing Plaintiff's Amended Complaint based upon a finding the Plaintiff has failed to identify any reasonably foreseeable duty of care that the Defendants violated. The Covid shut down order did not alter the allegation that Defendants were aware of the longstanding and ongoing use of the premises in a dangerous manner justifying the imposition of a duty.

A plaintiff "is not required to establish a prima facie case at the pleading stage."[1] Instead, the allegations should be examined "to determine whether they call for relief on any possible theory."[2]

The Circuit Court of Raleigh County erred in granting Respondents' *Motions* based upon Court's conclusion that Respondents were not required to hire security personnel to prevent individuals from entering the premises during the Covid shut down. In fact, the Circuit Court's reasoning in the *Order* is contradictory. The Court found that the pandemic was not reasonably foreseeable, and then determined that a "reasonable person would not believe during a pandemic"

[1] *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va.*, 244 W. Va. 508, 525, 854 S.E.2d 870, 887 (2020).
[2] *Id*.

that security personnel should be hired. (*Order*, A.R. 180 and 183.) The reasoning is unsupported by logic. If the pandemic was not foreseeable, the required actions of individuals during the pandemic cannot be foreseeable as a matter of law. In other words, if one cannot foresee the whole, then one cannot foresee the parts of the whole.

In essence, the Circuit Court created a dispute regarding the facts about foreseeability resulting in issues for the jury. Under well-settled precedent:

> 'When the facts about foreseeability as an element of duty are disputed and reasonable persons may draw different conclusions from them, two questions arise-one of law for the judge and one of fact for the jury.' Syl. Pt. 11, *Strahin v. Cleavenger*, 216 W. Va. 175, 603 S E.2d 197 (2004).
>
> 'If the court determines that disputed facts related to foreseeability, viewed in the light most favorable to the plaintiff, are sufficient to support foreseeability, resolution of the disputed facts is a jury question.' Syl. Pt. 12, in part, *Strahin v. Cleavenger*, 216 W. Va. 175, 603 S E.2d 197 (2004).[3]

The WVSCA has also held that a "bona fide dispute as to the foundational or historical facts that underlie the immunity determination" renders summary judgment inappropriate.[4]

The Circuit Court failed to recognize the internal inconsistency in the *Order's* reasoning and erroneously dismissed Petitioner's *Amended Complaint* in the face of disputed facts about foreseeability. The first disputed fact is whether the pandemic was foreseeable to an ordinary person.

The pandemic started in China, which began initiating lockdowns on January 23, 2020, two months before the Executive Order was issued in West Virginia.[5] Even prior to Covid, warnings regarding pandemics were given decades earlier.[6] Interestingly, in January through

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[3] Syl. Pts. 8 and 9, *Marcus v. Staubs*, 230 W.Va. 127, 130, 736 S.E.2d 360 (2012).
[4] *See, Syl. Pt. 4, W. Va. Dep't of Health & Human. Res. v. Payne,* 231 W. Va. 563, 569, 746 S.E.2d 554 (2013) (citing, *Syl. Pt. 1*, *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996).)
[5] https://en.wikipedia.org/wiki/COVID-19_lockdown_in_China (accessed April 30, 2023).
[6] https://www.nationalgeographic.com/science/article/experts-warned-pandemic-decades-ago-why-not-ready-for-coronavirus?loggedin=true&rnd=1682630691646 (accessed April 30, 2023).

August of 2019, "numerous national, state and local, private and public organizations in the US participated, in order to test the capacity of the federal government and twelve states to respond to a severe pandemic of influenza originating in China."[7]

Even if the ordinary person did not read scientific articles or was not aware of the governments' actions, history can provide evidence of foreseeability. The Swine Flu pandemic occurred in 2009-2010; SARS occurred in 2002-2004; and, in 1918, the Spanish Flu occurred.[8][9] Personal experience can also provide evidence of foreseeability. How many physicians tell their patients that antibiotics are not going to be prescribed because the infection is viral and the antibiotics cannot be overused because bacteria will develop resistance to them?

