

12-0106

H. Waddell

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

WALTER E. HERSH and
MARY L. HERSH,

Plaintiffs,

v.

E-T ENTERPRISES LIMITED
PARTNERSHIP and
RALPH L. ECKENRODE,

*Defendants and
Third Party Plaintiffs,*

CIVIL ACTION NO. 10-C-149
HON. GINA M. GROH

v.

P. & H. INVESTMENTS, INC,
a Virginia corporation, and
TROLLERS ASSOCIATES, LLC,
a Virginia limited liability company,

Third Party Defendants.

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BERKELEY COUNTY
WEST VIRGINIA
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ORDER GRANTING SUMMARY JUDGMENT TO THIRD-PARTY
DEFENDANTS P&H INVESTMENTS, INC. AND TROLLERS
ASSOCIATES, LLC

THIS MATTER came before the Court on the 15th day of December,
2011, upon Third-Party Defendants P&H Investments, Inc. and Trollers Associates,
LLC's *Motion for Summary Judgment*, upon Defendants E-T Enterprise Limited Partnership and
Ralph L. Eckenrode's *Response to Third-Party Defendants' Motion for Summary Judgment*,
upon the Plaintiffs' *Memorandum in Opposition to Motion for Summary Judgment of Defendants
P&H Investments, Inc. and Trollers Associates, LLC*, and upon Third Party Defendants P&H

Investments, Inc. and Trollers Associates, LLC's *Reply to E-T Enterprises Limited Partnership and Ralph L. Eckenrode's Response to Our Motion for Summary Judgment*.

The Court, having reviewed the respective parties' pleadings, briefs, motions, and memoranda, and having further consulted pertinent legal authorities, finds that the Plaintiffs have not identified any disputed material facts regarding the open and obvious missing handrails along the stairs in question or the Plaintiff's admitted knowledge of those missing handrails before he fell. The Plaintiffs also have not identified any law which contradicts the fundamental West Virginia premises liability principle that a property owner is not liable for injuries sustained as a result of dangers that are "obvious, reasonably apparent, or as well known to the person injured as they are to the owner." *Burdette v. Burdette*, 147 W.Va. 313, 318, 127 S.E.2d 249, 252 (W. Va. 1962). Therefore, summary judgment in favor of Third-Party Defendants P&H Investments, Inc. and Trollers Associates, LLC is appropriate at this time. In support of this ruling, the Court makes the following Findings of Fact and Conclusions of Law:

Findings of Undisputed Fact

1. On October 9, 2009, at approximately 10:30 a.m., Plaintiff Walter E. Hersh (hereinafter "Mr. Hersh"), drove to a shopping plaza on Winchester Avenue in Martinsburg, West Virginia. Complaint, ¶¶2-4. He parked his car at the bottom of a small embankment near a set of stairs leading from a lower parking lot to an upper parking lot.¹ Hersh Deposition, pg. 14, lines 8-15. After getting out of his car, Mr. Hersh ascended the stairs and

¹ Defendant Ralph L. Eckenrode (hereinafter "Defendant Eckenrode"), who is the general partner in Defendant E-T Enterprises Limited Partnership, constructed and maintained the subject stairs. Eckenrode Deposition, pp. 27-29. The subject stairs led from a lower parking lot owned and controlled by the Third Party Defendants (Third-Party Defendant P&H Investments, Inc., manages property owned by Third-Party Defendant Trollers Associates, LLC) to an upper parking lot owned and controlled by the Defendants. See Agreed Order Substituting Third Party Defendants entered February 15, 2011. Although there may be some dispute between the Defendants and the Third Party Defendants concerning ownership and control of the subject stairs, these are not material facts for purposes of this summary judgment order, because the Court's decision today is grounded on whether or not a duty of care was owed to the Plaintiffs, regardless of who actually owned the stairs.

walked to a store called "Second Time Around." Complaint, ¶4. He spent approximately twenty-five (25) minutes browsing in "Second Time Around," then decided to leave. Hersh Deposition, pg. 38, lines 18-19. Mr. Hersh returned to his car using the same set of stairs he had ascended approximately twenty-five (25) minutes earlier. Hersh Deposition, pg. 40, lines 13-15. He was able to navigate one or two steps as he descended, then fell down the remaining steps and sustained a head injury. Complaint, ¶¶4-5; Hersh Deposition, pg. 44, lines 12-22.

