

---

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**CASE NO. 12-0106**

---

WALTER E. HERSH and MARY L. HERSH,

*Plaintiffs Below  
and Petitioners,*

v.

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

*Defendants/Third Party  
Plaintiffs Below and  
Respondents,*

and

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

*Third Party Defendants  
Below and Respondents.*

---

**RESPONDENTS' BRIEF**

---

Joseph L. Caltrider WWSB #6870  
Bowles Rice McDavid Graff & Love LLP  
Post Office Drawer 1419  
Martinsburg, West Virginia 25402-1419  
(304) 264-4214  
jcaltrider@bowlesrice.com  
*Counsel for the Respondents  
E-T Enterprises, Limited Partnership  
and Ralph L. Eckenrode*

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iv-v

STATEMENT OF THE CASE ..... 1

SUMMARY OF ARGUMENT ..... 6

STATEMENT REGARDING ORAL ARGUMENT AND DECISION ..... 8

ARGUMENT ..... 9

    I.    STANDARD OF REVIEW ..... 9

    II.   THE CIRCUIT COURT PROPERLY GRANTED SUMMARY  
          JUDGMENT AND FOUND NO DUTY OF CARE BY APPLYING  
          THE SESLER “NO DUTY FOR KNOWN DEFECTS” RULE AND  
          THE BURDETTE “OPEN AND OBVIOUS” RULE WHICH THIS  
          HONORABLE COURT SPECIFICALLY APPROVED IN BURDETTE  
          AS THE CONTROLLING STANDARD OF CARE FOR WEST  
          VIRGINIA PREMISES LIABILITY CASES. ....10

    III.  THE CIRCUIT COURT PROPERLY GRANTED SUMMARY  
          JUDGMENT AND FOUND NO DUTY OF CARE BY RECOGNIZING  
          THAT A BUILDING CODE VIOLATION DOES NOT CREATE  
          ACTIONABLE NEGLIGENCE IN WEST VIRGINIA WHEN THAT  
          VIOLATION IS AS WELL KNOWN TO THE PERSON INJURED AS  
          IT IS TO THE OWNER OR OCCUPANT OF THE PREMISES. .... 12

        A.    A Known, Open, And Obvious Condition Is Not Actionable  
              Even If It Is A Building Code Violation. .... 13

        B.    This Court Has Declined To Find Actionable Negligence  
              Where A Known, Open, And Obvious Condition Is Also A  
              Violation Of A Safety Regulation. ....15

        C.    Other Courts Have Declined To Find Actionable Negligence  
              Where Missing Handrails Along Stairs Were A Known, Open,  
              And Obvious Condition And Also A Violation Of A Safety  
              Statute Or Building Code. ....17

    IV.  THIS HONORABLE COURT SHOULD REJECT THE PETITIONERS’  
          SELECTIVE RELIANCE ON FOREIGN AUTHORITY AND  
          SECONDARY SOURCES IN AN ATTEMPT TO CHANGE WELL-  
          ESTABLISHED WEST VIRGINIA PREMISES LIABILITY LAW. .... 21

A.	This Court Has Reaffirmed The <u>Burdette</u> “Open And Obvious” Rule Numerous Times Since 1989 When It Abolished Assumption Of Risk As An Absolute Defense In Favor Of Comparative Fault Analysis. . . . .	22
B.	This Court Has Recognized The Important Distinction Between The <u>Burdette</u> “Open And Obvious” Rule, Which Focuses On The Duty Owed To A Plaintiff, And The Assumption Of Risk And Comparative Fault Doctrines, Which Focus On The Plaintiff’s Fault. . . . .	27
C.	Other Courts Have Also Recognized The Important Distinction Between The “Open And Obvious” Rule, Which Focuses On The Duty Owed To A Plaintiff, And The Assumption Of Risk And Comparative Fault Doctrines, Which Focus On The Plaintiff’s Fault. . . . .	30
D.	The <u>Burdette</u> “Open And Obvious” Rule Fairly Limits A West Virginia Property Owner’s Duty Of Care And Should Not Be Replaced With The Subjective Restatement Foreseeability Analysis Suggested By The Petitioners . . . . .	35
CONCLUSION . . . . .		39
CERTIFICATE OF SERVICE . . . . .		41