Moreover, factual questions exist as to the exact prohibitions contained in the Executive Order.[10] While many amusement establishments were closed, a multitude of other businesses were permitted to be open, including restaurants offering take-out or drive thru service.[11] More importantly, Paragraph 1(g) defined permissible essential activities as "engaging in outdoor activity" as long as the number of people was ten or less and social distancing was observed.[12] Individuals performing an exempted activity were not required to stay in their residences.[13] The Circuit Court failed to recognize this part of the Executive Order, which could be the basis of a factual dispute underlying the issue of foreseeability.

Furthermore, the Circuit Court erred in failing to consider whether the allegations regarding the prior (and subsequent) injuries on the premises from actions of other teenagers such

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[7] https://en.wikipedia.org/wiki/Crimson_Contagion. (accessed April 30, 2023).
[8] https://en.wikipedia.org/wiki/2009_swine_flu_pandemic. (accessed April 30, 2023).
[9] https://en.wikipedia.org/wiki/Pandemic_predictions_and_preparations_prior_to_the_COVID-19_pandemic#United_States (accessed April 30, 2023).
[10] A copy of Executive Order 9-20 is attached hereto as Exhibit 1 and fully incorporated herein.
[11] *Id.* at ¶ 3(c).
[12] *Id.* at ¶ 1(g).
[13] *Id.* at ¶ 1.

as Linzy and his friends required reasonable actions to be taken prior to the shutdown to prevent or discourage teenagers from using the premises as a hangout. The Circuit Court acknowledged Petitioner's allegations that the premises "had been used by teen-agers as a local hang-out and parking spot and for such activities as cruising, burnouts, and other activities." (*Order*, A.R. 174.) The Court also recognized the allegation that Respondents did not do anything to prevent the public from entering the premises. (*Order*, A.R. 174.) Therefore, one can reasonably conclude that, prior to the pandemic, the premises were knowingly being repeatedly used in an unsafe manner and Respondents took no actions to prevent the unsafe use of the premises. If Respondents had taken steps to consistently prohibit the use of the premises prior to the pandemic, Linzy and other individuals would not have been on the premises and he would not have been injured. The pandemic did not affect the use of the premises prior to the pandemic, which resulted in injuries occurring on the premises. Linzy specifically alleged that "[n]umerous calls were made to Raleigh County 911 to dispatch law enforcement to the premises for the actions at this premises that occurred due to the lack of security. (*Am. Compl.* at ¶ 16, A.R. 21.)

Assuming the Circuit Court was correct in considering the issue of foreseeability with respect to the existence of a duty as opposed to foreseeability with respect to whether a person was a trespasser, the Court erred in determining that the pandemic was not foreseeable as a matter of law. Underlying factual issues exist regarding foreseeability in light of the scientific, historical, and everyday life experiences of the ordinary person; knowledge of the prior use of the property; and the provisions of the Executive Order.

Based upon the disputed factual issues outlined above, the Circuit Court's dismissal of the *Amended Complaint* was in error. The Circuit Court failed to properly analyze the Respondents' *Motions* and Petitioner respectfully requests that this Court reverse the decision of the Circuit

Court granting Respondents' *Motions to Dismiss*.

II. The Circuit Court of Raleigh County erred in dismissing Plaintiff's Amended Complaint based upon an improper application of the standards regarding the determination of a Motion to Dismiss under Rule 12(b)(6). The Circuit Court failed to construe the allegations in the light most favorable to the Plaintiff by failing to consider the longstanding and ongoing use of the premises in a dangerous manner justifying the imposition of a duty.

