NO. 23-ICA-31

IN THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

ICA EFiled: Jun 19 2023
02:18PM EDT
Transaction ID 70217034

JORDAN LINZY,

Plaintiff Below, Petitioner

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

v.

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

Defendants Below, Respondents

RESPONDENTS' JOINT RESPONSE 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 Respondents:
Jared C.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.,
Counsel for Jordan Linzy Marquee Cinemas-WV, Inc., and
Marquee Cinemas Holdings, Inc.

Cy A. Hill, Jr. (WV Bar #8816)
Jayson T. Hamrick (WV Bar #13623)
Cipriani & Werner, P.C.
500 Lee Street, East, Suite 900
Charleston, WV 25301
Email: chill@c-wlaw.com; jhamrick@c-wlaw.com
Counsel for Beckley Galleria, LLC,
Paramount Development Corporation,
and Paramount Development Properties, LLC

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STATEMENT OF THE CASE

As an initial matter, Respondents object to Petitioner's argumentative and unsubstantiated legal conclusions that he argues in the Petitioner's Statement of the Case. Rule 10(c)(4) of the Rules of Appellate Procedure states that the "…the statement of the case must contain a *concise account of the procedural history of the case and a statement of the facts of the case that are relevant to the assignments of error*." (*emphasis added*) The statement of the case is not meant to be an assertion of baseless conclusions and the Petitioner's theories of liabilities. The Respondents respectfully request the improper sections of the Petitioner's statement of the case be disregarded and stricken from the record.

The following facts are pertinent to this appeal:

On May 30, 2020, the "Marquee Cinema" movie theater located at the subject property was closed due to the ongoing COVID-19 pandemic, pursuant to Governor Jim Justice's then in place government mandate. (A.R. 11 at ¶ 11).

Prior to midnight on that date, Petitioner Linzy and a group of understood high schoolers were illegally loitering in the parking lot owned by the Respondents, ignoring the "No Loitering" signs posted and clearly visible at the time of his accident. (A.R. 50-53.) Linzy was standing in the bed of a pickup truck operated by Torrey Anderson who was performing a burnout. (A.R. 22 at ¶ 19.) Linzy was thrown from the bed of the pickup truck and sustained injuries as a result of being thrown from the bed of the pickup truck. *Id.*

Petitioner subsequently initiated this action and the Respondents filed Motions to Dismiss arguing the lack of any legal duty. The Circuit Court of Raleigh County, Judge Darl W. Poling, entered an Order GRANTING Defendants' Motions to Dismiss, which is the subject of the appeal before this Court. Petitioner appealed the entry of this Order as improper and incorrect.

Respondents dispute this and argue that the Order granting their Motions to Dismiss was properly determined and entered.

SUMMARY OF ARGUMENT

The Circuit Court properly determined that the Amended Complaint failed to state a claim upon which relief can be granted and the Order Granting Defendants' Motion to Dismiss should be affirmed. Even accepting the allegations in the Amended Complaint as true and in a light most favorable to the Petitioner, Plaintiff below, the Amended Complaint simply does not contain any factual allegations that could entitle the Plaintiff to relief and allow his claims to survive a Rule 12(b)(6) Motion.

Plaintiff cannot now, at the appellate stage, begin to assert arguments, attempt to assert facts from outside the pleadings, and throw statements at the proverbial wall, hoping something sticks. Plaintiff's entire appellate brief is simply trying to distract from the actual issue at this stage – Did the court below properly determine the sufficiency of the Amended Complaint to state a claim upon which relief can be granted, based on the factual allegations within the four corners of that pleading and in accordance with Rule 12(b)(6) of the West Virginia Rules of Civil Procedure? The indisputable answer in this case is yes.

The legal duty that a property owner owes to a trespasser in West Virginia is well established – they must not willfully or wantonly injure a trespasser – and as the Circuit Court found, there are no allegations within the four corners of the Amended Complaint that allege the Defendants took any willful or wanton actions.

