

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Supreme Court No. 090622

BRANDY PINGLEY, et al.,

Plaintiffs/Appellants,

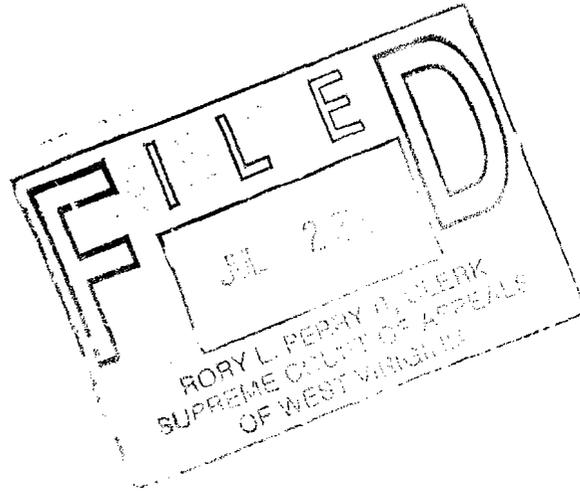
v.

HUTTONSVILLE PUBLIC  
SERVICE DISTRICT,

Defendant/Appellee.

Civil Action No. 08-C-135

Circuit Court of Randolph County  
(Honorable Jaymie Godwin Wilfong)



APPELLANT'S BRIEF

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## **INTRODUCTION**

The Appellants are residents of Randolph County, West Virginia. Defendant is the Public Service District which provides water and sewage services to Appellants' residence. Plaintiffs resided in the residence at issue for a very short time when on April 14, 2007, sewage backed up into the residence causing dangerous and hazardous material, including fecal matter, to accumulate in the residence. Plaintiffs suffered severe injuries, damages and losses as a direct and proximate result thereof. Defendant's insurance carrier paid a portion of Plaintiff's damages and made repairs to the home. Plaintiff's then filed a lawsuit claiming the remaining damages from the initial back up as well as damages incurred due to the negligent repair of the home. It is believed that Appellee did have or should have had knowledge that a problem existed with the system.

## **STATEMENT OF THE CASE**

Appellants are residents of a home located in the East Dailey area of Randolph County, West Virginia. Plaintiffs moved into the residence on or about January or February of 2007.<sup>1</sup> On April 14, 2007, heavy rains produced an excess amount of water in Appellants' neighborhood. At approximately 2:00 a.m. on April 14, 2007, Appellants awoke to a substantial amount of sewage backup throughout their home. Sewage was coming up from not only the toilets but the sinks. Appellant's were forced to vacate their home and were out of their residence for approximately three and one

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<sup>1</sup> It should be noted that the Defendant has been adamant the Plaintiffs never made any prior complaints about sewage back up and/or problems with the system. However, Plaintiffs only resided in the residence a short time prior to the back up, most of which would have been winter weather.

half months. Said back up was reported to the Appellee, Huttonsville Public Service District, which is the water and sewage provider for Plaintiff's residence. The insurer for the Defendant made partial payments to Appellee for the severe damages, injuries and losses which occurred as a result of the back up. However, the amount paid did not fully compensate the Pingley family for their damages nor did the Pingleys sign a release. The insurer also made arrangements to have the Pingley home cleaned and repaired as a result of the back up. Unfortunately the clean up and repair was performed in a negligent manner. Appellants filed a multi count lawsuit against Appellee alleging among other things a negligent failure to maintain and inspect the sewer system and a negligent repair of the home. Appellants also included a count that Appellee's clean up and/or repair of the residence following the initial back up was negligent.<sup>2</sup>

Prior to filing an answer in regards to said Complaint, Appellee filed a motion for summary judgment alleging that Appellant/Plaintiffs could prove no issue of material fact. Appellee alleged that the standard of care had not been breached because Appellants made no prior complaints regarding the sewer system. In support Appellee attached various documentation including affidavits which purported to prove that no prior complaints regarding the system had been made.. Appellant filed a response to said motion on the basis that a motion for summary judgment was premature in that they had not been afforded an opportunity to conduct discovery. Appellants were not permitted to conduct any discovery whatsoever. Appellee's Motion for Summary

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<sup>2</sup> It should be noted that both the circuit court and Appellee/Defendant have failed to ever address the negligent repair and clean up count and have only approached Appellants'/Plaintiffs' case regarding the initial back up.

Judgment was filed as the responsive pleading. Therefore, Appellants were not given the opportunity to engage in written discovery or depositions. Appellants' counsel submitted an affidavit, pursuant to West Virginia Rule of Civil Procedure 56(f) and the applicable case law regarding her retention of an expert and that if permitted to engage in discovery, the likelihood of obtaining evidence that Defendant breached the standard of care was probable. See Exhibit A. Following a hearing before the Judge John Henning, Appellee's Motion for Summary Judgment was granted. Appellant subsequently filed a Motion for Reconsideration and Motion for Relief From Judgment. Although Appellees' motion was denied, Circuit Court Judge Jaymie Goodwin Wilfong did not address the merits of Defendant's original motion. The denial was based solely upon the fact the motion for reconsideration was not timely filed and that new evidence submitted was available at the time of responding to the original motion. The Court in no way addressed the original motion for summary judgment or the appropriateness of the prior Circuit Court Judge, John Henning's, decision.