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*."[14] The WVSCA recently reaffirmed the standards application to Rule 12(b)(6) motions.[15] "[U]nder Rule 12(b)(6), a pleading need only outline the alleged occurrence which (if later proven to be a recognized legal or equitable claim), would justify some form of relief."[16] A pleading is not required "to state all of the elements of the particular legal theory advanced."[17] The allegations only must show that relief can be granted on any possible theory and "a party is not required to establish a *prima facie* case at the pleading stage."[18] "Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard[.]"[19]

A complaint "is only required to provide 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'"[20] Reliance is placed on "liberal discovery rules and summary judgment motions" to dispose of claims without merit.[21]

Contrary to the underlying policies of liberal pleading standards, the Raleigh County

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[14] Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W.Va. 770, 773, 461 S.E.2d 516 (1995).
[15] *Mountaineer Fire & Rescue Equip., LLC v. City Natl. Bank of W. Virginia*, 244 W.Va. 508, 854 S.E.2d 870 (2020).
[16] *Id*. at 521, 883.
[17] *Id.* at 522, 884.
[18] *Id.*
[19] *Id.* (quoting, *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002).
[20] *Id.* (quoting, "Leatherman *v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993).
[21] *Id.* (citations omitted).

Circuit Court narrowly construed the allegations of the *Amended Complaint* in favor of the Respondents. The Court characterized Petitioner's allegations as requiring the implementation of security measures in response to the restrictions imposed by the Executive Order. However, Petitioner's injuries were just as likely to have happened in the absence of the Executive Order as the dangerous use of the premises existed prior to the pandemic. The empty parking lot used as a hang-out by teenagers, who did teenager things and suffered injuries, existed, for example, after the cinema had closed for business for the day. Thus, Respondents' duties did not arise out of the pandemic and Executive Order, but arose out of the dangerous use of the premises that pre-existed the pandemic. Petitioner specifically alleges Respondents knew of and permitted the dangerous activities to occur on the premises prior to the pandemic. If Respondents, for example, had employed security to prevent the use of the premises by teenagers as a hang-out prior to the pandemic, the premises would have most likely not been used for such purposes during the pandemic.

The Circuit Court's narrow interpretation of Petitioner's *Amended Complaint* led the Court to rely upon *Keen v. Coleman*, which was decided by the WVSCA in May 2022.[22] The plaintiffs in *Keen* sought damages for injuries and death resulting from a vehicle driving into the building. The WVSCA determined that "the conclusion that respondent owes no legal duty to protect invitees from the remote and unforeseeable possibility that a driver will breach the building's exterior and harm the invitees inside, even where that driver is alleged to have been upset and without a driver's license, is unavoidable."[23]

The incident in *Keen* was an isolated occurrence. Petitioner herein, however, alleged that the premises "was the scene of frequent injuries and incidents regarding teenagers, both before

[22] No. 21-0144, 2022 W. Va. LEXIS 448 (May 31, 2022)(memorandum decision).
[23] *Id.* at *18.

and after Jordan Linzy was injured on May 20, 2020." (*Am. Compl.* at ¶ 16, A.R. 21.) Therefore, Petitioner has alleged that Respondents could "anticipate that the harm of the general nature of that suffered was likely to result" as required under *Sewell*.[24] Thus, the Circuit Court's narrow and misplaced analysis resulted in an erroneous dismissal of the *Amended Complaint*.

III. The Circuit Court of Raleigh County erred in dismissing Plaintiff's Amended Complaint based upon consideration of whether Count II of the Amended Complaint stated a claim upon which relief can be granted when none of the Defendants raised the argument in their Motions. A Court violates the standards applicable to a Motion to Dismiss when the Court considers arguments not raised by the parties, which do not affect a Court's subject matter jurisdiction.

Neither Petitioner nor Respondents addressed Count II of the *Amended Complaint* regarding negligent hiring, training, retention, and supervision in the motions and responses. Respondents' *Motions* were premised on the argument that Petitioner was a trespasser, even if he was not a trespasser, Petitioner did not sufficiently allege willful or wanton conduct, or that the condition of the premises was not dangerous. Apparently, Respondents concluded that if the Circuit Court rejected all of their arguments, Count II was sufficiently pled. At no time during the hearing was Count II addressed by the Court or the parties. (*Transcript*, A.R. 127-162.)

While Petitioner had notice of the hearing and responded to the *Motions*, Petitioner had no opportunity to be heard regarding the dismissal of Count II. Generally, notice of a potential dismissal and an opportunity to be heard must be given to a party.[25]

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[24] Syl. Pt. 3, in part, *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988), cited in the *Order*, A.R. 178-179.