Therefore, the Amended Complaint clearly fails to plead facts, which would entitle the Plaintiff to relief, and the Circuit Court properly granted the Defendants' Motion to Dismiss. W. Va. R. Civ. Pro. 12(b)(6). For the reasons asserted *infra* and those others apparent to this Honorable

Court, Defendants respectfully request this Court issue a decision AFFIRMING the Circuit Court's January 5, 2023, Order GRANTING the Defendants' Motion to Dismiss.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The issues in this Appeal involve assignments of error regarding the application of well settled law, specifically involving a trial court's discretion and application of that well settled law. Respondents believe these issues can only be fully heard through oral arguments pursuant to Rule of Appellate Procedure 19(a) and respectfully request to be fully heard through oral arguments so that these issues may be fully addressed.

ARGUMENT

Standard Of Review

This Court applies a *de novo* standard of review in assessing orders granting a motion to dismiss. Syl. Pt. 1, *Boone v. Activate Healthcare, LLC*, 245 W. Va. 476, 859 S.E.2d 419 (2021), citing Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995); Syl. Pt. 1, *Barber v. Camden Clark Mem'l Hosp. Corp.*, 240 W. Va. 663, 815 S.E.2d 474 (2018).

As such, this Court must first consider the standard for a Rule 12(b)(6) motion, the purpose of which is solely to determine the sufficiency of a complaint. When ruling on a Rule 12(b)(6) motion, a circuit court should not dismiss the complaint unless it appears that the plaintiff can prove no set of facts which would entitle him or her to relief. *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 200 W. Va. 221, 227, 488 S.E. 2d 901, 907 (1997); see *Price v. Halstead*, 177 W. Va. 592, 594, 355 S.E. 2d 380, 383 (1987) (quoting Syl. Pt. 2, *Sticklen v. Kittle*, 168 W. Va. 147, 287 S.E. 2d 148 (1981)). The court is to construe the complaint in the light most favorable to the plaintiff, accepting the factual allegations as true. *Price*, 177 W. Va. at 594, 355 S.E. 2d at

383 (quoting *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 538, 236 S.E. 2d 207, 212 (1977)). Although a plaintiff's burden to survive a 12(b)(6) motion is light, the complaint must at least set forth enough information to outline the elements of the claim, or to permit inferences that such elements exist. *Fass v. Nowsco Well Service, Ltd.*, 177 W. Va. 50, 52, 350 S.E. 2d 562, 563 (1986).

In deciding on a 12(b)(6) motion, a circuit court must rely primarily on the four corners of the complaint. *Chapman*, 160 W. Va. at 536, 236 S.E. 2d at 210. However, the court is permitted to consider exhibits attached to the complaint, as well as "materials fairly incorporated within" the complaint and other instruments that are "susceptible to judicial notice." *Forshey v. Jackson*, 222 W. Va. 743, 747, 671 S.E. 2d 748, 752 (2008) (citing Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b)(6)[3], at 358 (3d ed. 2008)).

I. The Circuit Court did not err in dismissing the Petitioner's Amended Complaint because the Petitioner failed to identify any "reasonably foreseeable duty of care" that the Defendants allegedly owed to the Petitioner because the Circuit Court correctly found that the Amended Complaint failed to allege *any* facts which would support a breach of *any* duty of care.

In the Petitioner's first assignment of error, he attempts to argue that the Circuit Court created a disputed fact regarding the foreseeability, and reasonableness of actions, under the COVID-19 pandemic that was on going at the time of the accident. This is inaccurate, and a misrepresentation of the Circuit Court's Order and findings.

As an initial matter, the Circuit Court did not grant the Respondents' Motion "based upon [sic] Court's conclusion that Respondents were not required to hire security personnel to prevent individuals from entering the premise during the COVID shut down" as Petitioner alleges on page 12 of his brief. The Circuit Court repeatedly stated that it was granting the Motion and dismissing the Amended Complaint because the Amended Complaint lacked sufficient pleadings to state a

claim upon which relief could be granted sufficient to survive a Rule 12(b)(6) motion. (A.R. 0177, 0182.) The Circuit Court did not, as Petitioner is representing to this Honorable Court, rely upon a factual or legal conclusion to support its dismissal of the Amended Complaint.

Petitioner fails to acknowledge that the Circuit Court's Order plainly states that the reason the Amended Complaint was dismissed was because "**the Plaintiff has not asserted any specific negligent, willful or wanton act by any of the Defendants or their employees which resulted in the injury to the plaintiff."** (A.R. 177) (**emphasis added**).