**ASSIGNMENT OF ERROR NUMBER ONE - THE TRIAL COURT ABUSED ITS DISCRETION GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

**ARGUMENT**

The court reviews a trial court's decision regarding a motion for summary judgment de novo. Painter v. Peavy, Syl. Pt. 1, 192 W.Va. 189, 451 S.E.2d 755(1994).

"A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 2, Logan Bank & Trust v. Letter Shop, Inc., 190 W. Va.

107, 437 S.E.2d 271(1993); Syl. Pt. 3, Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York, 148 W. Va. 160, 133 S.E.2d 770 (1963).

"If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure." Syl. Pt. 3, Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995). "Even after discovery the court should exercise caution in reaching a conclusion based on discovery" Board of Ed. v. Van Buren, 165 W. Va. 140, 143-44, 267 S.E.2d 440, 443 (1980) quoting Masinter v. Webco Company, et al., \_\_\_\_ W. Va. \_\_\_\_, 262 S.E.2d 433 (1980). The Supreme Court of Appeals of West Virginia has held that "a court considering a motion for summary judgment "must grant the nonmoving party the benefit of inferences, as [credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]" Mountain Lodge Assn. v. Crum & Forster, 210 W. Va. at 543 quoting Williams v. Precision Coil, Inc., 194 W. Va. 52, 59, 459 S.E.2d 329 (1995) quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

The defendant's motion for summary judgment should have been denied as " . . . questions of negligence, contributory negligence, proximate cause, intervening cause and concurrent negligence are questions of fact for the jury where the evidence is conflicting or when the facts, though undisputed, are such that reasonable men draw different

conclusions from them." Syl. Pt. 7, Sergent v. City of Charleston, 209 W. Va. 437, 549 S.E.2d 311 (2001), quoting Syl. Pt. 2, Evans v. Farmer, 148 W. Va. 142, 133 S.E.2d 710 (1963).

The plain language of Rule 56( c ) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. See W. Va. R. Civ. P. 56 ( c ) "Where a party is unable to resist a motion for summary judgment because of an inadequate opportunity to conduct discovery, that party should file an affidavit pursuant to W. Va.R.Civ.P. 56(f) and obtain a ruling thereon by the trial court. Syl. Pt. 3, Crain v. Lightner, 178 W.Va. 765, 772, 364 S.E.2d 778 (1987). Such affidavit and ruling thereon, or other evidence that the question of a premature summary judgment motion was presented to and decided by the trial court, must be included in the appellate record to preserve the error for review by this Court." Syl. Pt. 3, Crain v. Lightner, 178 W. Va. 765, 364 S.E.2d 778 (1987); Syl. Pt. 4, Harbaugh v. Coffinbarger, 209 W. Va. 57, 543 S.E.2d 338 (2000).

"An opponent of a summary judgment motion requesting a continuance for further discovery need not follow the exact letter of Rule 56(f) of the West Virginia Rules of Civil Procedure in order to obtain it. When a departure from the rule occurs, it should be made in written form and in a timely manner. The statement must be made, if not by affidavit, in some authoritative manner by the party under penalty of perjury or by written representations of counsel. At a minimum, the party making an informal Rule 56(f) motion must satisfy four requirements. It should (1) articulate some plausible basis for the party's belief that specified 'discoverable' material facts likely exist which have not yet become

accessible to the party; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier." Syl. Pt. 1, Powderidge Unit Owners Ass'n v. Highland Properties, Ltd., 196 W. Va. 692, 474 S.E.2d 872 (1996); Syl. Pt. 5, Harbaugh v. Coffinbarger, 209 W. Va. 57, 543 S.E.2d 338 (2000). Summary judgment is also inappropriate while discovery is being pursued as it was in this case. See Board of Ed. v. Van Buren, 165 W. Va. 140, 141-44, 267 S.E.2d 440 (1980). Summary judgment is appropriate only after the non-moving party has enjoyed "adequate time for discovery." Payne's Hardware v. Apple Valley Trading, 200 W. Va. 685, 690, 490 S.E.2d 772 (1997) quoting Celotex Corp., 477 U.S. at 322, 106 S.Ct. at 2552; Anderson, 477 U.S. at 250 n. 5, 106 S.Ct. at 2511 n. 5. "As this Court has recognized, summary judgment prior to the completion of discovery is "precipitous." Payne's Hardware v. Apple Valley Trading, 200 W. Va. 685, 690, 490 S.E.2d 772 (1997) quoting Williams, 194 W. Va. at 61, 459 S.E.2d at 338, quoting Board of Ed. v. Van Buren, 165 W. Va. 140, 144, 267 S.E.2d 440, 443 (1980).

In Williams v. Precision Coil, Inc., the Supreme Court of Appeals of West Virginia stated that "subject to the conditions of Rule 56(g), we believe a continuance of a summary judgment motion is mandatory upon a good faith showing by an affidavit that the continuance is needed to obtain facts essential to justify opposition to the motion." Payne's Hardware v. Apple Valley Trading, 200 W. Va. 685, 690, 490 S.E.2d 772 (1997) quoting Williams v. Precision Coil, Inc., 194 W. Va. at 61-62, 459 S.E.2d at 338-39.