[25] Syl. Pt. 1, *Hartman v. Morningstar Bldg. Co.*, 206 W.Va. 616, 527 S.E.2d 160 (1999) (requiring notice and an opportunity to be heard prior to a dismissal for failure to prosecute); *In re Gazette FOIA Request*, 222 W.Va. 771, 671 S.E.2d 776 (2008) (requiring notice and an opportunity to be heard prior to a court's *sua sponte* dismissal of a declaratory judgment complaint); *In re Marriage of J.B.*, No. 17-0689, 2018 W. Va. LEXIS 572 (Oct. 12, 2018) (requiring notice and an opportunity to be heard prior to a dismissal of a divorce action for failure to prosecute under Rule 22(e) of the West Virginia Rules of Practice and Procedure for Family Court); and, *Scherich v. Wheeling Creek Watershed Protection & Flood Prevention Comm.*, 244 W.Va. 604, 855 S.E.2d 912 (2021) (requiring notice and an opportunity to be heard prior to a *sua sponte* grant of summary judgment).

> ‘Section 10, article 3, of the Constitution of West Virginia, properly applied, secures to a litigant a reasonable opportunity to be heard when the processes of the courts are invoked against him; and where that opportunity has been denied by the refusal to grant a reasonable time in which to prepare and file pleadings setting up his defense, this court will not pass on the merits of the case until opportunity is given to file such pleadings in the court of original jurisdiction, and a hearing had thereon in said court.’ Syllabus Point 1, *Simpson v. Stanton*, 119 W.Va. 235, 193 S.E. 64 (1937).[26]

The Circuit Court of Raleigh County never gave Petitioner the opportunity to address Count II of the *Amended Complaint* at the hearing as Respondents did not argue that Count II should be dismissed in their *Motions*. Nonetheless, the Circuit Court engaged in its own analysis without arguments from any of the parties or elucidation at the hearing as to the nature of the allegations of Count II thus depriving Petitioner of notice and an opportunity to be heard.

IV. The Circuit Court of Raleigh County erred in dismissing Plaintiff's Amended Complaint based upon a failure to consider all reasonable inferences that can be drawn from the allegations when analyzing Count II of the Amended Complaint, which alleged negligent hiring and negligent retention. The Plaintiff could not establish the contractual relationship between the parties prior to the drafting of the Amended Complaint and one or more of the parties may have be the employee or agent of the other with a contractual obligation to provide security for the premises or that an independent security company may have been hired.

The Circuit Court of Raleigh County erred in dismissing Count II of the *Amended Complaint* as it failed to draw all reasonable inferences in favor of the Petitioner.[27] The *Amended Complaint* is required to be liberally construed “so as to do substantial justice.”[28] “[T]he preference is to decide cases on their merits.”[29]

Instead of following these principles, the Circuit Court engaged in a literal interpretation of the allegations in Count II rather than considering reasonable inferences that can be drawn from

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[26] *In re Gazette FOIA Request* at Syl. Pt. 2.
[27] *Hoover v. Moran*, 222 W.Va. 112, 116, 662 S.E.2d 711 (2008) (citing, *Conrad v. ARA Szabo,* 198 W. Va. 362, 369, 480 S.E.2d 801, 808 (1996)).
[28] *Camden-Clark Mem. Hosp. Corp. v. Tuan Nguyen*, 240 W.Va. 76, 80, 807 S.E.2d 747 (2017) (citing, *Cantley v. Lincoln Cty. Comm'n*, 221 W.Va. 468, 470, 655 S.E.2d 490, 492 (2007)).
[29] *Id.* (quoting, *Sedlock v. Moyle*, 222 W.Va. 547, 550, 668 S.E.2d 176, 179 (2008).).

the allegations. For example, Respondents are businesses. Businesses generally have certain security measures in place. Certain security measures may be required by contract. Businesses want to provide a safe environment for their invitees as is their legal duty. Some businesses hire security personnel and others hire an outside company to provide security. In either circumstance, businesses are required to act reasonably in the hiring, retention, training, and supervision of the security personnel.

