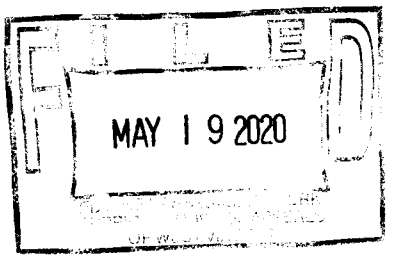
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



DOCKET NO. 19-1077

RONALD A. GABLE,

Plaintiff Below, Petitioner

v.

DEBORAH GABLE and JOHN DOE(S),

Defendant Below, Respondent.

Respondent's Brief

Counsel for Respondent, Deborah Gable

Perry W. Oxley, Esq (WVSB #7211)
David E. Rich, Esq (WVSB #9141)
Oxley Rich Sammons
517 9th Street, P.O. Box 1704
Huntington, WV 25718-1704
Phone: (304) 522-1138
Fax: (304) 522-9528
poxley@oxleylawwv.com
drich@oxleylawwv.com

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RONALD A. GABLE,

Plaintiff,

v.

Appeal No. 19-1077
(Ohio County Case No. 19-C-167)

DEBORAH GABLE and
JOHN DOES(S)

Defendants

RESPONSE OF RESPONDENT DEBORAH GABLE

Respondent, Deborah Gable, by counsel, Perry W. Oxley, David E. Rich, and the law firm of Oxley Rich Sammons, PLLC, respectfully responds to Petitioner's Brief. For the reasons discussed below, this Court should affirm the October 30, 2019 Order of the Circuit Court of Ohio County, West Virginia.

STATEMENT OF THE CASE

I. Procedural History

Respondent contends that Petitioner's procedural history is accurate.

II. Statement of Facts

The case arises out of a personal injury action to recover damages for injuries allegedly sustained as a result of purported negligence under a theory of premises liability. *See generally Plaintiff's Complaint* at R.1. [1] On or about September 18, 2017, Ronald Gable (hereinafter

[1] Respondent acknowledges that under Rule 10(d) under the West Virginia State Court Rules of Appellate Procedure, a Statement of Facts in not necessary in the response brief. However, the Respondent feels it

"Petitioner") presented uninvited at Deborah Gable's (hereinafter "Respondent") residence. *Id.* While on the property unannounced, evidenced by the absence of any language in the Complaint which would indicate an invitation was conveyed, Petitioner allegedly fell on golf balls on the front steps of Respondent's front porch and injured himself. *Id.* Petitioner asserts that Respondent had a duty to maintain the steps in a reasonably safe condition and breached a duty of care owed by failing to remove golf balls and other objects from the steps of Respondent's porch. R.3. Petitioner filed a Complaint on July 11, 2019. R.1. Petitioner contends that this fall was the direct result of the failure to remove the aforementioned golf balls and debris from Respondent's front porch steps. *Id.*

SUMMARY OF THE ARGUMENT

Respondent asserts that, based on the facts pled in Petitioner's Complaint, Petitioner failed to state a claim upon which relief can be granted and the Ohio County Circuit Court's decision granting Respondent's Motion to Dismiss should be affirmed. First, Petitioner failed to plead facts sufficient to establish his status as a non-trespassing entrant, which is necessary to create a duty of reasonable care under current West Virginia premises liability law. As a trespassing entrant onto a premises, the only duty of care owed by a property-owner under West Virginia law is to refrain from willful or wanton conduct causing injury. This type of intentional conduct is conspicuously missing from the allegations plead in Petitioner's Complaint. If this Court declines to consider extrinsic evidence outside of the Complaint, Petitioner cannot establish a duty of care was owed by Respondent to a trespassing Petitioner and Petitioner's claim must fail.

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necessary to present her own Statement of Facts to correct inaccuracies and/or omissions in the Petitioner's version of the facts. Specifically, the Petitioner includes facts outside of the four corners of the Complaint, which is irrelevant in determining whether the standard of Rule 12(b)(6) of the West Virginia Rules of Civil Procure was met.

Additionally, Petitioner failed to plead facts sufficient to establish that the hazard which allegedly precipitated his fall was hidden and dangerous or otherwise not open and obvious. Respondent asserts that a duty of care to warn or remedy a hazard exists under West Virginia law only when the condition is hidden in nature or not otherwise reasonably apparent to an individual exercising due care. The Circuit Court in this case correctly found the alleged hazard of multiple golf balls on a concrete front porch step to be open and obvious and thus Respondent owed no duty of care to the Petitioner.

This Court should affirm the Circuit Court's ruling and find Petitioner to be a trespasser, or in the alternative, that Respondent has no duty to warn of an open and obvious condition on the property.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent does not believe oral argument is necessary in this case. The Circuit Court's ruling made in its October 30, 2019 Order granting Respondent's Motion to Dismiss is thorough, well-reasoned, and does not involve novel legal concepts or theories which would necessitate oral argument. Therefore, Respondent believes a Memorandum Decision is appropriate *without* oral argument from counsel.