This Court has addressed issues regarding Rule 56(f) requests for discovery extensions quite extensively. In Board of Education of the County of Ohio v. Van Buren and Firestone Architects the Court held that a granting summary judgment before discovery is completed must be viewed as precipitous. 165 W.Va. 140, 144, 267 S.E.2d 440 (1980). The plaintiff was a school board that contracted with the defendants to build a new school. Plaintiff filed a breach of contract action against defendants alleging negligent construction and/or design of the school which resulted in a collapse of the structure. Several defendants, including the engineer, filed motions for summary judgment and the same were granted by the circuit court. Although discovery had commenced, evidence suggesting that the engineer was negligent had not yet been developed. However, additional discovery would have clarified the engineer's role and therefore his potential liability. This Court reversed the decision of the circuit court and based the reversal upon the fact that the engineer was dismissed from the case before the plaintiffs were afforded the opportunity to conduct discovery in order to determine the involvement of the engineer. The Court also held that the proper action for the circuit court would have been to set a deadline for discovery and defer ruling on the motion for summary judgement until completion of discovery.

The circumstances are almost identical to the instant case. However, there is one important distinction. In the case at issue the Appellants had not been permitted to conduct ANY DISCOVERY WHATSOEVER. Appellants requested information from the Appellees in this matter prior to the filing of the Complaint, which was never provided. Exhibit B. However, Appellants were never afforded an adequate opportunity to conduct

formal discovery once suit was filed. Appellee filed a motion for summary judgment as the responsive pleading.

Appellants submitted a proper affidavit under Rule 56 setting forth a basis regarding the necessity of discovery. Said affidavit clearly meets the requirements set forth in Powderidge. Said affidavit indicated that Appellants retained an expert whom needed information which could be obtained through discovery to author a report. Said report was likely to indicate that the material and design of the subject system alone was sufficient to give Appellee notice that there was a problem and would be considered a breach of reasonable care in and of itself. Appellants' counsel further informed the Court at the hearing in this matter that the expert opined that he suspected the system was made from terra cotta pipe and that the use of the pipe itself would have breached the standard of care and would have provided notice to the Defendant of potential back up problems. Appellants also asserted they required the opportunity to depose and cross examine witnesses whom submitted affidavits in support of Appellee's motion as well as conduct discovery regarding the documents attached in support. Although Appellee produced self serving records and documentation, there is additional documentation which Appellee possessed that Appellants were never given the opportunity to review. Furthermore, Appellants were not given the opportunity to depose the individuals responsible for creating the documents and in charge of lodging complaints and record keeping.

This case was never set for trial, a discovery deadline was never set, the Appellant's never had the opportunity to formally disclose expert witnesses, and a Scheduling Order was never entered, confirming that the Appellant's never at any point

during the litigation slept on their rights. Furthermore, an answer was never filed and Appellants were afforded no opportunity to conduct discovery. Under West Virginia law the Court should have denied Defendant's motion for summary judgment. See Payne's Hardware v. Apple Valley Trading, 200 W. Va. 685, 690, 490 S.E.2d 772 (1997) quoting Williams, 194 W. Va. at 61, 459 S.E.2d at 338, quoting Board of Ed. v. Van Buren, 165 W. Va. 140, 144, 267 S.E.2d 440, 443 (1980); Payne's Hardware v. Apple Valley Trading, 200 W. Va. 685, 690, 490 S.E.2d 772 (1997) quoting Celotex Corp., 477 U.S. at 322, 106 S.Ct. at 2552; Anderson, 477 U.S. at 250 n. 5, 106 S.Ct. at 2511 n. 5.

This Honorable Court on several occasions has upheld summary judgment where a party did not comply either formally or informally with the requirements of Rule 56 (f). See Payne, Harbaugh, Lightner, Powderidge. The Court has indicated it cannot be an abuse of discretion where the appellant did not request an opportunity to conduct discovery from the circuit court. However, in the instant case, Appellants through the affidavit submitted by counsel and the response to the motion for summary judgment asked the court for an opportunity to conduct discovery. Exhibit A. This request was denied by the Court. In its order granting Appellee's motion the circuit court failed to address Appellant's Rule 56(f) request whatsoever other to mention briefly the affidavit submitted by counsel. See Exhibit C. The Court failed to analyze Rule 56(f) but merely recited the facts provided by Appellee's in its self serving motion for summary judgment. The court failed to provide justification for denying Appellants the opportunity to conduct discovery, which is mandatory under the law established by this Court.

It certainly sets a dangerous precedent if Defendants in the State of West Virginia are permitted to submit self serving affidavits and documentation in a response to a

complaint alleging that they are not liable and subsequently have such motions granted. It would serve to allow cases to be dismissed before Plaintiffs have had any opportunity whatsoever to engage in discovery and/or scrutinize any evidence presented by defendant.

### CONCLUSION

Appellant, asserts the circuit court failed to apply West Virginia Rule of Civil Procedure 56(f) and the case law regarding the same. The Court further failed to address essential legal issues and controlling law raised by the Appellants. The Appellant/Plaintiffs were not afforded the opportunity to conduct any discovery prior to the Court granting the motion for summary judgment and the Court failed to give any reason for overruling the black letter law which mandates that the non-moving party have an opportunity to conduct discovery prior to granting a motion for summary judgment. For all the hereinbefore described reasons, Appellants respectfully request that this Honorable Court reverse the decision of the circuit court in granting Appellee/Defendant's motion for summary judgment and return this matter to the active docket of the Circuit Court of Randolph County to afford Appellant/Plaintiffs an opportunity to fully conduct discovery.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Erika Klie Kolenich', written over a horizontal line.