## TABLE OF AUTHORITIES

### I. CASES

<u>Aikens v. Debow</u> , 208 W. Va. 486, 541 S.E.2d 576 (2000) . . . . .	38
<u>Alexander v. Curtis</u> , 808 F.2d 337 (4th Cir. 1987) . . . . .	11
<u>Anderson v. Moulder</u> , 183 W. Va. 77, 394 S.E.2d 61 (1990) . . . . .	13
<u>Armstrong v. Best Buy Co., Inc.</u> , 99 Ohio St. 3d 79, 788 N.E.2d 1088 (2003) . . . . .	33
<u>Bertrand v. Alan Ford, Inc.</u> , 449 Mich. 606, 537 N.W.2d 185 (1995) . . . . .	36
<u>Birdsell v. Monongahela Power Co., Inc.</u> , 181 W. Va. 223, 382 S.E.2d 60 (1989) . . . . .	32
<u>Bradley v. Appalachian Power Co.</u> , 163 W. Va. 332, 256 S.E.2d 879 (1979) . . . . .	22
<u>Bucheleres v. Chicago Park Dist.</u> , 171 Ill.2d 435, 216 Ill. Dec. 568, 665 N.E.2d 826 (1996) . . . . .	33
<u>Burdette v. Burdette</u> , 147 W. Va. 313, 127 S.E.2d 249 (1962) . . . . .	7, 10, 13, 20, 22
<u>Cazad v. Chesapeake and O. Ry. Co.</u> , 622 F.2d 72 (4th Cir. 1980) . . . . .	11
<u>Eichelberger v. United States</u> , 2006 U.S. Dist. LEXIS 19250, 2006 WL 533399 (N.D. W. Va. 2006) . . . . .	11,17
<u>Estate of Helmick by Fox v. Martin</u> , 192 W. Va. 501, 453 S.E.2d 335 (1994) . . . . .	11, 16, 24
<u>Harrington v. Syufy Enterprises</u> , 113 Nev. 246, 931 P.2d 1378 (1997) . . . . .	30
<u>Hawkins v. U.S. Sports Assoc. Inc.</u> , 219 W. Va. 275, 633 S.E.2d 31 (2006) . . . . .	26
<u>King v. Kayak Manufacturing Corp.</u> , 182 W. Va. 276, 387 S.E.2d 511 (1989) . . . . .	22, 28, 29
<u>Lang v. Holly Hill Motel, Inc.</u> , 122 Ohio St. 3d 120, 909 N.E.2d 120 (2009) . . . . .	18, 19, 20
<u>Lemley v. U.S.</u> , 317 F. Supp. 350 (N.D. W. Va. 1970) . . . . .	39
<u>Mallet v. Pickens</u> , 206 W. Va. 145, 522 S.E.2d 436 (1999) . . . . .	24, 39
<u>McDonald v. University of W. Va. Bd. of Trustees</u> , 191 W. Va. 179, 444 S.E.2d 57 (1994) . . . . .	7, 10, 12, 14, 23, 24
<u>Morris v. City of Wheeling</u> , 140 W. Va. 78, 82 S.E.2d 536 (1954) . . . . .	13

<u>Mundell v. Consolidation Coal Co.</u> , 89 F.3d 829 (4th Cir. 1996) . . . . .	11
<u>O’Sullivan v. Shaw</u> , 431 Mass. 201, 726 N.E.2d 951 (2000) . . . . .	31
<u>Painter v. Peavy</u> , 192 W. Va. 189, 451 S.E.2d 755 (1994) . . . . .	9
<u>Senkus v. Moore</u> , 207 W. Va. 659, 535 S.E.2d 724 (2000) . . . . .	11
<u>Sesler v. Rolfe Coal &amp; Coke Co.</u> , 51 W. Va. 318, 41 S.E. 216 (1902) . . . . .	6, 10, 39
<u>Sewell v. Gregory</u> , 179 W. Va. 585, 371 S.E.2d 82 (1988) . . . . .	32
<u>Stevens v. West Virginia Inst. of Tech.</u> , 207 W. Va. 370, 532 S.E.2d 639 (1999) . . . . .	25
<u>Walters v. Fruth Pharmacy, Inc.</u> , 196 W. Va. 364, 472 S.E.2d 810 (1996) . . . . .	11, 29
<u>West Virginia Pride, Inc. v. Wood County</u> , 811 F.Supp. 1142 (S.D. W. Va. 1993) . . . . .	19

**II. STATUTES**

28 U.S.C. § 4042(a) (current version at 18 U.S.C. § 4042(a)(2) . . . . .	17
--	----

**III. OTHER AUTHORITIES**

65 C.J.S. <u>Negligence</u> § 50 (updated May 2012) . . . . .	10, 11, 22
38 Am. Jur. <u>Negligence</u> § 97(cited by <u>Burdette v. Burdette</u> , 147 W. Va. 313, 318, 127 S.E.2d 249, 252). . . . .	7, 10, 11, 22
Restatement (Second) of Torts § 343 (1965) . . . . .	35
Restatement (Second) of Torts § 343A (1965) . . . . .	35, 36, 37, 38
International Property Maintenance Code § 102 (2003), <u>available at <a href="http://publicecodes.citation.com/icod/ipmc/2003/icod_ipmc_2003_1_sec002.htm">http://publicecodes.citation.com/icod/ ipmc/2003/icod_ipmc_2003_1_sec002.htm</a></u> . . . . .	14
International Property Maintenance Code § 106 (2003), <u>available at <a href="http://publicecodes.citation.com/icod/ipmc/2003/icod_ipmc_2003_1_sec006.htm">http://publicecodes.citation.com/icod/ ipmc/2003/icod_ipmc_2003_1_sec006.htm</a></u> . . . . .	20
International Property Maintenance Code § 306 (2003), <u>available at <a href="http://publicecodes.citation.com/icod/ipmc/2003/icod_ipmc_2003_3_sec006.htm">http://publicecodes.citation.com/icod/ ipmc/2003/icod_ipmc_2003_3_sec006.htm</a></u> . . . . .	14
Rule 20 of the West Virginia Rules of Appellate Procedure . . . . .	9

## STATEMENT OF THE CASE

On October 9, 2009, at approximately 10:30 a.m., the Petitioner, Walter E. Hersh (“Mr. Hersh”), drove to a shopping plaza on Winchester Avenue in Martinsburg, West Virginia. App. 1. 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. App. 921.<sup>1</sup> Both parking lots are accessible from Winchester Avenue. App. 927.<sup>2</sup> After getting out of his car, Mr. Hersh ascended the stairs and walked to a store called “Second Time Around.” App. 1. He spent approximately twenty-five (25) minutes browsing in “Second Time Around”, then decided to leave. App. 927. Mr. Hersh returned to his car using the same set of stairs he had ascended approximately twenty-five (25) minutes earlier. App. 928. He was able to navigate one or two steps as he descended, then tripped, fell down the remaining steps, and sustained a head injury. App. 1 & 929.