Petitioner alleged that teenagers used the open parking lot for many years as a local hang-out and parking spot. (*Am. Compl.* at ¶ 14, A.R. 21.) These teenagers would use the premises for activities such as cruising, burnouts, and other loitering activities. (*Am. Compl.* at ¶ 14, A.R. 21.) The premises were and are the scene of frequent injuries and incidents involving teenagers. (*Am. Compl.* at ¶ 16, A.R. 21.) Numerous calls were made to 911 for actions at these premises. (*Am. Compl.* at ¶ 16, A.R. 21) Respondents chose not to employ reasonable security measures, not adequately train or supervise their employees, and otherwise failed to provide security to make the premises reasonably safe. (*Am. Compl.* at ¶ 17, A.R. 21-22.) Respondents, through their agents, apparent agents, employees, servants, and/or any other personnel providing services knew that invitees would be at risk for injury or death as a result of the activities on the premises. (*Am. Compl.* at ¶¶ 24-25, A.R. 23.)

Therefore, one can reasonably infer that some of these individuals would be charged with the duty to oversee the security of the premises. Petitioner alleges that Respondents failed to provide adequate security. (*Am. Compl.* at ¶¶ 28-31, A.R. 24-25.)

Respondents, who are business entities, can only act through its individuals. One can reasonably infer that the duties of one or more of these individuals included overseeing that a reasonably safe premises was provided. Respondents may have also hired an outside company for

this purpose. As Petitioner alleged the premises were not reasonably safe, then one or more of these individuals (or the outside company) was negligent. As the activities resulting in injuries and other incidents continued for many years on the premises, one can infer that Respondents were negligent in hiring, retaining, training, and/or supervising the individuals (or with respect to the outside company).

The Circuit Court did not consider any inferences that could have been drawn from the allegations. Instead, the Court dismissed Count II on the basis that Petitioner did not identify any particular individual that was negligent or allege one specific negligent act. Petitioner does not have knowledge of the operation of Respondents' businesses and cannot, for example, state that a particular employee made a decision to refrain from providing security on the premises when the business was closed. The Circuit Court engaged in none of this analysis or reasoning. The *Amended Complaint* was narrowly construed rather than liberally construed and Petitioner was denied the opportunity to have his claims decided on their merits. For these reasons, the grant of dismissal should be reversed.

V. The Circuit Court of Raleigh County erred in dismissing Plaintiff's Amended Complaint based upon a failure to consider Count II as pleading in the alternative. Defendants may have in fact hired an independent security company and may have been negligent in the hiring and retention. Plaintiff may not have been aware of this fact prior to the drafting of the Complaint. Plaintiff is permitted to plead in the alternative.

The Circuit Court of Raleigh County considered whether Count II of the *Amended Complaint* should be dismissed despite the lack of any argument on behalf of the Respondents that Count II failed to state a claim upon which relief can be granted. Nonetheless, the Circuit Court's consideration of the sufficiency of Count II resulted in an erroneous dismissal of the claim. The Circuit Court disregarded the right of Petitioner to plead in the alternative.

West Virginia Rule of Civil Procedure 8(e)(2) provides that:

> A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

The WVSCA has recognized that "[a] party is normally permitted to make inconsistent factual allegations in its pleadings."[30] Further, if one claim is permitted to act "as an admission against an alternative or inconsistent claim [this] would significantly restrict, if not eliminate, the freedom to plead inconsistent claims provided by Rule 8(e)(2)."[31] "Thus, a factual assertion pertaining to one claim set forth in a pleading will not be construed as an admission with respect to an alternative or inconsistent claim in the same pleading."[32] Moreover, alternative theories of liability may be presented to the jury.[33]

In determining whether to dismiss Count II, the Circuit Court relied upon inconsistent pleading in the *Amended Complaint*, noting that as part of the general facts, Petitioner "specifically alleges facts in opposition to a claim of negligent hiring." (*Order,* A.R. 185.) Specifically, the Court relied upon the allegations that Respondents did not employ or hire security guards or personnel. (*Order,* A.R. 185.)