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**CERTIFICATE OF SERVICE**

Service of the foregoing APPELLANT'S BRIEF was had upon the parties herein by delivering a true and correct copy thereof to their attorney this 30th day of June, 2009, as follows:

**Roberta F. Green**  
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**Charleston, WV 25339**  
*(Counsel for Appellee/Defendant)*

Respectfully submitted,  
  
\_\_\_\_\_  
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IN THE CIRCUIT COURT OF  
RANDOPH COUNTY, WEST VIRGINIA

BRANDY PINGLEY, et al.,

Plaintiffs,

Civil Action 08-C-135  
Judge John L. Henning

v.

HUTTONSVILLE PUBLIC  
SERVICE DISTRICT,

Defendant.

**PLAINTIFFS' RESPONSE TO DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT**

Now comes the Plaintiffs, by and through counsel, and respectfully moves this Honorable Court to Deny Defendant's Motion for Summary Judgment. Defendant's motion for summary judgment must be denied because the defendant as the party moving for summary judgment has failed to meet its burden and obligation to show that there is no genuine issue of material fact. See Syl. Pt. 8, Mountain Lodge Assn. v. Crum & Forster, 210 W. Va. 536, 558 S.E.2d 336 (2001); Syl. Pt. 6, Aetna Casualty & Surety Co. v. Federal Ins. Co., 148 W.Va 160, 133 S.E.2d 770 (1963). "A party who moves for summary judgment has the burden of showing that there is no genuine issue of material fact and any doubt as to the existence of such issue is resolved against the movant for such judgment." See Syl. Pt. 8, Mountain Lodge Assn. v. Crum & Forster, 210 W. Va. 536, 558 S.E.2d 336 (2001); Syl. Pt. 6, Aetna Casualty & Surety Co. v.

EXHIBIT

Federal Ins. Co., 148 W.Va 160, 133 S.E.2d 770 (1963). "Even if the trial judge is of the opinion to direct a verdict, he should nevertheless ordinarily hear evidence and, upon a trial, direct a verdict rather than try the case in advance on a motion for summary judgment." Syl. Pt. 1, Masinter v. WEBCO Co., 164 W. Va. 241, 262 S.E.2d 433 (1980); Syl. Pt. 1, Logan Bank & Trust v. Letter Shop, Inc., 190 W. Va. 107, 437 S.E.2d 271 (1993). "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 2, Logan Bank & Trust v. Letter Shop, Inc., 190 W. Va. 107, 437 S.E.2d 271(1993); Syl. Pt. 3, Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York, 148 W. Va. 160, 133 S.E.2d 770 (1963).

"If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure." Syl. Pt. 3, Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995). The defendant's motion for summary judgment must be denied because there are genuine issues of material fact to be tried and inquiry is desirable to clarify the application of law. Syl. Pt. 3, Aetna Casualty & Sur. Co. v. Federal Ins. Co. of New York, 148 W. Va 160, 133 S.E.2d 770 (1963); Syl. Pt. 2, Consolidation Coal Co. v. Boston Old Colony Ins. Co., 203 W.Va. 385, 508 S.E.2d 102 (1998); Syl. Pt. 2, Mallet v.

Pickens, 206 W. Va. 145, 522 S.E.2d 436 (1999). “Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the non-moving party, such as where the non-moving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” Syl. Pt. 2, Williams v. Precision Coil, Inc., 194, W.Va. 52, 459 S.E.2d 329 (1995); Syl. Pt. 3, Consolidation Coal Co. v. Boston Old Colony Ins. Co., 203 W.Va. 385, 508 S.E.2d 102 (1998). “Even after discovery the court should exercise caution in reaching a conclusion based on discovery” Board of Ed. v. Van Buren, 165 W. Va. 140, 143-44, 267 S.E.2d 440, 443 (1980) quoting Masinter v. Webco Company, et al., \_\_\_\_ W. Va. \_\_\_\_, 262 S.E.2d 433 (1980).

“The circuit court’s function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial.” Syl. Pt. 2, Harbaugh v. Coffinbarger, 209 W. Va. 57, 543 S.E.2d 338 (2000); Syl. Pt. 3, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994). “The question to be decided on a motion for summary judgment is whether there is a genuine issue of material fact and not how that issue should be determined.” Syl. Pt. 10, Mountain Lodge Assn. v. Crum & Forster, 210 W. Va. 536, 558 S.E.2d 336 (2001); Syl. Pt. 5, Aetna Casualty & Sur. Co. v. Federal Ins. Co. of New York, 148 W. Va 160, 133 S.E.2d 770 (1963). The Supreme Court of Appeals of West Virginia has held that “a court considering a motion for summary judgment “must grant the nonmoving party the benefit of inferences, as [c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a

judge[.]” Mountain Lodge Assn. v. Crum & Forster, 210 W. Va. at 543 quoting Williams v. Precision Coil, Inc., 194 W. Va. 52, 59, 459 S.E.2d 329 (1995) quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