At the time Mr. Hersh fell, the stairs from the lower parking lot to the upper parking lot did not have handrails on either side. App. 2 & 925.<sup>3</sup> The subject stairs appeared just as they do in the following photograph:

---

<sup>1</sup> The Respondent, Ralph L. Eckenrode (“Mr. Eckenrode”), constructed and maintained the subject stairs. App. 1105. The subject stairs lead from a lower parking lot owned and controlled by the Respondents, P & H Investments, Inc. (“P & H”) and Trollers Associates, LLC (“Trollers”), to an upper parking lot owned and controlled by the Respondents, E-T Enterprises Limited Partnership (“E-T Enterprises”) and Mr. Eckenrode. App. 7–9. Although there is some dispute among the Respondents concerning ownership and control of the subject stairs, these were not **material** facts for purposes of summary judgment.

<sup>2</sup> Mr. Hersh denied knowing that there was an alternative means of accessing the upper parking lot from Winchester Avenue when he first parked his car; however, he admitted recognizing this fact immediately after he ascended the subject stairs approximately twenty-five (25) minutes before he fell. App. 926–27. It is undisputed that Mr. Hersh could have avoided the subject stairs by initially parking in the upper parking lot or by walking through the lower parking lot to the sidewalk along Winchester Avenue, then walking up the sidewalk to the upper parking lot. He also could have avoided the subject stairs by using the sidewalk along Winchester Avenue after he finished shopping at Second Time Around. App. 407.

<sup>3</sup> Mr. Eckenrode removed the handrails from the subject stairs because he feared for the safety of some local teenagers who had been skateboarding on the stairs despite several warnings to stop. These skateboarders were attempting to ride their skateboards down the handrails. In the process, they caused the handrails to splinter, loosen, and lean outward. Mr. Eckenrode took the handrails down specifically to avoid injury and to deter the skateboarders from riding on the stairs and damaging the handrails. App. 1101 & 1110. He had arranged to reinstall the handrails two (2) weeks before Mr. Hersh’s October 9, 2009 fall. App. 1103.



App. 1139–40, 1054 & 1159. Multiple witnesses confirmed that the absence of handrails along either side of the subject stairs was an open and obvious condition. App. 923–24, 928, 1063 & 1140. Multiple witnesses also confirmed that nothing obscured their view of the subject stairs or prevented them from recognizing that there were no handrails along either side of the stairs.

App. 923–24, 928, 1063 & 1140. Specifically, Mr. Hersh testified:

Q: Looking at Exhibit 7, 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.**

App. 924 (emphasis added). 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. App. 923 & 928. Given Mr. Hersh's admissions, and the unanimous testimony of other witnesses, there is no dispute that the missing handrails along the subject stairs were an open and obvious condition.

Prior to his October 9, 2009 fall, Mr. Hersh had significant problems with peripheral neuropathy (i.e. numbness in his feet), balance, and equilibrium. Mr. Hersh was aware of these medical problems, and the dangers they presented, before he fell. During a disability evaluation less than three (3) week before his fall, Mr. Hersh complained of "equilibrium/balance—problems walking—falls almost daily." App. 879–85, 914, 1363–66, 1403–04, 1444–45, 1496–1502, 1579–82 & 1626–41.<sup>4</sup> As a result of these medical problems, Mr. Hersh used a single point cane for balance. App. 922. Despite his medical problems, Mr. Hersh admitted ascending the subject stairs while using his cane for balance specifically because there were no handrails:

Q: When did you find that you needed a cane?

A: Well, **when I walked up the steps, since there was nothing to hold onto, I used the cane to walk up the steps to provide equilibrium on that—on my right side.**

---

<sup>4</sup> On May 5, 2009—approximately five (5) months before the fall—Dr. Paul R. Spilsbury, Mr. Hersh's neurologist, noted that Mr. Hersh had "chronic slowly progressive problems with 'balance'" such that "[s]teps are hazardous, particularly going down when his 'heel will get caught on the tread.'" App. 879–885 and 912–13. Dr. Spilsbury also noted that Mr. Hersh needs "to be very careful about falling." App. 885 & 914 (emphasis added).

On July 16, 2009—less than three (3) months before the fall—Dr. Karoly Varga, Mr. Hersh's neurologist, noted that "[d]uring the last couple of years, [the] numbness, burning and tingling feeling became worse on both lower extremities and [Mr. Hersh had] significant balance difficulties [with] several close to falling episodes." App. 1363–66 & 1403–04 (emphasis added).

On September 21, 2009—less than three (3) weeks before the fall—Mr. Hersh consulted with Dr. Alex Ambroz for a disability evaluation. During the course of this evaluation, **Mr. Hersh reported his chief complaint as "equilibrium/balance—problems walking—falls almost daily."** App. 1444–45 & 1496–1502 (emphasis added).

On September 29, 2009—ten (10) days before the fall—Dr. Robert Phares, Mr. Hersh's family physician, noted **Mr. Hersh had "progressive worsening of his balance, gait and strength"** as well as "worsening peripheral neuropathy." App. 1579–82 & 1626–41 (emphasis added).

[ . . . ]

Q: When you got out of your car, did you look at the steps before you went up the steps?

A: I started, I got out of the car and I started up the steps and as I started up the steps I used the cane, my cane, to support my right side.

App. 922 (emphasis added).

Q: Now I think you just told us that **you used your cane for equilibrium, and in this particular case, you used your cane to go up the steps because there was no handrail, is that true?**

A: **That's true.**

App. 923 (emphasis added). Despite his medical problems, Mr. Hersh also admitted descending the subject stairs while using his cane for balance specifically because there were no handrails:

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.

App. 930. Given Mr. Hersh's admissions, it is also undisputed that he knew there were no handrails on either side of the subject stairs when he first ascended the stairs twenty-five (25) minutes before he fell and when he later descended the stairs just before he fell.