ARGUMENT

I. Standard of Review

The standard for this Court's review of a circuit court decision dismissing a complaint is well established: "[a]ppellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." *Barber v. Camden Clark Memorial Hospital Corp.*, 240 W.Va. 663, 669, 815 S.E.2d 474, 480 (2018) (*Citing* Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995)). Under the *de novo* standard, the court is to

hear the arguments of both parties, and in affirming the circuit court's decision, is not bound by the reasons set forth by the circuit court in its decision to dismiss the matter. *Savarese v. Allstate Ins. Co.*, 223 W.Va. 119, 125, 672 S.E.2d 255, 260 (2008). The purpose of a motion to dismiss under rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to test the formal sufficiency of the Complaint. *Collia v. McJunkin*, 178 W.Va 158, 358 S.E.2d 242 (1987). A motion to dismiss under Rule 12 "enables a court to weed out unfounded suits." *Harrison v. Davis*, 197 W.Va. 651, 478 S.E.2d 104, n. 17 (1996). The singular purpose of the motion is to seek a determination of whether the plaintiff is entitled to offer evidence to support the claims made in the complaint. *Dimon v. Mansy*, 198 W.Va. 40, 479 S.E.2d 339 (1996). It is certainly true that, when considering a motion to dismiss, the complaint is construed in the light most favorable to the plaintiff. *See State Ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 200 W.Va. 221, 448 S.E.2d 901 (1978); *Price v. Halstead*, 177 W.Va. 592 355 S.E.2d380 (1987). However, a trial court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations. *Fass v. Nowsco Well Service, Ltd.*, 177 W.Va. 50, 350 S.E.2d 562 (1986) (per curiam).

In the instant case, the conclusions of law reached by the Circuit Court of Ohio County are simple, clear and based on the fact that no duty of care was owed by Respondent to Petitioner as a trespasser and, *in the alternative,* the alleged danger that caused Petitioner's injury was an open and obvious condition on the front steps.

II. The Circuit Court Did Not Err In Finding that Petitioner Entered Respondent's Property as a Trespasser and Failed to Plead Facts in His Complaint that Would Indicate Otherwise.

A. Petitioner's Complaint And West Virginia Law Support That He Was a Trespasser On Respondent's Property When He Was Allegedly Injured.

The portion of Petitioner's Complaint containing facts is two paragraphs long. R.2. In Paragraph 5 of the Complaint, Petitioner simply alleges that he was "visiting" the property owned by Respondent located at 130 North 16th Street, Wheeling, Ohio County, West Virginia 26003. R.2 ¶5. In Paragraph 6 of the Complaint, Petitioner specifically references the "front porch steps" of the premises causing him to fall to the ground. R.2 ¶6. No mention is made whatsoever of the relationship between Petitioner and Respondent, any past custom or practice of him visiting the property, any prior communications between the parties, the purpose of the visit or whether permission was granted to pass onto the property.

Nothing more in the fourteen paragraph, five page Complaint provides any further insight as to the status of Petitioner while on the land of the Respondent. *See* R 1-5. In the absence of any information otherwise, there is no evidence that Petitioner had permission to go onto the property of Respondent, and as such, Petitioner should have no greater legal rights than that of a trespassing entrant.

Traditionally, a landowner owed a different duty of care to an entrant of their land based on whether the entrant was classified as a licensee, invitee, or trespasser. *Mallet v. Pickens*, 206 W. Va. 145, 522 S.E.2d 436, 446 (W. Va. 1999). In West Virginia, however, this distinction between licensees and invitees has been abolished, and as a result, landowners and possessors of land owe *any non-trespassing entrant* a duty of reasonable care under the circumstances. *Id.* at 446, 155. A trespasser is one who goes upon the property or premises of another without invitation, express or implied, and does so for his own purpose or convenience, and not in the performance of any

duty to the owner. *Huffman v. Appalachian Power Co.*, 187 W.Va. 1, 5, 415 S.E.2d 145, 148 (W. Va. 1991). The owner or possessor of property does not owe trespassers a duty of ordinary care but rather a possessor of property only need refrain from conduct causing willful or wanton injury. *Id.*

Thus, under ordinary circumstances, the possessor of property is not liable to trespassers for injuries caused by his or her failure to use reasonable care to maintain the property in a reasonably safe condition or to carry on activities so as not to endanger them. *Id.* For example, in *Huffman v. Appalachian Power Co.*, the plaintiff was climbing a transmission tower when he suffered an electrical shock causing him severe and permanent injuries. *Id* at 148. The court found that AEP, as the owner of the transmission tower and defendant in the case, owed no duty of care and could not be held liable for the individual's injuries absent a showing of willful or wanton conduct by defendant, due to the fact that, at the time of the injury, plaintiff was a trespasser. *Id.*

In the instant case, Petitioner showed up unannounced and uninvited onto the property of Respondent. The Complaint states that Petitioner was "visiting" Defendant's property. R.2 ¶5. However, simply "visiting" another's property does not establish a duty of care is owed and no facts were pled that established that Petitioner was invited, either expressly or impliedly, onto the property. In the absence of this language, the Court is left to ponder why Plaintiff entered onto the premises and whether it was of his own device or rather by invitation of the landowner. However, the fact that Respondent was not at home when Petitioner approached the front porch steps to visit is proof positive that no invitation was extended. Furthermore, there are no facts contained within the Complaint which indicate that Plaintiff was performing any duty or conferring any benefit on the landowner. Thus, based on the information provided in the Complaint, Respondent owed no

duty of care to the trespassing Petitioner and this Court should affirm the Circuit Court's dismissal of the Complaint for failure to state a claim upon which relief can be granted.