2. The subject stairs did not have a handrail on either side. Complaint, ¶¶12-13; Hersh Deposition, pg. 30. Lines 11-12.²

3. Mr. Hersh confirmed that the absence of handrails along either side of the subject stairs was an open and obvious condition. Hersh Deposition, pg. 20, lines 21-23; pg. 40, line 22 - pg. 41, line 1. Specifically, Mr. Hersh testified:

Q: Looking at Exhibit 7 [a photograph of the stairs taken shortly after the accident], Mr. Hersh, can you tell that there are no handrails on those steps?

A: Yes.

Q: Is that an open condition as depicted on Exhibit No. 7?

A: What do you mean by open condition?

Q: Something that anybody could see if they looked at the steps?

A: Yeah.

[. . .]

Q: [. . .] As you look at Exhibit No. 7 and the steps depicted in Exhibit No. 7, is there anything hiding the condition or lack of a handrail on those steps?

² Defendant Eckenrode removed the handrails from the subject stairs because he feared for the safety of a group of local teenagers who had been skateboarding down the rails and the stairs despite several warnings to stop. Eckenrode Deposition, pg. 12, line 13 - pg. 13, line 6; pg. 49, line 10 - pg. 50, line 5.

A: No, not from this.

Q: Is it obvious that there's no handrail on those steps?

A: Yes, from the picture, looking at the picture it is.

Hersh Deposition, pg. 24, line 8 - pg. 25, line 11. Mr. Hersh also confirmed that nothing obscured his view of the subject stairs or prevented him from recognizing that there were no handrails along either side of the stairs before he fell. Hersh Deposition, pg. 20, lines 21-23; pg. 40, line 22 - pg. 41, line 1.

4. Aside from the missing handrails, the subject stairs appeared to be safe before Mr. Hersh ascended them on October 9, 2009. He explained:

Q: Did you have any concerns about the steps before you went up the steps?

A: No.

Q: Did you take any special precautions before going up the steps aside from using your cane?

A: No.

[...]

Q: Did you feel that the steps were unsafe when you started to walk up them?

A: When I started walking up them they did not feel unsafe.

Q: What do you mean by they did not feel unsafe?

A: They were not unstable. In other words, my feet planted solidly on something that was steady.

Q: Okay. Did you have any concerns about the safety of those steps as you walked up the steps?

A: No.

Hersh Deposition, pg. 36, lines 12-17; pg. 37, line 21 - pg. 38, line 6. The subject stairs also appeared to be safe before Mr. Hersh descended them twenty-five (25) minutes later on October 9, 2009. He explained:

Q: Did you feel the steps were unsafe before you started going down them?

A: No. Again, the steps themselves, the step that I put my foot on was as solid as it was when I came up.

[. . .]

Q: Did the steps appear to be safe to you before you started walking down them?

A: Yes.

Hersh Deposition, pg. 41, lines 2-5; pg. 41, lines 21-23. Mr. Hersh further testified that it was not raining, there was no moisture on the steps, and the steps were not slippery before he fell.

Hersh Deposition, pg. 38, lines 7-9; pg. 41, lines 13-15; and pg. 19, lines 16-19.

5. Based upon these facts, Mr. Hersh and his wife, Mary L. Hersh (hereinafter "Mrs. Hersh"), allege that the Defendants negligently maintained their property, and thus caused or contributed to Mr. Hersh's October 9, 2009 fall and resulting head injury.

Complaint, ¶¶11-16. Specifically, Mr. and Mrs. Hersh allege:

Defendants breached the duty of care owed to the plaintiff by failing to . . . maintain [the] steps in a safe condition and non-defective condition, including but not limited to, defendants' failure to have one or more handrails attached to the steps.

Complaint, ¶11; Hersh Deposition, pg. 54, lines 13-21; Hersh Response to Defendants' Interrogatory No. 4.³ In support of these allegations, Mr. and Mrs. Hersh hired a professional

³ Please identify and describe all dangerous and/or defective conditions which you contend caused or contributed to the accident described in your Complaint. ANSWER: Defendant failed to maintain the stairs in a safe condition. Additionally, there were no handrails attached to the stairs, which is in violation of the 2003 IC International Property Maintenance Code adopted by the City of Martinsburg.

engineer, Richard T. Hughes, P.E., as their expert witness. During his June 15, 2011, deposition, Mr. Hughes confirmed that Mr. Hersh did not slip and fall, but most likely tripped and fell down the stairs:

Q: Did you try to do any other type of human factors analysis from Mr. Hersh's fall in October 9, [2009]?