The defendant’s motion for summary judgment should be denied as “ . . . questions of negligence, contributory negligence, proximate cause, intervening cause and concurrent negligence are questions of fact for the jury where the evidence is conflicting or when the facts, though undisputed, are such that reasonable men draw different conclusions from them.” Syl. Pt. 7, Sergent v. City of Charleston, 209 W. Va. 437, 549 S.E.2d 311 (2001), quoting Syl. Pt. 2, Evans v. Farmer, 148 W. Va. 142, 133 S.E.2d 710 (1963). Moreover, “summary judgment constitutes a decision that there are no genuine issues of material fact between the parties, and therefore a trial on the merits is foreclosed. For this reason, we have viewed summary judgment with suspicion . . .” Logan Bank & Trust v. Letter Shop, Inc., 190 W. Va. 107, 112, 437 S.E.2d 271, \_\_\_\_\_ (1993); Masinter v. WEBCO Co., 164 W. Va. 241, 241-242, 262 S.E.2d 433, 435 (1980), citing Gavitt v. Swiger, 162 W. Va. 238, 248 S.E.2d 849 (1978); Johnson v. Junior Pocahontas Coal Co., Inc., 160 W. Va. 261, 234 S.E.2d 309 (1977); Oakes v. Monongahela Power Co., 158 W. Va. 18, 207 S.E.2d 191 (1974); Hines v. Hoover, 156 W. Va. 242, 192 S.E.2d 485 (1972); State ex rel. Payne v. Mitchell, 152 W. Va. 448, 164 S.E.2d 201 (1968).

The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case,

and on which that party will bear the burden of proof at trial. See W. Va. R. Civ. P. 56(c). "Where a party is unable to resist a motion for summary judgment because of an inadequate opportunity to conduct discovery, that party should file an affidavit pursuant to W. Va.R.Civ.P. 56(f) and obtain a ruling thereon by the trial court. Such affidavit and ruling thereon, or other evidence that the question of a premature summary judgment motion was presented to and decided by the trial court, must be included in the appellate record to preserve the error for review by this Court." Syl. Pt. 3, Crain v. Lightner, 178 W. Va. 765, 364 S.E.2d 778 (1987); Syl. Pt. 4, Harbaugh v. Coffinbarger, 209 W. Va. 57, 543 S.E.2d 338 (2000).

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

Ltd., 196 W. Va. 692, 474 S.E.2d 872 (1996); Syl. Pt. 5, Harbaugh v. Coffinbarger, 209 W. Va. 57, 543 S.E.2d 338 (2000).

The first requirement of Powderidge and Harbaugh is satisfied because there are material witnesses that need deposed, including employees of the Defendant, Plaintiffs and expert witnesses. See Attached Exhibit A. Furthermore, Plaintiff's counsel has requested information from the Defendant's in this matter prior to the filing of the Complaint, which has never been provided. See Attached Exhibit B. The second requirement of Powderidge and Harbaugh is met because the case has not yet been set for trial, no expert witness disclosure deadline has been established and a discovery deadline has not been set. Further, the plaintiffs should be afforded the opportunity to conduct the depositions of witnesses and engage in written discovery in order to provide an expert report.

Next, the third requirement of Powderidge and Harbaugh is met because the depositions of the witnesses, experts and the written discovery will engender issues that are genuine, material and relevant to the allegations in the plaintiffs' complaint. Finally, the plaintiffs have satisfied the fourth requirement of Powderidge and Harbaugh because the case has not yet been set for trial and a discovery deadline has not been set. Further, the plaintiffs have not slept on their rights.

Summary judgment is also inappropriate while discovery is being pursued by the plaintiffs, as it is in this case at present. See Board of Ed. v. Van Buren, 165 W.Va. 140, 141-44, 267 S.E.2d 440 (1980). Summary judgment is appropriate only after the non-moving party has enjoyed "adequate time for discovery." Payne's Hardware v.

Apple Valley Trading, 200 W. Va. 685, 690, 490 S.E.2d 772 (1997) quoting Celotex Corp., 477 U.S. at 322, 106 S.Ct. at 2552; Anderson, 477 U.S. at 250 n. 5, 106 S.Ct. at 2511 n. 5. "As this Court has recognized, summary judgment prior to the completion of discovery is "precipitous." Payne's Hardware v. Apple Valley Trading, 200 W. Va. 685, 690, 490 S.E.2d 772 (1997) quoting Williams, 194 W. Va. at 61, 459 S.E.2d at 338, quoting Board of Ed. v. Van Buren, 165 W. Va. 140, 144, 267 S.E.2d 440, 443 (1980).

In Williams v. Precision Coil, Inc., the Supreme Court of Appeals of West Virginia stated that "subject to the conditions of Rule 56(g), we believe a continuance of a summary judgment motion is mandatory upon a good faith showing by an affidavit that the continuance is needed to obtain facts essential to justify opposition to the motion." Payne's Hardware v. Apple Valley Trading, 200 W. Va. 685, 690, 490 S.E.2d 772 (1997) quoting Williams v. Precision Coil, Inc., 194 W. Va. at 61-62, 459 S.E.2d at 338-39. "As we have often explained, "[t]he law ministers to the vigilant, not those who slumber on their rights." Payne's Hardware v. Apple Valley Trading, 200 W. Va. 685, 690-91, 490 S.E.2d 772 (1997) quoting Powderidge, 196 W. Va. at 703, Page 691 474 S.E.2d at 883, quoting Banker v. Banker, 196 W. Va. 535, 547, 474 S.E.2d 465, 477 (1996), citing Puleio v. Vose, 830 F.2d 1197, 1203 (1st Cir. 1987).