The Circuit Court went a step farther, and specifically stated that:

> …in the present case, the Plaintiff **has not alleged** any statute, regulation, ordinance or industry guideline that the Defendant have violated and **has not offered a single authority to support the imposition of the duties of care the Plaintiff wishes to impose** on the Defendants.

(A.R. 182) (**emphasis added**).

The Circuit Court did not create any disputes as to the facts of this matter. Its Order plainly stated that the Amended Complaint failed to allege *any* facts, under negligence, willful, or wanton standards, to support the alleged claims. *Id.* The Court detailed how, even if one assumed a reasonableness standard, the Amended Complaint, by its plain contents, still failed to contain any allegations that would entitle the Petitioner to relief.

The wholly irrelevant allegations in the Petitioner's Brief regarding medical outbreaks from 2002-2004, 2009-2010, and even 1918 have nothing to do with the foreseeability that a teenager, who was illegally trespassing, would ride in the bed of a moving truck while it was doing burnouts in 2020 during a global pandemic shut down. The Petitioner's inclusion of new "facts" that involve wholly irrelevant matters, and citations to "scientific"[1] articles, does not change the

[1] Respondents dispute Petitioner's assertion that Wikipedia articles are "scientific" articles. It is common knowledge that Wikipedia is an open-source website that any individual can edit the contents of, and a source that carries no reliable weight.

simple fact that the Amended Complaint lacks sufficient facts, even when viewed in a light most favorable to the Petitioner, to state a claim upon which relief could be granted. W. Va. R. Civ. Pro. 12(b)(6); *see* also *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 200 W. Va. 221, 227, 488 S.E. 2d 901, 907 (1997); *Price v. Halstead*, 177 W. Va. 592, 594, 355 S.E. 2d 380, 383 (1987) (quoting Syl. Pt. 2, *Sticklen v. Kittle*, 168 W. Va. 147, 287 S.E. 2d 148 (1981)); *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 538, 236 S.E. 2d 207, 212 (1977).

The Circuit Court's ultimate conclusions were proper and consistent with the Rule 12(b)(6) motion standard. It properly found that the Amended Complaint did not allege any applicable duty against the Respondents and failed to allege any facts whatsoever, whether based in negligent, willful, or wanton conduct, regarding the Respondents. The petitioner failed to plead sufficient facts to survive a Rule 12(b)(6) motion, and the Circuit Court's Order should be AFFIRMED.

II. The Circuit Court did not err in dismissing the Amended Complaint because the Circuit Court accepted the allegations in the Amended Complaint as true, and there still was insufficient pleadings to survive a Rule 12(b)(6) Motion to Dismiss.

Regarding the second assignment of error, the Petitioner is grasping at straws to try and say the lower Court failed to view the allegations in the Amended Complaint in a light most favorable to the Petitioner. The Petitioner wants this Intermediate Court to assume and come to reversible conclusions regarding the applicable standards and ignore the insufficient factual allegations that were contained in the Amended Complaint.

In West Virginia, the owner or operator of property owes a different legal duty to invitees than to trespassers. See *Mallet v. Pickens*, 206 W. Va. 145, 522 S.E.2d 436 (1999). "A typical visitor (who, prior to *Mallet*, would have been classified as either an invitee or a licensee) should be accorded some measure of due care." *Gable v. Gable*, 245 W. Va. 213, 225, 858 S.E.2d 838, 850 (2021). The duty of due care, in part, governs by "the time, manner and circumstances under

which the injured party entered the premises." *Gable*, 245 W. Va. at 226 (citing *Mallet v. Pickens*, 206 W. Va. 145, 522 S.E.2d 436 (1999).)

In contrast, West Virginia law recognizes a very limited duty to trespassers. "A trespasser is one who goes upon the property or premises of another **without invitation, express or implied, and does so out of curiosity, or for his own purpose or convenience, and not in the performance of any duty to the owner.**" *Mallet*, 206 W. Va. at 148. (**emphasis added**) In trespass cases, landowners or possessors **need only refrain from willful or wanton injury**. *Id*. at 155; W. Va. Code Ann. § 55-7-27. "A trespasser, whose presence on a property is never anticipated, expected or foreseeable, is afforded no duty of care whatsoever." *Gable*, 245 W. Va. at 225.