A: No, not that I recall other than - let me interject one thing, it was my understanding that the gentleman landed on his face. I mean, the witness saw that he was faced down. That tells me that . . . you slipped backwards, you trip forward. So, it appears that he fell forward, you know. That's . . . and they could have misstepped. You slip off your foot, you trip off the toe of your foot.

Q: So, the fact that Mr. Hersh landed on his face would indicate to you that he did not slip?

A: Possibly - yes; . . . it appears to me that people do not slip forward. They trip and fall forward, they slip backwards.

[. . .]

Q: Do you know whether Mr. Hersh tripped?

A: I believe he misstepped.

Hughes Deposition, pg. 38, lines 3-22; pg. 65, lines 20-21. Mr. Hughes also opined that the lack of a handrail along the subject stairs was the only defect or condition which caused or contributed to Mr. Hersh's fall:

Q: Aside from the lack of handrail, do you have an opinion that any other defect or hazard in the stairs caused or contributed to Mr. Hersh's fall?

A: No, the guardrail - the guard and the handrail combination, that's the . . . primary issue.

Q: Is there anything else that you have -

A: No.

Q: as an opinion?

A: No.

Hughes Deposition, pg. 77, line 21 - pg. 78, line 6. Finally, Mr. Hughes confirmed that the lack of a handrail along the subject stairs was an open and obvious condition:

Q: Is this one of the photographs that you reviewed before you formed your opinions on September 27, 2010?

A: Yes, it is.

Q: Is it your understanding that Photograph 5 - Exhibit 5 depicts the condition of the stairs that Mr. Hersh fell down on October 9, 2009?

A: Yes.

[. . .]

Q: Okay. Can you from looking at Photograph No. 5 see for yourself that there are no handrails or guardrails?

A: Yes.

[. . .]

Q: [. . .] Looking at the photograph we've marked as Exhibit 5 . . . can you tell from looking at that photograph that there is neither a handrail nor a guard?

A: Yes, I can tell by looking at it.

Q: Is there anything hiding that fact?

A: No.

Q: Is that in fact open?

A: Yes.

Q: Is that in fact obvious?

A: Yes.

Hughes Deposition, pg. 22, lines 1-23; pg. 117, lines 10-22.

6. Third-Party Defendants P&H Investments and Trollers now move for summary judgment, arguing that they did not own, construct, pay for, or control the subject staircase, and that pursuant to West Virginia tort law they owed no duty of care to Mr. Hersh to protect against open and obvious dangers.

Conclusions of Law

1. With regard to Third-Party Defendants P&H Investments and Trollers' first summary judgment contention, that the Third-Party Defendants did not own, construct, pay for, or control the subject staircase, both the Plaintiffs and Defendants E-T Enterprises and Eckenrode maintain that the staircase straddles the property line between E-T Enterprises and Trollers, and cite *Conley v. Stollings*, 223 W. Va. 762, 679 S.E.2d 594 (W. Va. 2009), for the proposition that ownership of the land, regardless of who actually constructed the stairs, gives rise to a duty of reasonable care to non-trespassing entrants. The Court notes merely that there appears to exist a legitimate question of material fact on this point, and moves on to address the Third-Party Defendants' second summary judgment contention, that "a property owner is not liable for injuries sustained as a result of dangers that are obvious, reasonably apparent, or as well known to the person injured as they are to the owner." It is this second summary judgment ground which will be addressed in the remainder of this Order.

2. In West Virginia, a property owner is not liable for injuries sustained as a result of dangers that are "obvious, reasonably apparent, or as well known to the person injured as they are to the owner." *Burdette v. Burdette*, 147 W.Va. 313, 318, 127 S.E.2d 249, 252 (W. Va. 1962). In this case, the allegedly dangerous conditions identified by the Plaintiffs were open, obvious, reasonably apparent, and known to Mr. Hersh on October 9, 2009, before he fell.

3. In keeping with the fundamental principle that a property owner is not liable for injuries sustained as a result of dangers that are “obvious, reasonably apparent, or as well known to the person injured as they are to the owner,” the West Virginia Supreme Court has consistently held that:

The duty to keep premises safe for invitees applies only to defects or conditions which are in the nature of hidden dangers, traps, snares, pitfalls, and the like, in that they are not known to the invitee, and would not be observed by him in the exercise of ordinary care. The invitee assumes all normal, obvious, or ordinary risks attendant on the use of the premises, and the owner or occupant is under no duty to reconstruct or alter the premises so as to obviate known and obvious dangers.