"[P]ursuant to the Rules of Civil Procedure, where a moving party introduces evidence indicating that there is no genuine issue of material fact, the resisting party must be provided reasonable opportunity to present evidence that the facts are indeed in dispute." Payne's Hardware v. Apple Valley Trading, 200 W. Va. 685, 688-89, 490 S.E.2d 772 (1997). At present the defendant's motion for summary judgment is

precipitous as the plaintiffs have not been afforded an adequate time for discovery. Payne's Hardware v. Apple Valley Trading, 200 W. Va. 685, 690, 490 S.E.2d 772 (1997) quoting Williams, 194 W. Va. at 61, 459 S.E.2d at 338, quoting Board of Ed. v. Van Buren, 165 W. Va. 140, 144, 267 S.E.2d 440, 443 (1980); Payne's Hardware v. Apple Valley Trading, 200 W. Va. 685, 690, 490 S.E.2d 772 (1997) quoting Celotex Corp., 477 U.S. at 322, 106 S.Ct. at 2552; Anderson, 477 U.S. at 250 n. 5, 106 S.Ct. at 2511 n. 5. Summary judgment should not be granted prior to an adequate discovery period. Payne's Hardware v. Apple Valley Trading, 200 W. Va. 685, 690, 490 S.E.2d 772 (1997) quoting Celotex Corp., 477 U.S. at 322, 106 S.Ct. at 2552; Anderson, 477 U.S. at 250 n. 5, 106 S.Ct. at 2511 n. 5.

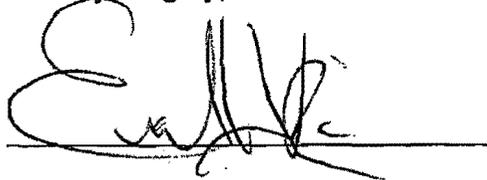
Defendant's motion for summary judgment is premature in that the plaintiffs have not had the opportunity to conduct discovery and disclose expert witnesses as a Scheduling Order has not been entered in this case requiring the disclosure or setting a deadline date for discovery. Payne's Hardware v. Apple Valley Trading, 200 W. Va. 685, 690, 490 S.E.2d 772 (1997) quoting Williams, 194 W. Va. at 61, 459 S.E.2d at 338, quoting Board of Ed. v. Van Buren, 165 W. Va. 140, 144, 267 S.E.2d 440, 443 (1980); Payne's Hardware v. Apple Valley Trading, 200 W. Va. 685, 690, 490 S.E.2d 772 (1997) quoting Celotex Corp., 477 U.S. at 322, 106 S.Ct. at 2552; Anderson, 477 U.S. at 250 n. 5, 106 S.Ct. at 2511 n. 5. Defendant has filed a premature motion for summary judgment which self servingly alleges that it has met the requisite standard of care due to the fact no prior complaints regarding Plaintiff's service were received. Plaintiffs' have been in contact with an expert witness who will author a report after

) requisite information has been collected through discovery. Plaintiffs anticipate said report will reflect Defendant did violate the standard of care through negligent maintenance, design and/or inspection See Attached Exhibit A.

**Wherefore**, based on all the above points and authorities, the plaintiffs respectfully request that this Court DENY defendant's motion for summary judgment, and for such other relief as this Court deems just.

Respectfully Submitted,

Brandy Pingley, et al.

A handwritten signature in black ink, appearing to read 'Brandy Pingley', is written over a horizontal line. The signature is stylized and cursive.

Erika H. Klie (9880)  
Klie Law Offices, PLLC  
Route 4 Box 529  
Buckhannon, WV 26201  
(304) 472-5007  
Fax (304) 472-1126

IN THE CIRCUIT COURT OF  
RANDOPLH COUNTY, WEST VIRGINIA

BRANDY PINGLEY, et al.,

Plaintiffs,

Civil Action 08-C-135  
Judge John L. Henning

v.

HUTTONSVILLE PUBLIC  
SERVICE DISTRICT,

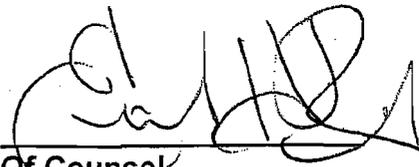
Defendant.

CERTIFICATE OF SERVICE

Service of the foregoing Plaintiff's Response to Defendant's Motion for Summary Judgment was had upon the parties herein by facsimile and mailing true and correct copies, by United States Mail, postage prepaid, this 24<sup>th</sup> day of September, 2008 to:

Roberta F. Green  
Shuman, McCuskey & Slicer  
1411 Virginia Street, East, Suite 200  
PO Box 3953  
Charleston, WV 25339  
*Attorney for Defendant*

Respectfully Submitted,  
Brandy Pingley et al.,



Of Counsel

Erika H. Klie (9880)  
Klie Law Offices, P.L.L.C.  
Route 4 Box 529  
Buckhannon, WV 26201