B. The Circuit Court Correctly Ruled that Petitioner Failed to State a Claim Under West Virginia Rule of Civil Procedure 12(b)(6).

In his appellate brief, Petitioner argues at length that his Complaint should have survived dismissal pursuant to West Virginia Rule of Civil Procedure 12(b)(6) because he plead facts sufficient to support his claim. While Respondent agrees that the standard for dismissal pursuant to Rule 12(b)(6) is not easily met, this rule should not be used to require an appellate court to reconstruct a Complaint to salvage an otherwise unsustainable claim. "[D]espite the allowance in Rule 8(a) that the plaintiff's statement of the claim be 'short and plain,' a plaintiff may not, 'fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint.'" *Harrison v. Davis*, 197 W.Va. 651, 478 S.E.2d 104, n.7 (1996).

The singular purpose of the motion [to dismiss] is to seek a determination of whether the plaintiff is entitled to offer evidence to support the claims made in the complaint. *Dimon v. Mansy*, 198 W.Va. 40, 48, 479 S.E.2d 339, 347 (1996). A trial court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations. *See Generally Fass v. Nowso Well Service, ltd.* 177 W.Va. 50, 350 S.E.2d 562, (1986). The *Fass* case involved an action for wrongful discharge and intentional infliction of emotional distress whereby the circuit court ruled in favor of dismissing the claim under Rule 12(b)(6). *Id.* The court in *Fass* found that,

> the allegations in this case are unsupported by essential factual statements. Absent in the complaint is any factual reference to the location of work, the conditions under which the appellants were employed, or the regularity of their working hours. General allegations in this regard are insufficient and those set forth in this complaint are mere sketchy generalizations of a conclusive nature unsupported by operative facts.

Fass at 564, 53. Similar to *Fass*, the allegations in Petitioner's Complaint are unsupported by essential facts and missing others that would make the claims sustainable under West Virginia law. Petitioner's Complaint simply provides the legal conclusion that Respondent was negligent without establishing that any duty of care was owed. The Circuit Court was not required to infer that a duty of care was owed just because Petitioner was "visiting" the property, nor should it infer this duty was breached just because Petitioner allegedly fell.

"[W]here the claim is not authorized by the laws of West Virginia, a motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits." *Harrison v. Davis*, 197 W.Va. 651, 478 S.E.2d 104, n.7 (1996) (citing *State ex rel. McGraw v. Scott Runyan Pontiac–Buick, Inc., 194 W.Va. at 776, 461 S.E.2d at 522 (1995)*). In the instant case, it is irrefutable that Petitioner showed up on Respondent's property without permission or notice, and is therefore a trespasser. There is no conceivable way a property owner could protect a trespasser without knowledge they are or will be on the premises. Due to the fact that Petitioner was a trespasser at the time he allegedly fell, no duty of ordinary care is owed. Thus, there is no manner in which Petitioner can make out a case of prima facie negligence based on premises liability. Without this claim, Petitioner's Complaint fails to state a claim upon which relief may be granted and the decision of the Circuit Court to dismiss the case pursuant to Rule 12(b)(6) should be upheld.

C. This Court Should Not Consider Facts Outside of Petitioner's Complaint.

Petitioner's Complaint, standing alone, fails to establish a duty of care was owed by Respondent to Petitioner on September 18, 2017. *See* R.1-5. In an attempt to correct the insufficiency of his Complaint, Petitioner introduces and argues extrinsic facts in subsequent pleadings and in his appellate brief, attempting to transform himself into an invited guest onto the property.

Whether a Complaint states a claim upon which relief may be granted is to be determined **solely** from the provisions of such complaint. *See Par Mar v. City of Parkersburg*, 183 W.Va. 706, 398 S.E.2d 532 (1990)(underline and emphasis added); *See also Barker v. Traders Bank*, 152 W.Va. 774, 166 S.E.2d 331 (1969). **Only** matters contained within the pleading may be considered on a motion to dismiss. *Id* (underline and emphasis added). "Matters outside the pleadings include...any written or oral evidence in support of or in opposition to the pleading that provide[s] some substantiation for and does not merely reiterate what is said in the pleadings." *See McAuley v. Federal Ins. Co.*, 500 F.3d 784 (8th Cir. 2007).

As noted above, Petitioner's Complaint contains only three statements that speak to his status on the property of Respondent; 1) that he was "visiting" the property, 2) that the front steps and porch of the property caused his fall, and 3) that Respondent failed to remove "golf balls and other objects and debris" from the front steps of the house. *See* R.1-5. It is from those three statements alone that Petitioner wishes this Court to stretch to find that he had permission to be on the property and that Respondent should have taken steps to protect him from the presence of golf balls and other objects in plain view on the front porch steps. This Court should decline to bend over backward to find facts sufficient to create a duty of care for Respondent where they simply were not plead.

Petitioner began the chore of advancing extrinsic facts in written submissions to create a duty of care on the part of Respondent in his Memorandum in Opposition to Respondent's Motion to Dismiss. *See* R.18-27. In that Memorandum, Petitioner attempted to expand his description of the alleged hazard on Respondent's steps, suggesting that he was caused to fall "by a small plastic ball located in the crease of the steps between the riser and the tread," not golf balls and other debris as initially plead in his Complaint. *Id.* Petitioner then attempted to offer for the first time

that "the angle of the stairs prevented Mr. Gable from seeing the dangerous condition," ignoring the fact that he had ascended these same stairs and presumably seen and stepped over this small ball (or golf balls), other objects and debris just seconds earlier. R.20.