While the Petitioner states the correct standard for a Rule 12(b)(6) motion in his brief, he ignores, whether intentionally or inadvertently, the crux of the Circuit Court's conclusion, which is that the Amended Complaint lacks sufficient factual allegations to state a claim upon which relief can be granted. The Circuit Court repeatedly viewed the allegations that were contained within the Amended Complaint in a light most favorable to the Petitioner, however the lower court cannot view facts that ***are not even in*** the Amended Complaint in a light favorable to the Petitioner. Indeed, the pled facts give rise to no inferences even that would potentially relate to any willful or wanton conduct by the Respondents.

As stated *supra* in Section I, the Circuit Court found that the Amended Complaint lacked *any* allegation, whether negligent, willful, or wantonly, that would allow the Petitioner's claim to succeed. Quite literally, that was the crux of the Respondents' underlying Motions. The Amended Complaint had failed to state a claim upon which relief could be granted because there were no allegations that the Respondents acted in any willful or wanton manner as required by well settled,

codified West Virginia law, to be liable to the Petitioner. *See* W. Va. Code §§ 55-7-27 and 55-7-28.

When taking the allegations in the Amended Complaint as true and even in a light most favorable to the Petitioner, it is indisputable that the Circuit Court correctly dismissed the Amended Complaint as the Petitioner can prove no set of facts which would entitle him to relief. By Petitioner's own admissions, Marquee Cinemas was closed at the time of the accident pursuant to Governor Jim Justice's COVID-19 mandate (A.R. 0011.) The Petitioner had no business with the Respondents, and was on the premise for his own purposes, not for a legitimate business or other reason. Moreover, he was ignoring the posted "No Loitering" signs that were present at the time of the accident and prohibiting the illegal gathering that the Petitioner was involved in.[2]

The Petitioner's theory that any parking lot must have additional security, and that this would have prevented his accident, is truly illogical. As the Circuit Court correctly noted, there was no rule, law, regulation, or standard that required the Respondents to hire extra security for an empty parking lot of a business that was ordered closed pursuant to a direct mandate from the Governor of West Virginia. (A.R. 0187.) There was no such requirement prior, during, or after the pandemic.

It may be argued that the Circuit Court went a step farther in attempting to determine if the Petitioner's Amended Complaint could even survive a lower reasonableness standard.[3] The Circuit Court pointed out in its Order that in the absence of a clearly defined duty (which does exist here

[2] While the Petitioner is now trying to argue the specific requirements of the then-in-place Governor's mandate, those facts and specific mandate requirements were not plead in the Amended Complaint.

[3] Respondents do not waive any argument that reasonableness or negligence is not the standard applicable to a property owner/lessee/lessor to trespassers. As required by W. Va. Code §§ 55-7-27 and 55-7-28, Respondents maintain that the applicable standard of landowners/occupants to a trespasser is only to not engage in willful or wonton conduct towards the trespasser. *See* also *Gable v. Gable*, 245 W. Va. 213, 225, 858 S.E.2d 838, 850 (2021); *Mallet v. Pickens*, 206 W. Va. 145, 522 S.E.2d 436 (1999)

pursuant to W. Va. Code §§ 55-7-27 and 55-7-28), foreseeability could be utilized to determine if a duty did exist. (A.R. 178, citing *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928)) The Circuit Court's assertions regarding the foreseeability and actions of a reasonable person further highlight the failures of Petitioner's Amended Complaint in that, even if there was no codified standard, a reasonable person could not foresee the need for additional security to ensure that a person does not stand in the bed of a pickup truck while the driver performs burnouts.

As the Order states, the Amended Complaint lacked sufficient factual allegations that, even viewed in this light and most favorably to the Petitioner, would support a claim upon which relief could be granted. (A.R. 0177 and 0182.) The Petitioner himself admitted in his Amended Complaint that the theater was closed as a result of Governor Jim Justice's COVID-19 mandates at the time of his accident. (A.R. 0021.) He was there for his own purpose, not in some legitimate business or other purpose. The factual allegations that were actually contained in the Amended Complaint, as correctly found by the Circuit Court, could not support a claim and lacked the required pleadings. Based on the facts pled in the Amended Complaint, there are simply no inferences of willful or wanton conduct, or that support Petitioner's claims, that can be drawn.