Mr. Hersh and his wife, Mary L. Hersh ("Mrs. Hersh"), filed their original Complaint on February 19, 2010 alleging that Mr. Eckenrode negligently maintained his property and, thus, caused or contributed to Mr. Hersh's October 9, 2009 fall and resulting head injury. App. 1-3.<sup>5</sup>

Specifically, Mr. and Mrs. Hersh alleged:

Defendant 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.

---

<sup>5</sup> Mr. Eckenrode subsequently filed a Third Party Complaint against P & H and Trollers as owners of the lower parking lot. App. 7-9. Mr. and Mrs. Hersh filed an Amended Complaint on July 15, 2010 and a second Amended Complaint on July 13, 2011 to include direct claims against P & H, Trollers, and E-T Enterprises and clarify the allegations of ownership against each party. App. 4-6 & 10-13. Each of these Complaints contains essentially the same allegations of violation of building code and negligent property maintenance based upon the missing handrails along the subject stairs.

App. 2, 5, 12, 146–47 & 931.<sup>6</sup>

In support of their premises liability claims, Mr. and Mrs. Hersh hired a professional engineer, Richard T. Hughes, P.E. (“Mr. Hughes”), as their expert witness. Mr. Hughes confirmed that Mr. Hersh did not slip and fall, but most likely tripped and fell down the stairs. App. 1197 & 1224. He also confirmed 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. App. 1236–37. Finally, Mr. Hughes confirmed that the lack of a handrail along the subject stairs was an open and obvious condition:

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: [. . .] 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.

App. 1181 & 1276.

---

<sup>6</sup> The missing handrails along the subject stairs are the only dangerous or defective condition identified by Mr. and Mrs. Hersh as a basis for the Respondents’ liability. Mr. Eckenrode’s Interrogatory No. 4 addressed this issue:

Please identify and describe all dangerous and/or defective conditions which you contend caused or contributed to the accident described in your Complaint.

Mr. Hersh’s answer to Interrogatory No. 4 was:

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.

App. 146–47.

Based upon this record, the Respondents moved the Circuit Court for summary judgment because 1) it is undisputed that the missing handrails along the subject stairs were an open and obvious condition on October 9, 2009; and 2) it is undisputed that Mr. Hersh knew there were no handrails on either side of the subject stairs before he fell on October 9, 2009. App. 14–16 & 162–546. The Circuit Court found that the Petitioners “have not identified any disputed material facts regarding the open and obvious missing handrails along the stairs in question or [Mr. Hersh’s] admitted knowledge of those missing handrails before he fell.” App. 797–98. The Circuit Court further found that the Petitioners “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, . . . .” App. 798. Accordingly, the Circuit Court granted the Respondents summary judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure by orders dated December 15, 2011. App. 797–816 & 817–38. Although they do not identify any disputed material facts, the Petitioners now appeal the Circuit Court’s summary judgment orders arguing that the fundamental premises liability principles established by Burdette and its progeny should be completely abolished.

### **SUMMARY OF ARGUMENT**

Since 1902, the West Virginia Supreme Court of Appeals has consistently applied a simple, common-sense rule to premises liability cases: “[T]he owner [of premises] owes the duty of reasonable care to have and keep his premises in safe condition . . . , **unless defects be known to [the entrant]**.” Syl. pt. 1, Sesler v. Rolfe Coal & Coke Co., 51 W. Va. 318, 41 S.E. 216 (1902) (emphasis added). Since 1962, the West Virginia Supreme Court of Appeals has also consistently applied a broader, common-sense rule to premises liability cases: “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.” Burdette v. Burdette, 147 W. Va. 313, 318, 127 S.E.2d 249, 252 (1962) (quoting 38 Am. Jur. Negligence § 97(cited by Burdette, 147 W. Va. at 318, 127 S.E.2d at 252)). These fundamental premises liability rules properly recognize the role of personal responsibility in our tort law and fairly balance the interests of West Virginia property owners against the interests of injured persons. These fundamental premises liability rules also provide one of the *prima facie* requirements for premises liability in West Virginia:

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 v. University of W. Va. Bd. of Trustees, 191 W. Va. 179, 182, 444 S.E.2d 57, 60 (1994) (emphasis added). As such, these fundamental premise liability rules support the basic policy principle that a West Virginia property owner or occupant “is not an insurer of the safety of” a person on his property in the absence of actionable negligence. Burdette, 147 W. Va. 313, 127 S.E.2d 249 at Syl. pt. 3, in part. Accordingly, people who voluntarily expose themselves to known, open, and obvious conditions in West Virginia cannot blame others for resulting injuries. This is both sound public policy and well-established West Virginia law.

In this case, it is undisputed that Mr. Hersh voluntarily exposed himself to a known, open, and obvious condition—the Respondents’ stairs with missing handrails—not once, but twice, before he fell. The Petitioners admit that: 1) the missing handrails along the subject stairs were open and obvious; 2) Mr. Hersh knew about the missing handrails before he fell; and 3) Mr. Hersh voluntarily traversed the stairs, using his cane for equilibrium, when he first ascended the stairs and when he later descended the stairs just before he fell. Given these undisputed facts, the

Circuit Court correctly concluded that the Petitioners cannot make a *prima facie* case of premises liability under Sesler, Burdette and McDonald and properly granted the Respondents summary judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure.