Burdette, 147 W.Va. at 318. Accordingly, a property owner is only liable “if he allows some hidden, unnatural condition to exist which precipitates the fall.” *McDonald v. University of West Virginia Board of Trustees*, 191 W.Va. 179, 181-182, 444 S.E.2d. 57, 59-60 (W. Va. 1994) (affirming that “[t]he owner . . . of premises used for business purposes is not an insurer of the safety of an invited person,” and, thus, is not liable for injuries in the absence of actionable negligence). The Plaintiffs have identified, at most, two defects or conditions which allegedly caused Mr. Hersh to fall on October 9, 2009: (1) missing handrails along the subject stairs; and (2) missing guards (vertical spindles below the handrails) along the subject stairs. The undisputed, material facts establish, however, that both of these defects or conditions were either known to Mr. Hersh or could have easily been observed by Mr. Hersh in the exercise of ordinary care before he fell on October 9, 2009. Moreover, neither of these alleged defects or conditions was hidden or unnatural. Therefore, these alleged defects or conditions are not actionable under West Virginia law.

4. In his testimony about the missing handrails, Mr. Hersh admitted that he began using his cane on the subject stairs specifically because there were no handrails. He testified:

Q: Why were you using your cane as you started down the steps?

A: For the same reason I used the cane going up the steps.

Q: Because there was no handrail?

A: Yes.

Hersh Deposition, pg. 48, lines 9-14. This admission clearly demonstrates that Mr. Hersh knew there were no handrails along the subject stairs before he fell on October 9, 2009.

5. Even if Mr. Hersh failed to notice there were no handrails along the subject stairs before he fell, it is undisputed that the missing handrails constituted an open and obvious condition on October 9, 2009. Mr. Hersh testified:

Q: Looking at Exhibit 7 [a photograph of the stairs taken just after the accident], Mr. Hersh, can you tell that there are no handrails on those steps?

A: Yes.

Q: Is that an open condition as depicted on Exhibit No. 7?

A: What do you mean by open condition?

Q: Something that anybody could see if they looked at the steps?

A: Yeah.

[. . .]

Q: [. . .] As you look at Exhibit No. 7 and the steps depicted in Exhibit No. 7, is there anything hiding the condition or lack of a handrail on those steps?

A: No, not from this.

Q: Is it obvious that there's no handrail on those steps?

A: Yes, from the picture, looking at the picture it is.

Hersh Deposition, pg. 24, line 8 - pg. 25, line 11. Mr. Hersh also admitted that nothing obscured his view of the subject stairs or prevented him from recognizing that there were no handrails along either side of the stairs before he fell. Hersh Deposition, pg. 20, lines 21-23; pg. 40, line 22 - pg. 41, line 1. These admissions demonstrate that Mr. Hersh could have easily observed the missing handrails simply by exercising due care for his own safety before he fell on October 9, 2009.

6. Mr. Hersh's admissions demonstrate that the Defendants' missing handrails and guardrails are not actionable under West Virginia law because: (1) the condition was open, obvious, reasonably apparent, and as well known to Mr. Hersh as it was to the Defendants on October 9, 2009; (2) the condition was not hidden in any manner; and (3) the condition was actually known to Mr. Hersh or could have easily been observed by Mr. Hersh in the exercise of ordinary care on October 9, 2009.

7. Even in negligence cases, summary judgment is appropriate where the plaintiff cannot establish the essential elements of his *prima facie* case. Syl. pt. 4, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (W. Va. 1994). Rule 56(c) of the West Virginia Rules of Civil Procedure mandates that summary judgment shall be granted if:

[T]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

W.Va. R. Civ. P. 56(c). "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.” Syl. pt. 4, *Painter*. An essential element of any West Virginia premises liability case is proof that the defect or condition allegedly causing injury was not “obvious, reasonably apparent, or as well known to the person injured as [it was] to the owner.” *Burdette, supra*. Another essential element of any West Virginia premises liability case is proof that the condition allegedly causing injury was a “hidden, unnatural” condition. *McDonald, supra*. Finally, a third essential element of a West Virginia premises liability case is proof that the defect or condition allegedly causing injury was not “known to the [plaintiff] and would not be observed by him in the exercise of ordinary care.” *Burdette, supra*. In this case, the undisputed, material facts clearly demonstrate that the Plaintiffs cannot satisfy these essential elements of their premises liability claim against the Defendants under West Virginia law. Any alleged defect or dangerous condition of the Defendants’ stairs and stair treads was open, obvious, reasonably apparent, well known to Mr. Hersh, and/or would have been observed by Mr. Hersh in the exercise of ordinary care for his own safety on October 9, 2009. Therefore, *Burdette* and its progeny hold that the Plaintiffs cannot make a *prima facie* case of premises liability against the Defendants under West Virginia law. Summary judgment in favor of the Third-Party Defendants is thus appropriate.