Petitioner also inserted additional, extrinsic facts into his Memorandum in Opposition to rationalize that he was a non-trespassing entrant and thus owed a duty of care. *See* R. 18-33. He began by attempting to humanize and legitimize his uninvited presence on the Respondent's property, offering that he was the biological father of Respondent and was visiting the property on that day to inform Respondent of the death her brother's father-in-law.[2] *Id.* He stated that he knocked on Respondent's front door, a fact absent from the Complaint. R.19. He alleged for the first time that the golf balls on the porch steps were somehow hidden from view. R. at 18. He even went so far as to create and attach two affidavits to his Memorandum in Opposition, one of his own and one of his son, David Lee Gable, which offered self-serving conclusions that that Petitioner was a non-trespassing entrant on that day. *See* R. at 28-32. These and all new facts not pled in the Complaint simply should not be considered by this Court. The Rule 12(b)(6) motion to dismiss process should not be a multi-step obligation on the part of the judiciary to assist Petitioner in salvaging a Complaint that on its face fails to state a claim upon which relief can be granted. Thus, this Court should affirm the Circuit Court's dismissal of Petitioner's Complaint for failure to state a claim.

[2] We may never know the true reason why Petitioner was on the property of Respondent at the day and time indicated. However, in this modern day of cellular telephones and technological advances, an in-person visit to inform your daughter of the death of her brother's wife's father seems unnecessary and a convenient excuse in light of the absence of any better explanation in the Complaint.

D. An Implied License to Enter Upon the Land of Another by Custom Cannot Be Inferred From The Facts Of This Case.

To avoid the categorical pitfall of the label trespasser, Petitioner cites foreign case law that analyzes theories of law outside the context of premises liability to argue an implied license permitted him to enter Respondent's premises without invitation. Essentially, Petitioner argues that he had an implied license to enter by his prior custom of coming onto the property of the Respondent, despite failing to offer any evidence in support of this implied license and failing to mention an implied license by custom whatsoever in his Complaint.

Petitioner attempts to establish this implied license through custom by generally offering the U.S. Supreme Court decision of *Florida v. Jardines*. (Petitioners brief P:9). The Supreme Court in *Jardines* was tasked with analyzing the hotly debated Knock and Announce rule found in the Fourth Amendment's prohibition on unreasonable searches and seizures. *See Florida v. Jardines, 569 U.S. 1 (2013)*. *Jardines* has no real application to the facts of our case and contributes nothing to West Virginia's well settled law on premises liability. The decision in *Jardines* dealt with a property owner charged with trafficking drugs who then moved to suppress evidence seized pursuant to a search warrant obtained after a dog sniff on the front porch of the property owner's home established probable cause for the warrant. *See generally Florida v. Jardines*, 569 U.S. 1 (2013). The *Jardines* case, albeit taught in every criminal procedure law school class in America on the issue of search and seizure, has no application whatsoever to the theory of negligence and premises liability in terms of holding a property owner liable for injuries to unannounced guests.

Petitioner also ignores the significance of the fact that West Virginia has abolished the distinction between licensee, invitee, and trespasser. In his brief, Petitioner cites to Restatement (Second) of Torts § 330 for the proposition that an implied license exists by using the traditional definition of licensee found in Restatement § 330(h). *See* Pet'r's Br. at 9 citing Restatement

(Second) of Torts § 330 (1965). It is important to note that this Court in *Mallet* made the decision to depart from the trichotomy of the licensee, invitee, and trespasser analysis found in the Restatement (Second) of Torts § 330 and other relevant provisions due to confusion in classifying entrants on the property. *See Mallet* v. *Pickens* at. 443, 152. Thus, the comments that follow the Restatement (Second) provisions covering the aforementioned trichotomy, cited by Petitioner as persuasive authority, are as equally irrelevant[3].

The concept that an implied license open to the public for all to enter upon a landowner's premises unannounced is not as widely accepted a policy as Petitioner argues. In fact, most states that do apply this implied license do so in the limited context of one executing a duty to the landowner or to the general public. For example, the South Carolina Appellate Court in *Sims v. Giles* found that an electric company meter reader entering the premises unannounced was owed a duty of care based on the license created by the contract between the energy company and the homeowner. *See Generally* 343 S.C. 708, 541 S.E.2d (S.C. Ct. App. 2001). The Kansas Supreme Court, which has also abolished the distinction between licensee and invitee, found that a neighbor herding loose cattle back onto a property owner's premises and subsequently injured held an implied license to enter the property without permission and unannounced, in order *to prevent serious harm*, based on a *Good Samaritan* policy. *Wrinkle v. Norman*, 297 Kan. 420, 425, 301 P.3d 312, 315 (Kan. 2013)(emphasis added). Other state courts have awarded mailmen a higher

[3] Applying the traditional definition of licensee influenced by the Restatement (Second) and followed prior to the *Mallet* decision, courts consistently found that uninvited guests were considered licensees and owed the same duty of care currently owed to trespassers under *Mallet*. *Jack v. Fritts*, 193 W.Va. 494, 501, 457 S.E.2d 431, 438 (1995)"(providing '[s]ince a tenant's social guest is nothing more than a licensee, a landlord owes only the minimal duty of refraining from willfully or wantonly injuring the licensee')." *Cole v. Fairchild*, 198 W.Va. 736, 482 S.E.2d 913 (1996); *See* also *Self v. Queen*, 199 W.Va. 637, 487 S.E.2d 295 (1997) (woman visiting her mother who fell into hidden hole in mother's front yard was a licensee and as such was only owed a duty to refrain from acting willfully or wantonly regardless of the relationship of the parties and whether and invitation was extended. Judgement affirmed in favor of property-owning mother.)

standard of care based on their performance of a public duty to deliver mail. *Haffey v. Lemieux*, 154 Conn. 185, 188, 224 A.2d 551, 553 (Conn. Dist. Ct. 1966).