The Petitioners do not contend the Circuit Court erred in granting the Respondents summary judgment based on some genuine issue of material fact to be resolved by a jury. Rather, they contend this Honorable Court should drastically change West Virginia law to create a property owner's duty of care with regard to known, open, and obvious conditions on their premises. Although they advocate virtually unlimited liability for West Virginia property owners, neither the Petitioners, nor their *amicus curiae*, offer any valid reasons for discarding one hundred ten (110) years of this Court's reasoned precedent which finds no duty of care with regard to known conditions on property or fifty (50) years of this Court's reasoned precedent which finds no duty of care with regard to open and obvious conditions on property. Likewise, neither the Petitioners, nor their *amicus curiae*, offer any valid reasons for disregarding the *prima facie* premises liability requirements; for ignoring Mr. Hersh's admitted knowledge of the missing handrails before he fell; for overlooking Mr. Hersh's voluntary exposure to the missing handrails on two occasions before he fell; or for reversing the Circuit Court's proper application of well-established West Virginia law to the undisputed facts. Therefore, the Circuit Court's December 15, 2011 summary judgment orders should be affirmed on appeal.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Petitioners and their *amicus curiae* ask this Honorable Court to abolish the Sesler "no duty for known defects" rule, the Burdette "open and obvious" rule, and the McDonald *prima facie* premises liability requirements, fundamentally changing West Virginia's well-settled premises liability law. These proposed changes will have wide-ranging effects for West Virginia

property owners and occupants. Therefore, if the Court is inclined to consider such drastic changes to West Virginia law, the Respondents believe oral argument is appropriate under Rule 20 of the West Virginia Rules of Appellate Procedure. The minimum time for oral argument set forth in Rule 20(e) should be sufficient for all parties.

## ARGUMENT

### **I. STANDARD OF REVIEW**

“A circuit court's entry of summary judgment is reviewed *de novo*.” Syl. pt. 1, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994). When undertaking a *de novo* review, the West Virginia Supreme Court of Appeals applies the same summary judgment standard applied by the circuit court: “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.” Id. at Syl. pt. 2 (citations omitted). Moreover, “[s]ummary 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.” Id. at Syl. pt. 4. The Petitioners do not identify any disputed material facts which should have prevented the Circuit Court from granting summary judgment. Therefore, the only issue for *de novo* review in this case is whether the Circuit Court properly applied well-established West Virginia law to conclude that the Petitioners cannot make a sufficient showing on an essential element of their *prima facie* premises liability case (i.e. that Mr. Hersh had no knowledge of the missing handrails along the subject stairs before he fell) and grant the Respondents summary judgment.

**II. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT AND FOUND NO DUTY OF CARE BY APPLYING THE SESLER “NO DUTY FOR KNOWN DEFECTS” RULE AND THE BURDETTE “OPEN AND OBVIOUS” RULE WHICH THIS HONORABLE COURT SPECIFICALLY APPROVED IN BURDETTE AS THE CONTROLLING STANDARD OF CARE FOR WEST VIRGINIA PREMISES LIABILITY CASES.**

In Sesler v. Rolfe Coal & Coke Co., the West Virginia Supreme Court of Appeals established the “no duty for known defects” rule as follows: “[T]he owner [of premises] owes the duty of reasonable care to have and keep his premises in safe condition . . . , **unless defects be known to [the entrant].**” Sesler, 51 W. Va. 318, 41 S.E. 216 at Syl. pt. 1 (emphasis added). Then, in Burdette, the West Virginia Supreme Court of Appeals established a broader “open and obvious” rule as follows:

In 65 C.J.S. Negligence § 50, the text contains this language: ‘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.**’ In 38 Am.Jur., Negligence, Section 97, the principle is expressed in these terms: ‘**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.’

Burdette, 147 W. Va. at 318, 127 S.E.2d at 252 (quoting 65 C.J.S. Negligence § 50 (updated May 2012) and 38 Am. Jur. Negligence § 97) (emphasis added). Burdette essentially expanded Sesler’s common-sense rule by exempting property owners and occupiers from a duty of care for conditions which, although not expressly known to the entrant, should have been known due to their open, obvious, and apparent nature.

Since Burdette, this Court has specifically quoted with approval the 65 C.J.S. Negligence § 50 and 38 Am. Jur. Negligence § 97 formulation of the “open and obvious” rule in two subsequent cases. See McDonald v. University of West Virginia Bd. Of Trustees, 191 W. Va.

179, 444 S.E.2d 57; Estate of Helmick by Fox v. Martin, 192 W. Va. 501, 453 S.E.2d 335 (1994). See also Eichelberger v. United States, 2006 U.S. Dist. LEXIS 19250, 2006 WL 533399 (N.D. W. Va. 2006) (observing that “[i]n West Virginia a property owner is not liable for injuries that result from dangers that are ‘obvious, reasonably apparent, or as well known to the person injured as they are to the owner.’”). In McDonald, the Court observed that the Burdette Court “discussed at some length what constitutes negligence in the maintenance of premises” and “**quoted with approval** generally accepted principles set forth in 65 C.J.S. Negligence §50 relating to the owner or occupant’s duties.” McDonald, 191 W. Va. at 182–83, 444 S.E.2d at 60–61 (emphasis added). Then, in Helmick, the Court specifically explained that “[i]n determining whether the defendant’s maintenance of [a parking] lot constituted negligence . . . **the standard of care set forth in Burdette . . . is controlling.**” Helmick, 192 W. Va. at 505, 453 S.E.2d at 339 (emphasis added). Thus, there is no question that the “open and obvious” rule quoted in Burdette, McDonald, and Helmick sets the “controlling” standard of care for West Virginia premises liability cases.<sup>7</sup>