The Court continued to apply inconsistent allegations as a basis for dismissal in the subsequent analysis of Petitioner's claims. Relying upon *C.C. v. Harrison Cty. Bd. of Edn.*, the Court stated that Petitioner failed to identify any specific employee or agent that was negligently

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[30] *Arnold Agency v. W. Virginia Lottery Comm.*, 206 W.Va. 583, 595-596, 526 S.E.2d 814, 826 (1999) (citation omitted).
[31] *Id.* at 595-596, 826-827 (citation and internal quotation marks omitted.)
[32] *Id.* at Syl. Pt. 10. (citations omitted).
[33] See, Syl. Pt. 6, *Ilosky v. Michelin Tire Corp.*, 172 W.Va. 435, 307 S.E.2d 603 (1983).

hired or any act of negligence with respect to the hiring. [34] (*Order,* A.R. 185.) Dismissal of the negligent hiring claim was based upon the Court's conclusion that noted that "Plaintiff has failed to allege facts relating to the hiring or retention of any employee/independent contractor and has specifically alleged a **failure to hire** as a basis for Count II." (*Order,* A.R. 186 (**emphasis in original**).) Moreover, the Court concluded that it could not find any "case law, statute, regulation, or ordinance" that required hiring or retention of security personnel during a pandemic when non-essential businesses were closed. (*Order*, A.R. 187.) It is unclear why the Court would look for legal requirements for circumstances that the Court found were unforeseeable as a matter of law.

The Circuit Court further incorrectly concluded that Petitioner failed to allege that Petitioner's injuries were caused by any negligent act of any employee. (*Order*, A.R. 187.) Clearly, Petitioner alleged that Respondents failed to have any adequate security safeguards in place; failed to secure the premises from loitering or dangerous activity; and, failed to secure the premises to prevent the public from entering to prevent injuries such as befell Petitioner. (*Am. Compl.* at ¶ 19, A.R. 22.)

With respect to the allegations of negligent supervision, the Court applied the same analysis in dismissing that portion of the claim. Specifically, the Court found the Petitioner did not identify any employee that was negligently supervised and caused injury to the Petitioner. (*Order*, A.R. 188.)

The Circuit Court failed to consider that Petitioner was alleging that Respondents had no security measures in place and did not retain any security personnel, however, if such security personnel were actually hired by Respondents, the Respondents were negligent in the hiring, training, retention, and supervision as teenagers were not excluded from the premises despite multiple injuries occurring on the premises as a result of the teenagers' presence. Therefore, the

[34] 245 W.Va. 594, 859 S.E.2d 762 (2021).

Circuit Court's faulty analysis requires that the dismissal of Count II be reversed.

VI. The Circuit Court of Raleigh County erred in dismissing Plaintiff's Amended Complaint and not allowing the Plaintiff to conduct discovery on the issues presented in Defendants' Motions.

The Circuit Court considered whether additional discovery was needed prior to ruling on the *Motions* and determined that no discovery was required. (*Order*, A.R. 182.) The Court's decision was based upon its conclusion, which almost becomes a mantra in the *Order*, that Respondents should not be expected to expend funds to hire security personnel during a pandemic so that teenagers would not be injured. The denial of additional discovery is based upon the Court's fundamental misunderstanding of the allegations of the *Amended Complaint* and/or failure to even consider that the duty breached was independent of the pandemic.

The WVSCA recognized that it is entirely appropriate for a plaintiff to request discovery that would enable the plaintiff to oppose a motion to dismiss.[35] "'The overarching purpose of discovery is to clarify and narrow the issues in litigations, so as to efficiently resolve disputes. This purpose makes litigation less of a game of "blindman's bluff" and more of a contest that seeks a fair and adequate resolution of a dispute.'"[36] The right to request discovery is explicitly stated in Rule 56(c) with respect to opposing a motion for summary judgment.[37]

During the hearing held regarding Respondents' *Motions*, Petitioner's counsel identified for the Circuit various issues that should be the subjects of discovery. Initially, questions arose as to the extent of Respondent Paramount's control over the parking lot and whether other businesses were open, for example, Starbuck's. (*Trans*., A.R. 141-143.) Petitioner indicated that he needed to see the leases to see what financial benefit Paramount receives from Starbuck's,