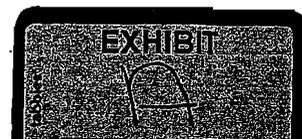
## AFFIDAVIT

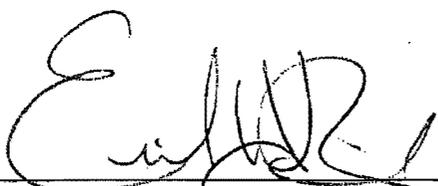
STATE OF WEST VIRGINIA  
COUNTY OF UPSHUR, TO- WIT

Your Affiant, Erika H. Klie first being duly sworn, deposes and says as follows:

1. Affiant is over the age of 18 and competent to testify to all the matters contained herein.
2. I am the counsel for Plaintiffs in a case styled Pingley, et al. v. Huttonsville Public Service District.
3. I have been in contact with Chuck Dutill, a public utility and/or septic system expert. Mr. Dutill can not author a report or provide an opinion until discovery has been conducted. Mr. Dutill requires information including but not limited to blueprints of the system, maintenance records. It is anticipated that Mr. Dutill will author a report following said discovery indicating Defendant did not meet the requisite standard of care in including but not limited to routine maintenance and inspection.
4. In order to respond to Defendant's allegation that they have met the requisite standard of care, Plaintiffs need to engage in written discovery and depositions. It is anticipated Plaintiffs will at that time be able to create a genuine issue of material fact regarding Defendant's inadequate maintenance of the sewer system and present evidence that Defendant knew or should have known about the potential problem.
5. Plaintiffs have previously requested documentation from Defendant and not been provided with the same. Plaintiffs have not yet engaged in discovery because Defendant has not yet answered the Complaint.

This Affidavit is, to the best of my knowledge, true and accurate.

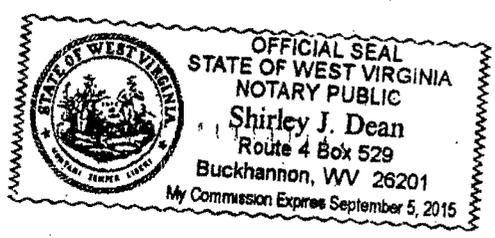


  
Erika H. Klie

Taken, sworn to and subscribed before me this 21<sup>th</sup> day of Sept. ~~May~~, 2008.

  
Notary Public

My Commission Expires: September 5, 2015



Route 4 Box 529  
Buckhannon, WV 26201  
Phone (304) 472-5007  
Fax (304) 472-1126

**KLIE LAW**  
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Brookfield, OH 44403  
Phone (330)714-9540

www.klielaw.com

May 16, 2008

Michael Stine  
Glatfelter Claims Management, Inc.  
183 Leader Heights Road  
P.O. Box 5126  
York, Pennsylvania 17405-9792  
Facsimile: 717-747-7051

Re: My Clients : Brandy and Jonathan Pingley  
Claim Number : WVCK207041003  
Date of Loss : 4/14/2007  
Your Insured : Huttonsville Public Service District

Dear Mr. Stine:

I am in receipt of your letter dated April 29, 2008. In order to better understand your position and to more effectively advise my client please supply our office copies of all documents pertaining to your investigation along with any pictures and videos taken. Also important to our assessment is any plans and/or blueprints of the sewer system of Brandy and Jonathan Pingleys' community.

Thank you for your timely cooperation with our requests. Should you have any questions or concerns please don't hesitate to contact our office.

Sincerely,



Erika H. Klie

EHK/kjk



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Buckhannon, WV 26201  
Phone (304) 472-5007  
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Sincerely,



Erika H. Klie

EHK/kjk



IN THE CIRCUIT COURT OF RANDOLPH COUNTY, WEST VIRGINIA

BRANDY PINGLEY, et al,

Plaintiffs,

vs.

08-C-135

HUTTONSVILLE PUBLIC  
SERVICE DISTRICT,

Defendant.

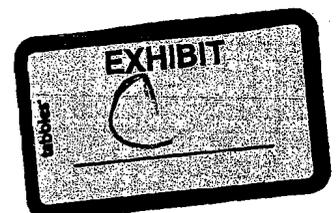
ORDER

On June 9, 2008, the Plaintiffs filed a Complaint with this Court against the Defendant, Huttonsville Public Service District (HPSD). The Defendant, HPSD filed a responsive pleading by way of a "Motion for Summary Judgment" on or about July 11, 2008.

This matter came for hearing on October 6, 2008 before this Court. After hearing arguments from all parties to this matter, the Court took the matters under advisement.

After mature consideration of the arguments made in the parties respective motions and pertinent case law, the Court FINDS as follows:

1. The Plaintiffs claims stem from an alleged sewer system failure in the Huttonsville Public Service District (HPSD) on or about April 14, 2007.
2. The Plaintiffs complaint alleges that the HPSD breached it's duty as a public utility to ensure water lines, sewer lines, and sewer systems are adequately maintained, inspected, in good repair, and compliant with all applicable code.
3. The Plaintiffs allege that the sewer system failed and caused substantial and hazardous back up into the Plaintiffs' property.
4. The Plaintiffs allege damages based on the following claims:
  - a. Loss of property,
  - b. Loss of use of property,
  - c. Emotion distress,



- d. Pain and suffering,
- e. The loss of consortium of family members,
- f. Loss of use of home,
- g. Diminution of value of home,
- h. Lost wages,
- i. Attorney fees and costs,
- j. Annoyance
- k. Inconvenience
- l. Humiliation
- m. Embarrassment
- n. Loss of enjoyment of life.