8. Several courts have granted summary judgment to West Virginia property owners in similar premises liability cases where the plaintiff cannot establish the essential elements of his *prima facie* case. “As a general proposition, issues of negligence are not ordinarily susceptible to adjudication upon a motion for summary judgment . . . , but when the party making the motion clearly establishes that the case involves no genuine issue of material fact, the court may properly render summary judgment in his favor.” Syl. pt. 7, *Anderson v.*

Turner, 155 W.Va. 283, 184 S.E.2d 304 (W. Va. 1971). See also *Hatten v. Mason Realty Co.*, 148 W.Va. 380, 389, 135 S.E.2d 236, 242 (W. Va. 1964). Given Mr. Hersh's own admissions in this case, it is clear that there are no genuine issues of material fact which would preclude summary judgment.

9. In *Eichelberger v. United States*, 2006 U. S. Dist. LEXIS 19250, 2006 WL 533399 (N.D. W.Va. 2006), a case closely analogous to the instant case, the District Court considered a federal inmate's claim that the defendant United States was negligent for: (1) failing to install guard rails along a ramp outside the recreation center at the Federal Correctional Institution in Morgantown; and (2) failing to properly maintain the ramp in icy conditions. In *Eichelberger*, the defendant United States filed a motion for summary judgment, which motion was ultimately granted by the District Court. *Id.* at 1. The District Court found that the plaintiff-inmate, like Mr. Hersh in the instant case, was aware that the subject ramp (stairs) had no guardrails (handrails). Applying West Virginia's substantive law, the District Court recognized that "[i]n West Virginia, an owner of premises is not liable for injuries sustained as a result of dangers that are obvious, reasonably apparent, or as well known to the person injured as they are to the owner." *Id.* at 3 (citing *Burdette, supra*). The District Court then concluded that summary judgment for the landowner was appropriate because "the absence of guardrails was an obvious condition and well known to the plaintiff prior to his fall." *Id.*

10. In *Alexander v. Curtis*, 808 F.2d 337 (4th Cir. 1987), the Fourth Circuit considered the claim of a plaintiff who injured his ankle while working at the defendants' camp. The plaintiff fell from a "climbing device," a cross between a ladder and stairs, which was excessively steep, lacked any type of handrails, and contained a protrusion at the top step. The District Court applied West Virginia's substantive law and observed that a property owner's duty

to maintain his premises in a reasonably safe condition is “not unlimited,” because “[a] land owner is not required to obviate dangers which are open and obvious, nor to warn of such patent hazards.” *Id.* at 339 (citing *Burdette, supra*). In affirming a directed verdict for the defendants, the Fourth Circuit found that “by the plaintiff’s admission, the entire device was in plain view, [and] all of these defects had to be readily visible to anyone approaching the [climbing] device.” *Id.* It also found there was “no evidence as to a hidden nature of the protrusion” which tripped the plaintiff. *Id.* Accordingly, the Fourth Circuit found that the plaintiff’s injuries were not actionable under West Virginia law. *Id.* at 339-340.

11. In *McDonald v. University of W. Va. Bd. of Trustees*, 191 W. Va. 179, 444 S.E.2d 57 (W. Va. 1994), the Supreme Court of Appeals considered the claim of a West Virginia University student who fell and injured herself while running on university property during a class. The Court affirmed its adoption of the *Burdette* “open and obvious” principle as a limitation on the duty of reasonable care owed to a business invitee, and offered this additional explanation:

What this, in effect, says is that an owner of business premises is not legally responsible for every fall which occurs on his premises. He is only liable if he allows some hidden, unnatural condition to exist which precipitates the fall In order to make out a *prima facie* case of negligence in a slip and fall case, the invitee must show (1) that the owner had actual or constructive knowledge of the foreign substance or defective condition and (2) that the invitee had no knowledge of the substance or condition or was prevented by the owner from discovering it.

McDonald, supra at 182, 60.. The Supreme Court in *McDonald* went on to affirm the trial court’s granting of summary judgment to the defendant.