Although other states have found that an implied license exists under narrow circumstances, Petitioner admittedly visited the property for his own personal benefit. The circumstances of his entrance onto Respondent's property were not to deliver mail, to aid in the prevention of substantial harm, or for any benefit whatsoever to either the general public or the Respondent.[4]

Petitioner cites to a number of cases for the proposition that an implied license exists under the facts of the case *sub judice*. *See* Pet'r's Br. at P:10 *citing Hamby v. Haskins,* 630 S.W.2d 37, 39 (Ark. 1982), *Frye v. Trustees of Rumbletown Free Methodist Church*, 657 N.E.2d 745, 750 (Ind. Ct. App. 1995) and *Jones v. Manhart*, 585 P.2d 1250, 1253 (Ariz, Ct. App. 1978). However, these cases are easily distinguishable.

In *Jones*, the primary issue was whether a dog bite victim could recover under an Arizona strict liability dog bite statute. *Jones* at 1251. The court, applying the trichotomy of definitions this Court decided to abolish, found plaintiff to be a *licensee* but did not create an implied license to trespass. (emphasis added). *Id.* at 1252, 1253. The *Jones* court placed emphasis on the fact that the property owner was present at the time the bite occurred and the strict liability statute was intended to expand, rather than narrow, common law protection. *Id.* Unlike *Jones*, in the case at bar, Respondent was not home at the time the alleged injury occurred and had no notice that Petitioner was on her property. Additionally, there is no strict liability statute before this Court to consider.

Similarly, the *Hamby* court also involved a dog bite whereby the entrant was lost and entered the premises seeking directions. *Hamby* at 386, 387. The *Hamby* court was tasked with deciding whether jury instructions, which, interestingly enough, identified the entrant as a trespasser, had

[4] Petitioner allegedly entered the premises that day to communicate a message that could have been completed in any number of alternative ways (telephone, email, text message, etc.).

influenced the jury's award of damages to the entrant. *Id.* at 389. The *Hamby* court acknowledged the fact that the jury found, applying the definition of trespasser, the "appellant was guilty of willful or wanton conduct" by not having the dog penned up, but made no unequivocal decision that the entrant had an implied license to enter the premises uninvited and unannounced. *Id.* The court's analysis centered on the culpability of the animal owner for the dangerous propensity of their animal rather than traditional principles of premises liability law. Based on the foregoing, the court's ruling in *Hamby* has no real application to the facts of the instant case.

In the one non-dog-bite case cited by Petitioner, the court in *Frye* found the plaintiff to be a licensee by custom because he was a stranded motorist seeking assistance from a nearby church on the side of the roadway. *Frye v. Trustees*, at 747. In that case, the plaintiff was injured when a step on the front porch of the attached parsonage failed and collapsed under his foot, causing him to fall into the space between the porch and the step. In our case, the hazard was not the step itself, but rather, open and obvious golf balls on the steps. As discussed above, Petitioner was neither seeking this sort of immediate roadside assistance, nor was he seeking it from a place of worship when he allegedly fell.

The issue in the instant case is what activities rise to the level of a custom such that a license to trespass onto the property of another can be created. No West Virginia court has spoken directly on this issue, and Petitioner is asking this Court to make new law so that his Complaint can be resuscitated. In support of the creation of this license by custom, Petitioner cites the Restatement (Second) of Torts, which describes the creation of a license in the presence of a local custom in a particular locality. Petitioner, however, ignores the limiting language of the Restatement (Second), which only advances the concept of an implied license in the presence of a "local custom," for a

"particular purpose," by residents "in that locality." *Id.* We do not have facts in our case sufficient to find such a custom that would create an implied license for Petitioner.

Most likely what the drafters of the Restatement (Second) had in mind was not for anyone to wander onto another's property and argue that they had been there previously so there exists a license for their entry by custom. One would imagine the type of custom contemplated by Restatement (Second) is akin to that created by the annual AutumnFest that takes place every October in the town of Kenova, West Virginia. For nearly three decades the current mayor, Rick Griffith, who owns a drug store named Griffith & Feil, has voluntarily decorated the outside of his personal residence with thousands of carved pumpkins that he lights up every night for on-lookers to enjoy. Truckloads of people matriculate to this large house on a sleepy back road in Kenova between October 1 and Halloween, trudging onto the property with family members, pets, wheelchairs and anyone else who wishes to see right up to the front door of the residence. They pay no fee and the owner receives no benefit outside of some free publicity for the town. This kind of license to enter upon the land by annual custom, to view the famous Pumpkin House, is precisely the kind of local custom the Restatement (Second) was referring to when it detailed that such a license could be created by "local custom" for "residents in that locality" to enter a premises for a "particular purpose." Restatement (Second) of Torts § 330, comment e, (1965). This Court should decline to apply an unlimited license by local custom to any individual who had ever previously visited the property of another, which is what Petitioner is asking this Court to do on appeal.