[35] Syl. Pt. 6, *Harrison v. Davis*, 197 W.Va. 651, 653, 478 S.E.2d 104 (1996); See also, *Doe v. Logan Cty. Bd. of Edn.*, 242 W.Va. 45, 829 S.E.2d 45 (2019).
[36] *State ex rel. Pritt v. Vickers*, 214 W.Va. 221, 226, 588 S.E.2d 210 (2003) (citation omitted).
[37] See, Syl. Pt. 5, *Harbaugh v. Coffinbarger*, 209 W.Va. 57, 60, 543 S.E.2d 338 (2000).

Marquee, Sweet Frog Frozen Yogurt, Qdoba, Chili's, and Chick-fil-A as it looks like one big parking lot. (*Trans*., A.R. 143.)

Additionally, determining the nature of the contractual relationship between Paramount and Marquee would only be available through the discovery process to determine what provisions may exist regarding security of the premises. (*Trans*., A.R. 146.)

Further factual issues exist with respect to who called 911 or the police to report injuries or disturbances on the premises and what dates these calls occurred, that is, whether they occurred during the shutdown. (*Trans*., A.R. 155.) Discovery would also reveal the steps, or lack thereof, that Respondents took in response to any knowledge of the incidents necessitating the calls.

Even taking into consideration the Circuit Court's myopic focus on the pandemic and complete disregard of the historical background of the premises which Petitioner alleges gave rise to a legal duty, the factual questions regarding control of the premises, financial benefits to the Respondents from the other businesses, and the actual parameters of the shut-down order as written and as followed (or not) by individuals are proper areas of discovery relevant to a fair determination of whether Petitioner's *Amended Complaint* should be dismissed. The Circuit Court erred in not permitting discovery to proceed on these factual issues prior to dismissal.

CONCLUSION

Wherefore, based upon the foregoing, Petitioner Jordan Linzy respectfully requests the *Order Granting Defendants' Motions to Dismiss* entered by the Circuit Court of Raleigh County be reversed and the case remanded for further proceedings.

JORDAN LINZY

BY COUNSEL

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Stephen P. New (*WVSB #7756*)
New, Taylor & Associates
Attorneys at Law
430 Harper Park Drive
P.O. Box 5516
Beckley, WV 25801
Telephone: 304-250-6017
Facsimile: 304-250-6012
Email: steve@newlawoffice.com

NO. 23-ICA-31

IN THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

JORDAN LINZY,

Plaintiff Below, Petitioner,

v. **Civil Action No.: 22-C-51**
Honorable Darl Poling

MARQUEE CINEMAS, INC.;
MARQUEE CINEMAS-WV, INC.;
MARQUEE CINEMAS, HOLDINGS, INC.;
BECKLEY GALLERIA, LLC;
PARMOUNT DEVELOPMENT CORPORATION;
and, PARAMOUNT DEVELOPMENT PROPERTIES, LLC.,

Defendants Below, Respondents.

CERTIFICATE OF SERVICE

I, Stephen P. New, counsel for Petitioner do hereby certify that the foregoing *Petitioner's Brief* was served via has been served upon all counsel of record by File N Serve Express, which will send copies of such filing to registered counsel of record as follows:

Jared Underwood, Esq. (#12141)
Pullin, Fowler, Flanagan, Brown & Poe, PLLC
252 George Street
Beckley, WV 25801
Email: junderwood@pffwv.com
Counsel for Marquee Cinemas, Inc., Marquee Cinemas-WV, Inc., and
Marquee Cinemas Holdings, Inc.

Cy A. Hill, Jr. (WV Bar #8816)
Cipriani & Werner, P.C.
500 Lee Street, East, Suite 900
Charleston, WV 25301
Email: chill@c-wlaw.com
Counsel for Beckley Galleria, LLC, Paramount Development Corporation,
and Paramount Development Properties, LLC.

Stephen P. New (*WVSB #7756*)