Therefore, the Circuit Court correctly ordered the dismissal of the Amended Complaint and the Circuit Court's Order should be AFFIRMED.

III. The Circuit Court did not err in dismissing Count II of the Amended Complaint because the Petitioner had sufficient notice that the entirety of the Amended Complaint was challenged by the Motion to Dismiss.

The Petitioner's assertion that he was not given adequate notice of the challenges to, or that Count II of his Amended Complaint was never addressed, is illogical. The entirety of the Motion to Dismiss argues that the Respondents owed *no duty at all* to the Petitioner as he was a trespasser.

The Motion to Dismiss, at no point in its language, identifies a specific Count that it is addressing. Its language is wholly encompassing of, and directed towards, both of the Petitioner's Counts.

Indeed, there is language in the Motion to Dismiss which clearly identifies the Petitioner's claims asserted in Count II. On Page 6, A.R. 0034, the Motion to Dismiss clearly states that the conclusion of the Respondent's arguments was that "the Defendant's only legal duty to the [the Petitioner] was to refrain from willful or wanton conduct – allegedly failing to provide adequate security is not sufficient." The Petitioner's decision to ignore this language and the arguments that the entire Amended Complaint was insufficient were his own downfall.

Moreover, as the Circuit Court correctly noted, the Petitioner was owed no duty whatsoever, whether in negligence or in regard to hiring, supervising, or retention of employees or agents. This was the essential position of the Respondents in the below filings and hearing. Petitioner was on the premise for his own purposes, standing in the bed of a truck doing burnouts via his own decision. The Petitioner is alleging that the Defendants were "negligent" in the hiring, retention, and supervision of its employees, yet the Respondents owed no duty to the Petitioner in the first place other than to refrain from acting willfully and wantonly. Without a duty, there can be no negligence, and without underlying negligence, there can be no negligent hiring, retention, or supervision.

The Petitioner himself also admitted the business was closed at the time of the accident ***pursuant to government mandate,*** and no employees were present. Just as the Circuit Court found, the pleadings in the Amended Complaint were insufficient, and in fact, proved by their very language that the Petitioner had failed to state a claim upon which relief could be granted. W. Va. R. Civ. Pro. 12(b)(6). When there is an absence of a duty to begin with, one cannot be negligent.

The Circuit Court appropriately found that the Amended Complaint failed to allege facts sufficient to support a negligent hiring or retention claim. (A.R. 184-189.) The Petitioner has ***not*** plead a failure to hire claim. The Petitioner was aware of the challenge in Motion to Dismiss to the *entire* complaint and chose not to respond to those issues. As such, the Circuit Court's Order should be AFFIRMED as it relates to the dismissal of the entire Amended Complaint.

IV. The Circuit Court did not err in dismissing Count II because it properly drew all inferences available based upon the actual contents of the Amended Complaint and the allegations therein.

In the Fourth Assignment of Error, Petitioner is yet again attempting to distract from the key issue in this matter – his Amended Complaint, based upon the plain contents of that pleading, lacked sufficient facts to support inferences, claims, or any of the Petitioner's requested theories of liability. The Petitioner's Brief focuses on what inferences could have been drawn based upon additional possible facts that are simply not within the Amended Complaint.

As the cases relied upon by the Petitioner in their own brief state, "a motion to dismiss for failure to state a claim tests the **legal sufficiency** of a complaint, **and an inquiry as to the legal sufficiency is essentially limited to the contents of the complaint."** W. Va. R. Civ. Pro. 12(b)(6); *Camden-Clark Mem'l Hosp. Corp. v. Tuan Nguyen,* 240 W. Va. 76, 80, 807 S.E.2d 747, 751 (2017) (**emphasis added**). "In order to defeat a motion to dismiss, a plaintiff must allege facts that, if accepted as true, are sufficient to state a claim." *Id.* As also noted in the Petitioner's brief, "the preference is to decide cases on their merits." *Id.*

Here, the Amended Complaint pleads facts that, even accepted as true, establish that the asserted claims have no merit and defeats his own claim. As stated in the prior section, and discussed by the Circuit Court in its Order, the Amended Complaint specifically pled that there were no employees present at the time of the accident and that the business was closed, per the

Governor's mandate. There cannot be negligent actions of employees who are not present, from a business that is not even open at the time of the accident. These are in addition to the fact that the Respondents owed no duty to the Petitioner other than to refrain from willful or wanton conduct, which there are likewise no allegations of in the Amended Complaint. *See* W. Va. Code §§ 55-7-27 and 55-7-28.