12. In *Senkus v. Moore*, 207 W.Va. 659, 535 S.E.2d 724 (W. Va. 2000), the Supreme Court of Appeals upheld summary judgment for defendants in a “trip and fall” case.

The plaintiff tripped over a scale located in plain view in a hallway of the defendants' veterinary hospital. Although she testified that nothing obstructed her view of the scale, the plaintiff still argued that the defendants were negligent in the placement of the scale, and thus responsible for her injuries. Upon consideration of the defendant's motion for summary judgment, the circuit court found the placement of the scales in question to have been open and obvious. *Id.* at 661, 726. On appeal, the Supreme Court of Appeals agreed, observing that the plaintiff "failed to offer any evidence before the trial court to show that the placement of the scale breached any duty to them or that it was inherently dangerous or unsafe," and that the plaintiff's "negligent failure to watch where she was walking was the sole precipitating cause of the accident." *Id.* at 662, 727.

13. In *Stevens v. West Virginia Inst. of Tech.*, 207 W. Va. 370, 532 S.E.2d 639 (W. Va. 1999), the Supreme Court of Appeals considered the claim of a college student injured while setting up a volleyball standard at a gymnasium on campus. The Court explicitly reaffirmed the *Burdette* "open and obvious" principle as follows:

[A] landowner owes any non-trespassing entrant the duty of reasonable care under the circumstances The duty of reasonable care does not require that the landowner be an "insurer of the safety of [the person] present on such premises and, if such [landowner] is not guilty of actionable negligence or willful or wanton misconduct and no nuisance exists, he is not liable for injuries there sustained by such [person]."

Id. at 374, 643 (citing Syl. pt. 3, *Burdette*). Finding that the plaintiff had failed to provide evidence sufficient to survive the defendant's summary judgment motion, the Supreme Court of Appeals affirmed the circuit court's granting of summary judgment to the defendant.

14. In *Hawkins v. U.S. Sports Assoc., Inc.*, 219 W. Va. 275, 633 S.E.2d 31 (W. Va. 2006), the Supreme Court of Appeals considered the claims of a softball player who injured

his knee on a plastic pipe while sliding toward first base during a tournament. The Court explained:

[I]n order to establish a *prima facie* negligence claim in a slip and fall case, "the invitee must show: (1) that the owner had actual or constructive knowledge of the foreign substance or defective condition; and (2) that the invitee had no knowledge of the substance or condition or was prevented by the owner from discovering it."

Id. at 279, 35 (citing *McDonald, supra*). Finding that the defendant landowner in *Hawkins* did not have any actual or constructive knowledge of the pipe in question, the Supreme Court of Appeals affirmed the circuit court's grant of summary judgment.

15. The foregoing cases collectively compel the Court to the conclusion that *Burdette* remains good law in West Virginia, and correspondingly that under West Virginia law a landowner owes no duty of care to protect against open and obvious dangers.

16. The Supreme Court of Appeals has expressly rejected the Plaintiffs' argument that *Burdette* has been superseded by *King v. Kayak Manufacturing Corp.*, 182 W. Va. 276, 282, 387 S.E.2d 511, 517 (W. Va. 1989). In *Walters v. Fruth Pharmacy, Inc.*, 196 W. Va. 364, 472 S.E.2d 810 (W. Va. 1996), the Supreme Court of Appeals considered the claims of a customer who fell in a drug store parking lot and the validity of a jury instruction based upon *Burdette*. The Court specifically addressed the distinction between issues of legal duty addressed in *Burdette*, and defenses based upon a plaintiff's fault (i.e. contributory negligence or assumption of risk), addressed in *King*. The plaintiff in *Walters* argued that the defendant's jury instruction, based upon *Burdette*, misapplied the Court's comparative negligence rule. The instruction read:

If the jury believes from the preponderance of the evidence that Betty Walters slipped on an oil spot and that the oil spot was not hidden from her and should have been observed by her in the

exercise of ordinary care, then you may find that her conduct caused the fall and your verdict may be for Fruth Pharmacy.