5. On or about July 11, 2008, the Defendant filed a Motion for Summary Judgment arguing that the Plaintiffs never informed the Defendant of any problems they experienced with the water/sewage system prior to April 17, 2007. Therefore, the Defendant argues that it had no notice of any problems regarding the Plaintiffs' sewer line and had no opportunity to remedy the alleged problems. The Defendant maintains that once the Plaintiffs notified the Defendant of the problem, the Defendant inquired as to the scope of damages and promptly repaired all damages to the Plaintiffs' premises.
6. That the Defendant's Motion for Summary Judgment included an affidavit of Ms. Bonnie Serrett, Executive Secretary of HPSD noting that the Plaintiffs came to the HPSD offices in April 17, 2008 with photographs of damage to their home and property. The affidavit also indicates that the HPSD promptly initiated an inquiry into the damage to the Plaintiffs' property and notified its insurer of potential liability. The affidavit states that the HPSD inquiry demonstrated that no complaints were made about water or sewer service to the Plaintiffs property prior to April 17, 2008.
7. On or about September 26, 2008, the Plaintiffs filed a "Response to Defendant's Motion for Summary Judgment" arguing that the Defendant's motion should be denied, as it is premature. Plaintiffs argue that the development of this case through discovery will show that the Defendant breached a duty of care through negligent maintenance, design and inspection of the sewer lines.
8. In support of their response, Plaintiffs submitted an affidavit authored and signed by their attorney, Erika Klie, Esq. Such affidavit indicates that Ms. Klie has contacted a public utility and septic system expert regarding the maintenance and design of the sewer lines involved in this matter. The affidavit states that, following discovery, the expert will likely author an opinion that the HPSD did not meet the requisite standard of care of reasonably prudent public service provider.

Preliminarily, the Court notes that summary judgment is proper in instances where there is no

genuine issue of material fact, as provided for under Rule 56(c) of the West Virginia Rules of Civil Procedure.

In reviewing the parties motions, the Court is of the opinion that summary judgment is proper, as the Plaintiff cannot make a sufficient showing on an essential element of the case that they have the burden to prove. The Plaintiff cannot prove an essential element of its claim of breach of duty by a public utility. The West Virginia Supreme Court of Appeals (WVSCA) has held that "summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." *Burless v. West Virginia University Hospitals*, 215 W.Va. 765 (2004), and *Painter v. Peavy*, 192 W.Va. 189 (1994).

As to a public utilities duty, the WVSCA held in *Calabrese v. City of Charleston*, 515 S.E.2d 814, 822, "a municipality, in maintenance of its sewerage system, owes only the duty of reasonable care to avoid damage to the property of others." The WVSCA also notes in *Calabrese* that without notice of a specific issue or concern with the property or service lines, a public utility has no duty to act beyond ensuring the line is open, in repair, and free from nuisance.

The Plaintiffs have not to date raised any allegations before this Court indicating that there was a pre-existing issue with the sewer line, prior to the April 14, 2008 problems. After the April 14, 2008 problems were brought to the HPSD's attention, some three days later, the HPSD took reasonable action. As the Defendant's Motion and accompanying exhibits indicate, the HPSD promptly inquired about the problems with Plaintiffs sewer line and notified it's insurer of the potential liability on April 17, 2008. After inquiring as to the problems, the Defendants repaired the Plaintiffs sewer line and any damages to the

property, as evidenced by insurance claim checks issued to the Plaintiffs following the April 14, 2008 problems.

Arguably, if the HPSD had knowledge of problems with the sewer lines and any impending damages and had ignored a duty to reasonably remedy those problems, they would be liable for such damages that might have occurred. In the case at bar, however, the HPSD had no knowledge of any problems with the Plaintiffs sewer line prior to April 17, 2008. Once the HPSD was made aware of such problems, it took prompt action to repair any damage to the Plaintiffs property and the Plaintiffs sewer lines.

Prior to the Plaintiffs notifying the Defendant on April 17, 2008 of the sewer line issue, the HPSD only had a duty to ensure the lines were open, in repair, and free from nuisance. The HPSD complied with the aforementioned duty, as outlined under *Calabrese*. Therefore, the Plaintiff cannot maintain a viable claim against the Defendant for breach of duty, as Plaintiffs are unable to make a sufficient showing of the essential elements of that claim.

In light of the foregoing, the Court hereby ORDERS that the Defendant's Motion for Summary Judgment be hereby GRANTED.

The Court further ORDERS that this case be DISMISSED and REMOVED from the Court's active docket.

It is, SO ORDERED.

The Clerk of this Court shall forward copies of this Order to counsel for the Plaintiffs, Erika Klie, Esq., and counsel for the Defendant, Robert F. Green, Esq.

Enter this 11th day of December, 2008.

**ENTERED**

DEC 12 2008

JUDGE

Civil ORDER BOOK  
NUMBER 84 PAGE \_\_\_\_\_  
PHILIP D. RIGGLEMAN, CLERK  
31: 8/1/08 . 286

A TRUE COPY:

ATTEST:

PHILIP D. RIGGLEMAN  
CLERK OF THE CIRCUIT COURT

BY [Signature] DEPUTY

E. Klie  
Green

[Signature]  
JUDGE