The Petitioner is correct that a court, including this one on a *de novo* appeal, considering a motion to dismiss must view all allegations in favor of the plaintiff, however the plaintiff must also live with the consequences of their pleadings and indisputable inferences therein. The Amended Complaint pled that the theater was closed because of the Governor's COVID-19 mandate. The Amended Complaint pled that there were no employees or representatives present at the time of the accident. Therefore, there cannot have been any negligent acts by the property owner, theater, or their employees in regards to their duties.

As the Circuit Court correctly found, the Amended Complaint failed to state allegations sufficient to support Count II of the Amended Complaint, and the Amended Complaint as a whole. The Amended Complaint does not state facts sufficient to support the asserted claims, and therefore, the Circuit Court's Order dismissing the Amended Complaint should be AFFIRMED.

V. The Circuit Court did not err in dismissing Count II because it properly considered Count II in its decision and Petitioner's requested application of pleadings in the alternative is improper.

Petitioner's argument in the first paragraph of the Fifth Assignment of Error is repetitive. Respondents reassert their argument in Section III, *supra*, that their Motion to Dismiss was applicable to the entire Amended Complaint.

As it relates to the new arguments asserted regarding pleadings in the alternative, the Petitioner's incorrect application and interpretation of pleadings in the alternative is patently false.

Petitioner is attempting to argue facts that *may* have occurred when his Amended Complaint never pleads those facts to begin with. The Petitioner is not arguing multiple real possibilities that he pled. He is instead now, on appeal, attempting to assert false facts and conclusions to try and save his case when he failed to plead them the first (in his initial Complaint) and second (in the Amended Complaint) times. This misuse of a legal doctrine is nothing more than an attempt to distract this court from the plain and simple issue in this case – the Amended Complaint lacked the sufficient pleading necessary to survive a Rule 12(b)(6) motion.

While Rule 8(e)(2) allows for pleading alternative facts, those facts *must actually be plead.* In this case, as stated *supra,* the Amended Complaint was found to lack sufficient factual allegations regarding any negligent hiring by the Respondents. Rule 12(b)(6) motions require the court to consider what is actually *within* a complaint, and drawing reasonable inferences from what is properly pled, not guessing as to what a plaintiff may have included in their complaint. W. Va. R. Civ. Pro. 12(b)(6); *Camden-Clark Mem'l Hosp. Corp. v. Tuan Nguyen,* 240 W. Va. 76, 80, 807 S.E.2d 747, 751 (2017). Despite the low bar of notice pleading, there must be at least some viable facts alleged that could support the asserted claims. That is simply not the case here.

The Petitioner is further trying to distract from the fact that there was no duty owed whatsoever to the Petitioner as he was a trespasser at the time of his accident. He himself admitted that the theater was closed, per Governor's COVID-19 mandate, and he had no business being conducted with the theater. He was not an invitee as the Petitioner now implies. There can be no negligent hiring, retention, or supervising duty when the Petitioner was owed no duty by virtue to his trespass.

The Circuit Court properly considered the facts pled in regard to Count II, and the Amended Complaint as a whole, and found them insufficient. A plain reading of the information plead within

the four corners of the Amended Complaint indisputably establishes this was the correct decision. Even considering these pleadings in the alternative, the Petitioner still failed to plead sufficient facts to support either of his Counts and therefore, the dismissal of the Amended Complaint and granting of Respondents' Motion should be AFFIRMED.

VI. The Circuit Court did not err in deciding that no additional discovery was necessary because additional discovery was not needed for the Circuit Court to rule on a Rule 12(b)(6) motion.

Throughout the entirety of his brief, Petitioner tries to again and again distract from the actual issue and standard applicable to this issue – that of a Rule 12(b)(6) motion. In making this analysis, a circuit court must rely primarily on the four corners of the complaint. *Chapman*, 160 W. Va. at 536, 236 S.E. 2d at 210. The final assignment of error is yet again an attempt to try and muddy the waters and misrepresent the Circuit Court's findings to this Court and the applicable standard.