There are no special circumstances that apply to the facts of this case to establish that Petitioner was anything other than a simple trespasser on Respondent's property on September 18, 2017. Respondent acknowledges that courts in other states have found an implied license to exist by

custom under narrow circumstances which do not exist in this case. Outside of those rare and narrow circumstances it is unreasonable to hold an owner of property liable to individuals entering their premises unannounced and uninvited. Petitioner did not enter onto Respondent's premises in furtherance of a duty to the landowner, or a duty to the general public, or for any other customary reason such as being lost or to prevent perceived imminent harm. Rather, Petitioner entered the premises for his own purpose and should take the property as he finds it. As a trespasser, he is owed no duty of reasonable care as a matter of law.

Finding a heightened duty of care is owed under the circumstances of this case would establish precedent which is uncertain and impractical for West Virginia property owners who wish to comply with the law. Placing this type of duty on property owners unfairly and unjustly expands their legal obligation and makes them potentially liable for all injuries sustained by entrants no matter the primary intent of the entrance. For example, a litigious individual walking through town may witness a cluttered porch and see an opportunity for financial windfall. Under Petitioner's theory, that individual may walk upon the front porch, fall, then bring suit against the property owner, regardless of the intent in entering onto the premises, based on this implied license to do so by custom. Thus, public policy is best served by affirming the Circuit Court's decision to dismiss for failure to state a viable claim for relief.

III. The Circuit Court Did Not Err in Finding that Petitioner's Alleged Fall on Respondent's Porch Steps was Due to an Open and Obvious Condition.

A. This Court Should Ignore Petitioner's Attempt to Inject Extrinsic Facts Into the Complaint Through Subsequent Pleadings and in His Appellate Brief.

Petitioner's Complaint alleges he fell on Respondent's steps because of "golf balls and other objects and debris from the surface of the aforesaid steps and front porch." R. at 4. From that short statement we can derive that there were multiple golf balls, along with other objects and

debris on the set of stairs leading up to Respondent's porch. As noted previously, while ascending these stairs, all of these objects would have been in plain view, placing Petitioner on notice of both their existence and potential hazard. Despite the simple description of his fall in the Complaint, in his Memorandum in Opposition to the Motion to Dismiss, Petitioner inserts additional facts concerning the cause of his alleged fall, in an attempt to survive dismissal. R. at 18-26. In this Memorandum, filed three months after the Complaint, Petitioner, realizing that common sense dictates the more balls he claims were on the stairs the greater the notice of their danger, suggests that "[t]he ball was hidden by the angle of the steps, paint chips and other debris;[.]" R.18.

In the three months between the filing of the Complaint and the filing of his Memorandum in Opposition, paint chips not referenced in the Complaint suddenly came into the picture, multiple golf balls became one ball and that one ball became "hidden in the crease of the stairs, between the riser and the tread."[5] *Id.* Most recently, in his appellate brief, Petitioner attempts to denude his prior description of multiple golf balls by referencing only a "**golf-ball sized object** hidden by debris." Pet'r's Br. at 14. (emphasis added) So, from the time of the filing of the Complaint to the present, the cause of Petitioner's fall has been, first, multiple golf balls, then just one golf ball, then a small ball, and finally an "object the size of a golf ball." In it's Order granting the Motion to Dismiss, the Circuit Court addressed the consistent and repeated inconsistency of Petitioner's description of the source of his fall in his pleadings. R. at 36-37 ("In this case, Plaintiff's response attempts to clean up the allegations in the Complaint, but only creates more confusion as to the facts he is alleging."). This Court should follow suit and decline to repair the Petitioner's Complaint and create a sustainable cause of action where one simply does not exist and was not plead.

[5] Plaintiff never attempted to amend her Complaint in the underlying case.

Petitioner argues in his Second Assignment of Error that these additional facts not contained in the Complaint but presented in his Memorandum in Opposition to a Motion to Dismiss should be considered, so long as they are consistent with the allegations. *See* Pet'r's Br. at 12. However, as analyzed above, whether a complaint states a claim upon which relief may be granted is to be determined solely from the provisions of the complaint. *See Par Mar v. City of Parkersburg*, 183 W.Va. 706, 398 S.E.2d 532 (1990); *Barker v. Traders Bank*, 152 W.Va. 774, 166 S.E.2d 331 (1969). Even assuming, *arguendo*, additional facts from post-Complaint filings could be considered, these new, inconsistent descriptions of the items on the porch steps make the Complaint and the Memorandum in Opposition contradictory at best. More importantly, it was only after Respondent placed Petitioner on notice that his Complaint failed to meet the pleading standard that he began supplementing the facts concerning his fall, in an attempt to save his claim. Based merely on the facts plead in the Complaint, Petitioner failed to provide the alleged hazard was hidden and not reasonably apparent. None of the statements in Petitioner's Complaint make a valid claim for which he may be granted relief, due to the fact that no duty exists under West Virginia law to warn of obvious dangers, such as multiple golf balls on a set of stairs.