---

<sup>7</sup> In addition to Burdette, McDonald, and Helmick, this Court has applied the “open and obvious” rule in other cases since 1962. See e.g., Walters v. Fruth Pharmacy, Inc., 196 W. Va. 364, 472 S.E.2d 810 (1996) (upholding a defendant’s jury instruction based on Burdette for the purpose of describing a property owner’s duties toward invitees and what constituted a breach of those duties); see also Senkus v. Moore, 207 W. Va. 659, 535 S.E.2d 724 (2000) (upholding summary judgment for a property owner where its placement of scales on the floor was open and obvious and, thus, did not violate any duty to the plaintiff); see also Cazad v. Chesapeake and O. Ry. Co., 622 F.2d 72 (4th Cir. 1980) (citing Burdette and observing that “it is well established in West Virginia that . . . a landowner . . . has no duty to warn persons of dangerous conditions which are open and obvious, nor is he required to take steps to obviate such hazards”); see also Alexander v. Curtis, 808 F.2d 337 (4th Cir. 1987) (citing Burdette and holding that an essential element of a plaintiff’s *prima facie* premises liability case is proof that a defect in defendant’s premises operated as a hidden danger or trap); see also Mundell v. Consolidation Coal Co., 89 F.3d 829 (4th Cir. 1996) (applying the Burdette “open and obvious” rule and upholding summary judgment for a defendant where the alleged defect, a single entrance step, was known and obvious to the plaintiff). Given this Court’s clear approval of the “open and obvious” rule in Burdette, and this Court’s long-standing history of applying the “open and obvious” rule as the “controlling” standard in premises liability cases, it is patently inaccurate for the Petitioners, or their *amicus curiae*, to suggest that this Court has not already recognized the “open and obvious” rule as an integral part of West Virginia tort law. It is equally inaccurate for the Petitioners, or their *amicus curiae*, to suggest that the Circuit Court misapplied the Sesler “no duty for known defects” rule, the Burdette “open and obvious” rule, and the McDonald *prima facie* premises liability requirements in the present case.

The Sesler “no duty for known defects” rule and the Burdette “open and obvious” rule provide the foundation for a *prima facie* case of premises liability in West Virginia:

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, 444 S.E.2d at 60 (emphasis added). Mr. Hersh’s own admissions establish that he knew about the missing handrails along the subject stairs when he first ascended the stairs and when he later descended the same stairs shortly before he fell. App. 812.<sup>8</sup> Given Mr. Hersh’s admissions, the Circuit Court correctly applied the Sesler “no duty for known defects” rule and the broader Burdette “open and obvious” rule, correctly concluded that the Petitioners cannot make a *prima facie* case of premises liability under McDonald, and properly granted the Respondents summary judgment pursuant to Rule 56.

**III. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT AND FOUND NO DUTY OF CARE BY RECOGNIZING THAT A BUILDING CODE VIOLATION DOES NOT CREATE ACTIONABLE NEGLIGENCE IN WEST VIRGINIA WHEN THAT VIOLATION IS AS WELL KNOWN TO THE PERSON INJURED AS IT IS TO THE OWNER OR OCCUPANT OF THE PREMISES.**

Under West Virginia law,

[t]he owner or the occupant of premises used for business purposes is not an insurer of the safety of an invited person present on such premises and, **if such owner or occupant 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 invited person.**

---

<sup>8</sup> Less than three (3) weeks before his October 9, 2009 fall, Mr. Hersh complained to his doctor about “equilibrium/balance - problems walking - *falls almost daily.*” App. 1444–45, 1496–1502, 1579–82 & 1626–41. Therefore, Mr. Hersh knew a set of stairs without handrails was more dangerous to him than an average person. Mr. Hersh was better situated than anyone to appreciate the particular dangers his own medical conditions created when combined with stairs without handrails.

Burdette, 147 W. Va. 313, 127 S.E.2d 249 at Syl. pt. 3 (emphasis added). In this case, there are no allegations of willful or wanton misconduct and no allegations of nuisance. Thus, the only question is whether the Respondents are guilty of “actionable” negligence.

**A. A Known, Open, And Obvious Condition Is Not Actionable Even If It Is A Building Code Violation.**

The Petitioners rely solely on the proposition that “violation of a statute is *prima facie* evidence of negligence” without also addressing what constitutes “actionable” negligence in West Virginia. See Syl. pt. 1, in part, Anderson v. Moulder, 183 W. Va. 77, 394 S.E.2d 61 (1990). Their arguments overlook reasonable limitations the West Virginia Supreme Court of Appeals has placed on this general rule. For instance, “[i]n order to be actionable, such violation [of statute] must be the proximate cause of the plaintiff’s injury.” Id. Accordingly,

[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. at Syl. pt. 3 (citing Syl. pt. 6, Morris v. City of Wheeling, 140 W. Va. 78, 82 S.E.2d 536 (1954)) (emphasis added). The Sesler “no duty for known defects” rule, the Burdette “open and obvious” rule, and the McDonald *prima facie* premises liability requirements are three (3) other reasonable limitations placed on “actionable” negligence. By arguing that a violation of building code constitutes *prima facie* evidence of negligence which must automatically be considered by a jury, the Petitioners ignore the operative word “actionable” and these reasonable limitations. This argument fails because it entirely ignores Sesler, Burdette, McDonald, and the basic requirements for West Virginia premises liability established by these cases.

In Sesler, Burdette, McDonald, and their progeny, the West Virginia Supreme Court of Appeals has wisely declared that known, open, and obvious conditions are not “actionable” and

do not create premises liability for a West Virginia property owner. The McDonald Court's synthesis of West Virginia's premises liability law is clear:

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.**

McDonald, 191 W. Va. at 183, 444 S.E.2d at 61 (emphasis added). Given this unequivocal statement of West Virginia law, a known, open, and obvious condition—like the missing handrails along the Respondents' stairs—cannot, as a matter of law, be a “state of facts which will support a jury finding that the defendant was guilty of negligence” under Morris. Moreover, such a known, open, and obvious condition 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” under Morris. Unless Sesler, Burdette, McDonald, Anderson, and Morris have absolutely no meaning, a known, open, and obvious condition is not “actionable” even if it is a violation of building code.