As repeatedly stated in the Order with regards to both Counts, the Amended Complaint failed to state sufficient facts to survive a Rule 12(b)(6) motion. (A.R. 0177 and 0182.) The Circuit Court made this determination based upon the facts plead in the Amended Complaint, just as it is required to pursuant to Rule 12 and the applicable case law. *See generally, State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 200 W. Va. 221, 227, 488 S.E. 2d 901, 907 (1997); see *Price v. Halstead*, 177 W. Va. 592, 594, 355 S.E. 2d 380, 383 (1987); *Sticklen v. Kittle*, 168 W. Va. 147, 287 S.E. 2d 148 (1981).

The Circuit Court plainly stated that it was not making factual determinations but was solely taking the allegations made by the Petitioner into consideration in making its finding. The Circuit Court detailed how, even under a foreseeability negligence standard; the Amended Complaint was still insufficient. Indeed, Petitioner had plead facts that defeated his own case by

admitting that the theater was closed, there was no business being conduct, and there were no employees or agents even present at the time of the accident because it was closed pursuant to government mandate.

No discovery that could be conducted would change the fact that Marquee Cinemas was closed pursuant to the Governor's mandate at the time of the accident. No discovery will change the fact that the Petitioner was illegally trespassing at the time of his accident. Most importantly, no discovery is going to change the fact that the Petitioner, as he admitted in his own pleadings, chose to stand in the bed of a pickup truck doing burnouts on his own volition. Petitioner cannot plead any set of facts that would entitle him to relief.

The decision to not allow discovery was proper based upon the facts already plead by the Petitioner. This matter is a simple Rule 12(b)(6) issue, and the Petitioner indisputable failed to plead any set of facts which could entitle him to relief against these Respondents. The Circuit Court conducted a proper analysis of the Amended Complaint and properly determined that it fell below the Rule 12(b)(6) standard. Therefore, the Circuit Court's Order should be AFFIRMED.

CONCLUSION

The Circuit Court applied the appropriate standard when considering the Respondents' Rule 12(b)(6) Motions to Dismiss and properly found that the Amended Complaint failed to state a claim upon which relief can be granted. The Respondents owed no duty to the Petitioner as he was a trespasser at the time of his accident other than to refrain from willful or wanton actions towards him, and the Amended Complaint contained no allegations of willful or wanton actions by the Respondents. The Amended Complaint was thus properly dismissed and the Circuit Court's Order Granting Defendants' Motion to Dismiss should be wholly AFFIRMED.

Respectfully submitted,

/s/ Cy A. Hill, Jr.
Cy A. Hill, Jr. (WV Bar #8816)
Jayson T. Hamrick (WV Bar #13623)
Cipriani & Werner, P.C.
500 Lee Street, East, Suite 900
Charleston, WV 25301
Telephone: 304-341-0500
Fax: 304-341-0507
Email: chill@c-wlaw.com
jhamrick@c-wlaw.com
COUNSEL FOR BECKLEY GALLERIA, LLC, PARAMOUNT DEVELOPMENT CORPORATION, and PARAMOUNT DEVELOPMENT PROPERTIES, LLC.

/s/ Jared C. Underwood
Jared C.Underwood, Esq. (WV Bar #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.,
COUNSEL FOR JORDAN LINZY MARQUEE CINEMAS-WV, INC., AND MARQUEE CINEMAS HOLDINGS, INC.

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and, PARAMOUNT DEVELOPMENT PROPERTIES, LLC.,

Defendants Below, Respondents

Certificate of Service

This is to certify that a copy of the foregoing "**RESPONDENTS' JOINT RESPONSE BRIEF**" was served via the Court's electronic filing system this 19th day of June 2023 to the following:

Stephen P. New, Esquire
New, Tylor & Associates
430 Harper Park Drive
Post Office Box 5516
Beckley, West Virginia 25801
Counsel for Plaintiff

Jared Underwood, Esquire
Pullin, Fowler, Flanagan, Brown & Poe, PLLC
252 George Street
Beckley, WV 25801
Counsel for Marquee Cinemas, Inc., Marquee Cinemas-WV, Inc. and Marquee Cinemas Holdings, Inc.

/s/ Cy A. Hill, Jr.
Cy A. Hill, Jr. (WVSB#8816)