B. The Circuit Court Correctly Ruled that Golf Balls on the Steps of a Front Porch Are an Open and Obvious Hazard.

Petitioner's Complaint cannot survive due to the alleged hazards at issue being open and obvious as a matter of law.[6] Respondent agrees with Petitioner that the open and obvious nature of a hazard can be decided as a matter of law by the court when the facts are undisputed. *See Austin*

[6] If this Court finds the Circuit Court's decision under Petitioner's first Assignment of Error was correct then Petitioner's Second Assignment of Error is irrelevant and moot. The open and obvious doctrine is an exception to the duty owed to non-trespassing entrants. If, in fact, this Court agrees that the Circuit Court correctly found that Petitioner failed to plead facts to establish himself as a non-trespassing entrant, no duty of care exists. Therefore, in the absence of a duty owed, a theory of law which is an exception to that duty is moot.

v. Clark Equipment Co., 821 F.Supp. 1130, 1334 (W.D.Va.1993), aff'd, 48 F.3d 833 (4th Cir.1995)(if reasonable minds could not differ as to whether the nature of a hazard was or should have been open and obvious, then the issue may be decided as a matter of law); *See also Aikens v. Debow*, 208 W.Va. 486, 541 S.E.2d 576 (2000)("[t]he determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law.); *Gellerman v. Shawan Road Hotel Ltd. Partnership*, 5 F.Supp.2d 351, (D.C. Md. 1998)(Condition of the sidewalk on the defendants' premises was open and obvious as a matter of law). *Anderson v. Wise*, 39 F.3d 1175, 1994 WL 592716, 3 (4th Cir. 1994)(As a general rule, a person 'who trips and falls over an open and obvious condition or defect is guilty of contributory negligence as a matter of law.) *citing Scott v. Lynchburg*, 241 Va. 64, 66, 399 S.E.2d 809, 810 (Va. 1991).

In order to satisfy the Rule 12(b)(6) standard, Petitioner was required to make a showing that a duty of care was owed under the circumstances. As stated above, *Mallet v Pickens* provides that "landowners or possessors...owe any *non-trespassing* entrant a duty of reasonable care under the circumstances." Syl. Pt. 4, 206 W.Va. 145 (1999) (emphasis added). However, the West Virginia Legislature has provided the following exception, widely known and referred to as the open and obvious doctrine:

> [a] possessor of real property, including an owner, lessee or other lawful occupant, owes no duty of care to protect others against dangers that are open, obvious, reasonably apparent or as well known to the person injured as they are to the owner or occupant, and shall not be held liable for civil damages for any injuries sustained as a result of such dangers.

W. Va. Code § 55-7-28(a) (2017).

In passing this statute, the Legislature intended that the open and obvious hazard doctrine be reinstated, and specifically overruled previous case law from the West Virginia Supreme Court of Appeals abolishing the doctrine in 2013.[7] Thus, cases decided prior to 2013 analyzing the open and obvious doctrine are once again good law.[8]

Although Petitioner's counsel appropriately discloses in his appellate brief that he could not locate any West Virginia case that addresses whether a hazard was open and obvious at the motion to dismiss stage, the Southern District Court of West Virginia has spoken on the issue. In one such case, *Addison v. Amonate Coal Co.*, the court upheld dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) when a plaintiff fell off a ninety foot high wall after getting stuck in the mud on a logging road and attempting to walk to find help. Docket No. 1:08-00221, 2008 WL 2787716 (SD. W.Va., July 16, 2008). The court in *Addison* found the claim completely implausible and sustained the dismissal, specifically holding that the high cliff wall was an open and obvious, hazardous condition for which there was no duty to warn plaintiff, regardless if he was a licensee or a trespasser. *Id.* This Court should likewise find Petitioner's claim, as plead, implausible, unsupported by West Virginia law and that this Respondent is entitled to dismissal.

Moreover, West Virginia courts have applied the open and obvious doctrine quite consistently. For example, in *Senkus v. Moore,* a visitor of a veterinary hospital filed an action for negligence when she tripped and fell over a scale located in the floor of the hallway of a hospital.

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[7] *See* W.Va. § 55-7-28(c) "It is the intent and policy of the Legislature that this section reinstates and codifies the open and obvious hazard doctrine in actions seeking to assert liability against an owner, lessee or other lawful occupant of real property to its status prior to the decision of the West Virginia Supreme Court of Appeals in the matter of *Hersh v. E-T Enterprises, Limited Partnership*, 232 W. Va. 305, 752 S.E.2d 336 (2013). In its application of the doctrine, the court as a matter of law shall appropriately apply the doctrine considering the nature and severity, or lack thereof, of violations of any statute relating to a cause of action."

[8] Most of the cases cited prior to 2013 have been flagged for negative treatment due to the 2013 *Hersch v. E-T Enterprises* decision. However, now that the West Virginia Legislature has reinstated the open and obvious doctrine, the temporary negative treatment is irrelevant.

207 W.Va. 659, 661, 535 S.E.2d 724, 726 (2000). The court found it was undisputed that the scale was in plain view of all patrons and was not a hidden danger. *Id.* The *Senkus* court further provided that "the uncontradicted evidence is that [Plaintiff's] negligent failure to watch where she was walking was the sole, precipitating cause of the accident. *Id.* at 662.