In their arguments, the Petitioners focus solely on whether the missing handrails were “open and obvious” and whether the missing handrails constituted a violation of Martinsburg Building Code.<sup>9</sup> This is only part of West Virginia's overall premises liability equation. The

---

<sup>9</sup> The Respondents do not concede that the open and obvious missing handrails along the subject stairs were an actual violation of the Martinsburg Building Code (based on the International Property Maintenance Code). Although the Martinsburg Building Code requires handrails along outdoor stairs, the same building code requires a property owner to maintain and repair required structures, such as handrails, and permits a property owner to remove required structures for necessary maintenance and repair. App. 408. See generally International Property Maintenance Code § 102 (2003); see also International Property Maintenance Code § 306 (2003). It is undisputed that Mr. Eckenrode removed the subject handrails to avoid injury to local skateboarders who had damaged the handrails. It is also undisputed that Mr. Eckenrode contracted to re-install the handrails two (2) weeks before Mr. Hersh's October 9, 2009 fall. App. 1101 & 1103. Whether or not the missing handrails violated Martinsburg Building Code is not a material dispute of fact which should defeat summary judgment because, even if the missing handrails violated the building code, such violation was known, open, and obvious to Mr. Hersh. Thus, any such building code violation did not create “actionable” negligence under existing West Virginia law.

Petitioners consistently ignore Mr. Hersh's admitted knowledge of the missing handrails along the subject stairs and his voluntary exposure to that condition not once, but twice before he fell. Unlike the Petitioners, however, the Circuit Court properly focused on Mr. Hersh's admitted knowledge of the missing handrails and correctly recognized that under Sesler, Burdette, McDonald, Anderson, and Morris "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." App. 815 (emphasis added). Thus, the Petitioners cannot make a *prima facie* case of premises liability through the undisputed material facts even if the Respondents' missing handrails violated Martinsburg Building Code.<sup>10</sup>

**B. This Court Has Declined To Find Actionable Negligence Where A Known, Open, And Obvious Condition Is Also A Violation Of A Safety Regulation.**

In Helmick, the Court considered the plaintiff's claim that her husband was killed as a result of a negligently designed and maintained restaurant parking lot. Specifically, the plaintiff

---

<sup>10</sup> A building code violation could reasonably be considered evidence that a property owner had constructive knowledge of a defective condition on his property to satisfy the first McDonald *prima facie* premises liability requirement (i.e. "that the owner had actual or constructive knowledge of the foreign substance or defective condition"). A building code violation could not, however, negate the second McDonald *prima facie* premises liability requirement (i.e. "that the invitee had no knowledge of the substance or condition"). Therefore, an open and obvious building code violation which is expressly known to the injured person cannot create "actionable" negligence and defeat the Sesler "no duty for known defects" rule, the Burdette "open and obvious" rule, or the McDonald premises liability requirements, all of which are ingrained in over a century of West Virginia's tort law. This Court can easily reconcile the Sesler "no duty for known defects" rule, the Burdette "open and obvious" rule, and the McDonald premises liability requirements with the "violation of statute is *prima facie* evidence of negligence" rule without drastically changing West Virginia law by adopting the following syllabus points:

1. In West Virginia, 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 of premises because the owner or occupant is not an insurer of the safety of every person present on such premises.
2. In order to make a *prima facie* case of negligence in a premises liability case, the injured person must show that (1) the owner or occupant had actual or constructive knowledge of the defective condition and (2) the injured person had no actual or constructive knowledge of the defective condition or was prevented by the owner or occupant from discovering it.
3. A violation of statute, rule, regulation, building code, etc. is *prima facie* evidence that the owner or occupant knew or should have known of a defective condition on the premises; however, such a violation does not negate the second element of a *prima facie* case for premises liability. If the injured person knew or should have known of the defective condition (i.e. it was known to him/her or was "open and obvious"), then there is no liability and he/she cannot recover.

contended that the restaurant operator's parking lot violated West Virginia Department of Highways (WVDOH) safety regulations. Helmick, 192 W. Va. at 503, 453 S.E.2d at 337. A WVDOH district engineer testified that WVDOH regulations do not allow unrestricted entry onto the highway for a distance as large as the restaurant owner's parking lot (160 feet). For commercial property, the maximum allowable opening onto the highway was only fifty (50) feet. He also testified that a sufficient sight distance to exit the lot safely existed only at the north end of the parking lot. Finally, he testified that a permit is required for every entry onto a state highway from a driveway or up to 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 requirements of the WVDOH regulations. Despite this clear violation of WVDOH safety regulations, and the lack of a WVDOH permit, the Helmick Court upheld summary judgment in favor of the restaurant owner specifically because "[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'" and, thus, "the [open and obvious] standard of care set forth in Burdette v. Burdette, ... [was] controlling." Id. at 505, 339.

Both the facts and the Court's reasoning in Helmick are highly significant. Not only did the Helmick court confirm the Burdette "open and obvious" rule as the "controlling" standard of care for premises liability in West Virginia, but it also agreed "with the circuit court that the defendant [was] not legally responsible for the accident" despite a violation of WVDOH safety regulations. Id. Given its peculiar facts, and the Court's pointed reasoning, Helmick clearly demonstrates that a known, open, and obvious condition, like the missing handrails along the Respondents' stairs, cannot, as a matter of law, be a "state of facts which will support a jury finding that the defendant was guilty of negligence." This is true even if that condition is a

violation of a safety regulation. The Circuit Court properly recognized the import of Helmick's facts and reasoning by concluding that "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." App. 815.