Id. at 367, 813. The plaintiff further argued that this instruction improperly called for application of contributory negligence when West Virginia law provided for comparative negligence pursuant to *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (W. Va. 1979). The Court acknowledged that the law concerning contributory negligence had changed since *Burdette*, but also observed that the *Burdette* instruction did “not instruct the jury on the doctrine of comparative negligence.” *Id.* at 368, 814. The Court found “no merit to [plaintiff’s] alleged error concerning confusion with or a return to the doctrine of contributory negligence.” *Id.* at 369, 815. Instead, the Court agreed with the defendant’s position that the instruction “was meant to describe [the defendant’s] *duty* toward invitees and what constituted a breach of those duties.” *Id.* at 368, 814. The Plaintiffs’ arguments against application of the well-established *Burdette* “open and obvious” principle in this case are similarly misplaced. Here, as in *Walters*, the Plaintiffs argue that reliance on the *Burdette* “open and obvious” principle ignores *King* and *Bradley* comparative negligence principles. The Plaintiffs’ argument fails, just as it did in *Walters*, because it ignores the distinction between the legal duty owed by a property owner and defenses based upon a plaintiff’s fault. *Burdette* “was meant to describe [a property owner’s] duty toward invitees,” not defenses related to a plaintiff’s fault, such as contributory negligence or assumption of risk.

17. In their Response, the Plaintiffs focus solely on the general principle that violation of a statute or regulation constitutes *prima facie* evidence of negligence. *See, e.g.*, Syl. pt. 1, *Miller v. Warren*, 182 W.Va. 560, 390 S.E.2d 207 (W. Va. 1990) (“Failure to comply with a fire code or similar set of regulations constitutes *prima facie* negligence, if an injury proximately flows from the non-compliance and the injury is the sort the regulation was intended

to prevent”); *see also* Plaintiffs’ Response, pp. 8-9. This argument ignores the *Burdette* “open and obvious” principle and the line of West Virginia cases which have established the specific requirements for a *prima facie* case of negligence against a property owner in a premises liability case:

In order to make out a *prima facie* case of negligence in a slip and fall case, the invitee must show (1) that the owner had actual or constructive knowledge of the foreign substance or defective condition and (2) that the invitee had no knowledge of the substance or condition or was prevented by the owner from discovering it.

McDonald, 191 W.Va. at 182; *Hawkins*, 219 W.Va. at 279. As *McDonald* and *Hawkins* clearly demonstrate, the Plaintiffs cannot make a *prima facie* case of negligence against the Defendants in this premises liability case without specifically proving that Mr. Hersh “had no knowledge” of the missing handrails along the subject stairs. Based upon Mr. Hersh’s own admissions, this is impossible for the Plaintiffs to prove in this case.

18. In their Response, the Plaintiffs cite Syl. pt. 6 of *Morris v. City of Wheeling*, 140 W.Va. 78, 82 S.E.2d 536 (W. Va. 1954), for the proposition that “[o]nce a *prima facie* case of actionable negligence is established, a case must be submitted to a jury and not decided against the plaintiff as a matter of law.” *See* Plaintiffs’ Response, pg. 9. This argument misstates the actual syllabus point which reads:

A *prima facie* case of actionable negligence is that state of facts which will support a jury finding that the defendant was guilty of negligence which was the proximate cause of plaintiff’s injuries, that is, it is a case that has proceeded upon sufficient proof to the stage where it must be submitted to a jury and not decided against the plaintiff as a matter of law.

Id. This argument also ignores the operative word “actionable.” Essentially, the Plaintiffs attempt to avoid the *Burdette* “open and obvious” principle by contending they can make a *prima*

facie case of premises liability against the Defendants under West Virginia law simply by showing that the missing handrails along the subject stairs violated the Martinsburg building code.⁴

19. In *Burdette* and its progeny, the Supreme Court of Appeals has clearly established that “open and obvious” conditions which are known to a plaintiff are not “actionable,” and do not create liability for a West Virginia property owner. The Court’s synthesis of West Virginia’s premises liability law in *McDonald, supra*, is clear and direct:

As previously stated in *Burdette v. Burdette, supra*, the duty to keep premises safe for invitees applies only to defects or conditions which are in the nature of hidden dangers, traps, snares, pitfalls, and the like. The duty to keep premises safe does not apply to defects or conditions which should be known to the invitee or which would be observed by him in the exercise of ordinary care. As otherwise stated, there is no liability for injuries from dangers that are obvious, reasonably apparent, or as well known to the person injured as they are to the owner or occupant.