Unfortunately, no West Virginia court has decided whether a "small ball and other types of debris" on a front porch step are open and obvious. However, the highest courts in the states of Nebraska and New York have considered facts nearly identical to the facts of our case. In the case of *Scalice v. Braisted*, 982 NY.S.2d 921, 116 A.D.3d 755 (Sup. Ct. App. Div. 2nd Dept. 2014), the plaintiff slipped and fell on the back steps of defendant's residence. The plaintiff alleged that prior to her fall, she felt a "hard cone" or "ball" underneath her foot, and after the fall she observed a crushed seed ball, about the size of a golf ball, on the step along with two or three other similar seed balls. *Id* at 755, 921. The court in *Scalice* held that the ball of seeds on the steps was open and obvious and readily observable by plaintiff, had she been employing the reasonable use of her senses. *Id.* Likewise, in the case of *Schwartz v. Selvage*, a mailman who had ascended a set of stairs to a house fell on an unidentified object while descending those same stairs. 277 N.W.2d 681, 683, 203 Neb. 158, 160 (Neb. 1979). The court in *Schwartz* granted defendant's motion to dismiss on the premise that whatever hazard was on the steps was just as open and obvious on the mailman's way down the steps as the way up. *Id.*

Petitioner cites case law for the proposition that only dangerous conditions that are a natural feature of the terrain can be deemed open and obvious. *See Petitioners brief* at 13. However, such is not the case and is easily distinguishable after a cursory review of other courts' interpretations of the widely applied open and obvious doctrine. For example, with facts similar to those in the instant case, a Michigan Court of Appeals found that a child's toy on a individual's porch was an

open and obvious danger. *See Eubanks v. Smith*, Docket No. 241313, 2003 WL 22850649 (Mich. Ct. App. Dec. 2, 2003). Similarly, the Fourth Circuit Court of Appeals found that the government owed no duty to warn or protect a customer against open and obvious debris in the parking lot of the post office. *See generally Coleman v. U.S.*, 369 Fed. Appx. 459, Docket No. 09-1039, 2010 WL 813957 (4th Cir. Mar. 10 2010).

As applied to the facts of the instant case, the Ohio County Circuit Court correctly found that multiple golf balls, given the very nature of their design, are typically easily seen. A golf ball, multiple golf balls, or a single small ball is similar to a child's toy in that both are usually bright in color and easily seen and avoided. Moreover, the fact the porch was allegedly covered with debris is even more indicia that should have put Petitioner on notice to exercise reasonable caution when traversing the steps of the porch and the porch itself.[9] There is no doubt that one walking from one place to another throughout the day is cognizant of where they walk and often encounters conditions which, if ignored, could cause the individual to fall and suffer injury. These open and obvious conditions should not create liability on the owner of a premises when an individual fails to notice such a condition. In light of the reasonably apparent nature of golf balls and other small balls, Respondent respectfully requests that this Court affirm the Circuit Court's ruling as a matter of law that such conditions were open and obvious.

CONCLUSION

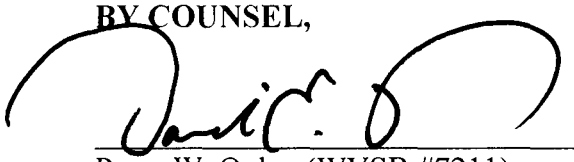
The Petitioner failed to plead sufficient facts in the Complaint to establish a viable claim for relief under any legal theory. Even assuming enough facts were pled, Petitioner was not owed

[9] Assuming this Court accepts the additional facts proffered by the Petitioner in subsequent filings that the ball at issue was hidden from view by paint shavings on the porch, the presence of such shavings should have put the Petitioner on notice that repair work/remodeling was being done to the porch area, and thus should have put him on heightened alert to potential dangers associated with repairs being performed on the porch and steps.

a duty of reasonable care under the circumstances, based on his status as trespasser at the time he entered Respondent's premises. If the Court does find a duty of reasonable care was owed based on an implied license by custom, Petitioner's claim cannot stand, as recovery from injuries caused by open and obvious hazardous conditions are not recoverable under West Virginia law. Thus, for the foregoing reasons, Respondent respectfully requests that this Court affirm the Circuit Court's decision to dismiss Petitioner's Complaint for failure to state a claim for which relief may be granted.

DEBORAH GABLE,

BY COUNSEL,



Perry W. Oxley (WVSB #7211)
Dave E. Rich (WVSB #9141)
Oxley Rich Sammons
517 9th Street, P.O. Box 1704
Huntington, WV 25718-1704
Phone: (304) 522-1138
Fax: (304) 522-9528
poxley@oxleylawwv.com
drich@oxleylawwv.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RONALD A. GABLE,

Petitioner,

v.

Appeal No. 19-1077
(Ohio County Case No. 19-C-167)

DEBORAH GABLE and
JOHN DOES(S)

Respondent.

CERTIFICATE OF SERVICE

The undersigned counsel for Respondent served the foregoing "***Respondent's Brief***" by depositing a true copy of the same in the United States mail, postage prepaid on this 14th day of May, 2020, upon the following counsel of record:

James A. Villanova, Esquire
Michael E. Metro, Esquire
Villanova Law Offices, PC
16 Chatham Square
Pittsburg, PA 15219

Perry W. Oxley (WVSB #7211)
Dave E. Rich (WVSB #9141)