Id. at 183, 61. Given this clear statement of West Virginia law, an open, obvious, and known condition, like the missing handrails along the subject stairs in the case *sub judice*, cannot, as a matter of law, constitute a “state of facts which will support a jury finding that the defendant was guilty of negligence,” as contemplated by *Morris, supra*. Moreover, an open, obvious, and known condition, like the missing handrails along the subject stairs, cannot, as a matter of law, establish “a case that has proceeded upon sufficient proof to the stage where it must be submitted to a jury,” as contemplated by *Morris, supra*. In summary, open, obvious, and known conditions

⁴ The Defendants do not concede that the open and obvious missing handrails along the subject stairs were an actual violation of the Martinsburg building code, which is based on the International Property Maintenance Code. For purposes of this summary judgment motion, however, the Court will assume the missing handrails along the subject stairs constituted a building code violation. This is not a material dispute of fact because, even if the Defendants violated the building code by removing the subject handrails, such violation was “open and obvious” and, thus, did not create a legal duty or actionable negligence under West Virginia law.

cannot create *actionable* negligence in West Virginia premises liability cases, even if those conditions are a violation of a regulation or ordinance.

20. The Supreme Court of Appeals has applied the *Burdette* “open and obvious” principle and upheld summary judgment in favor of a property owner despite violations of a regulation or statute. In *Estate of Helmick by Fox v. Martin*, 192 W. Va. 501, 453 S.E.2d 335 (W. Va. 1994), the Supreme Court of Appeals considered the claim of a plaintiff who alleged that her decedent was killed as a result of a negligently designed and maintained restaurant parking lot. Specifically, the plaintiff contended the restaurant operator’s parking lot violated West Virginia Department of Highways (WVDOH) regulations. *Id.* at 503, 337. A deposition was taken from a WVDOH district engineer. He testified that WVDOH regulations did not allow unrestricted entry onto a highway for a distance as large as the restaurant owner’s parking lot in that case, which was 160 feet. For commercial property, the maximum allowable opening onto the highway was only fifty (50) feet. The WVDOH engineer also testified that a permit was required for every entry onto a state highway from a driveway or a parking lot. No permit was found for the restaurant owner’s parking lot. A permit would not have been issued because the parking lot did not meet the minimal WVDOH requirements. Despite this clear violation of WVDOH regulations, the Supreme Court of Appeals upheld summary judgment in favor of the restaurant owner specifically because the “the [open and obvious] standard of care set forth in *Burdette v. Burdette*, *supra* [was] controlling.” *Id.* at 505, 339. In upholding summary judgment, the Court applied the *Burdette* “open and obvious” principle and observed that “[t]he evidence [was] clear that the dangers of the [parking] lot were ‘as well known to the person injured as they [were] to the owner or occupant.’” *Id.* Given its peculiar facts, and the Supreme Court of Appeals’ pointed reasoning, *Estate of Helmick by Fox* demonstrates that an

open, obvious, and known condition, like the missing handrails along the subject stairs in the case *sub judice*, cannot, as a matter of law, constitute a “state of facts which will support a jury finding that the defendant was guilty of negligence,” as contemplated by *Morris, supra*, even if that condition is a violation of a State regulation.

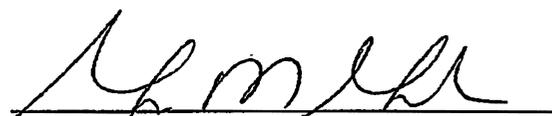
21. “Summary judgment is appropriate where . . . the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” Syl. pt. 4, *Painter v. Peavy, supra*. In this case, it is undisputed that the missing handrails along the subject stairs were an open and obvious condition. It is also undisputed that Mr. Hersh knew of the missing handrails along the subject stairs minutes before he fell. Pursuant to the *Burdette* “open an obvious” principle, the Defendants did not owe Mr. Hersh a legal duty with regard to the known, open, and obvious missing handrails along the subject stairs. There can be no actionable negligence without a duty owed. Known, open and obvious conditions do not create actionable negligence in West Virginia, even if they are a violation of a statute, ordinance, or regulation. Given the lack of any genuine issue of material fact, and given West Virginia’s clearly-established premises liability law, summary judgment in favor of the Third-Party Defendants is appropriate at this time.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby **ADJUDGED** and **ORDERED** that the Third-Party Defendants’ Motion for Summary Judgment is **GRANTED**.

The Court notes the exception of the Plaintiffs to any adverse ruling contained herein.

The Circuit Clerk shall enter this Order as of the day and date first above written and shall forward attested copies to all counsel of record and/or *pro se* parties.

Entered: December 15, 2011



HON. GINA M. GROH
JUDGE OF THE CIRCUIT COURT OF
BERKELEY COUNTY, WEST VIRGINIA

**A TRUE COPY
ATTEST**

Virginia M. Sine
Clerk Circuit Court
By: J. Cooper
Deputy Clerk