**C. Other Courts Have Declined To Find Actionable Negligence Where Missing Handrails Along Stairs Were A Known, Open, And Obvious Condition And Also A Violation Of A Safety Statute Or Building Code.**

In Eichelberger v. United States, a plaintiff-inmate fell on an icy ramp without handrails outside the recreation center at the Federal Correctional Institution in Morgantown. See Eichelberger, 2006 U.S. Dist. LEXIS 19250, 2006 WL 533399. The Bureau of Prisons is specifically required by statute to provide for inmates' safekeeping, care, and subsistence. See id. (citing 28 U.S.C. §4042(a), current version at 18 U.S.C. § 4042(a)(2)). Therefore, the plaintiff-inmate sued claiming the United States was negligent for 1) failing to install guard rails along the ramp outside the recreation center, and 2) failing to properly maintain the ramp in icy conditions. The United States filed a motion for summary judgment. Despite its statutory duties, the District Court granted the United States' motion for summary judgment finding that the plaintiff-inmate, like Mr. Hersh, was aware that the subject ramp (stairs) had no guardrails (handrails). Applying West Virginia's substantive law, the District Court acknowledged 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, 147 W. Va. at 318, 127 S.E.2d at 252). The District Court then concluded that summary judgment for the United States was appropriate because "the absence of guardrails was an obvious condition and well known to the plaintiff prior to his fall." Id. The same is true in this case because the absence of handrails along the Respondents' stairs

was an obvious condition which was well known to Mr. Hersh *before* his October 9, 2009 fall. Therefore, Eichelberger, like Helmick, demonstrates that a known, open and obvious condition, such as the missing handrails along the subject stairs, cannot, as a matter of law, be a “state of facts which will support a jury finding that the defendant was guilty of negligence” as contemplated by Morris, even if it is a violation of a safety statute.

In Lang v. Holly Hill Motel, Inc., the Supreme Court of Ohio considered a set of facts and legal issues nearly identical to those presented in this case. See Lang, 122 Ohio St. 3d 120, 909 N.E.2d 120 (2009). The plaintiff and her physically-impaired husband requested a handicapped-accessible room in the defendant’s motel. The defendant’s desk clerk advised that it did not have such a room, but could offer a room which would require them to climb one (1) step. The plaintiffs actually received a room which required them to climb two (2) steps with no handrails. These conditions were known, open, and obvious to the plaintiff and her husband before they entered the room. As the plaintiff’s husband attempted to climb the second step, he fell, broke his hip and, ultimately, died three (3) months later. Id. at 121–22 (same pagination between reporters). The plaintiff sued the defendant motel for negligence alleging that the step her husband tripped over exceeded the Ohio Basic Building Code’s height limitations and that the absence of handrails also violated the Ohio Basic Building Code’s requirements. The defendant motel moved for summary judgment claiming that “even if the step was constructed in violation of the Building Code, it was nonetheless an open and obvious condition and that they therefore owed no duty of care to the [plaintiff and her husband].” Id. at 122. The trial court granted summary judgment for the defendant motel. On appeal, the plaintiff argued, just as the Petitioners argue, that “the open-and-obvious doctrine is inapplicable and summary judgment is improper when the condition at issue is in violation of the Building Code.” Id. The Ohio

intermediate appellate court rejected this argument and certified the question to resolve a conflict among the appellate districts.

The Lang Court first identified the issue presented as follows: “whether the open-and-obvious doctrine is applicable to a premises-liability action when the condition that caused the injury violates the Ohio Basic Building Code.” Id. This is precisely the issue the Petitioners now raise in their own appeal. Then, the Lang Court reviewed Ohio’s premises liability law:

[T]he motel had a duty “to exercise ordinary care and to protect the [plaintiffs] by maintaining the premises in a safe condition. [. . .] However, this duty does not require landowners to insure the safety of invitees on their property. As we have repeatedly recognized, “[t]he open-and-obvious doctrine remains viable in Ohio. Where a danger is open and obvious, and landowner owes no duty of care to individuals lawfully on the premises.” [. . .] “[T]he owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves.” [. . .] Thus, when a plaintiff is injured by an open and obvious danger, summary judgment is generally appropriate because the duty of care necessary to establish negligence does not exist as a matter of law.

Id. at 123 (citations omitted). Ohio’s premises liability law is practically identical to West Virginia’s in this regard. The Lang plaintiff did not contest the open and obvious nature of the steps with missing handrails just as the Petitioners admit the known, open, and obvious condition of missing handrails along the Respondents’ stairs. Therefore, the Lang Court next addressed the plaintiff’s suggestion that a violation of Building Code should be regarded as negligence *per se* and create an exception to the “open and obvious” rule.<sup>11</sup> In rejecting such an exception, the

---

<sup>11</sup> Unlike the Lang plaintiff, however, the Petitioners in this case seek to abolish the Sesler “no duty for known defects” rule, the broader Burdette “open and obvious” rule, and the McDonald *prima facie* premises liability requirements, fundamentally changing premises liability law in West Virginia. These drastic changes would allow an injured person to blame any West Virginia property owner for any known, open, or obvious condition which allegedly caused his/her injury, even if he/she voluntarily exposed him/herself to that condition on multiple occasions. Under the Petitioners’ wide-open premises liability theory, the only way a property owner could absolve him/herself of liability for known, open, and obvious conditions would be to incur the extraordinary cost and risk of a jury trial. This wide-open premises liability theory would further diminish the ability of Circuit Courts in our state to utilize Rule 56 of the West Virginia Rules of Civil Procedure for its acknowledged purpose: “to isolate and dispose of meritless litigation.” See West Virginia Pride, Inc. v. Wood County, 811 F. Supp. 1142 (S.D.

Lang Court “distinguished between duties arising from statutes, which reflect public policy, and duties arising from administrative rules, which are created by administrative agenc[ies].” Id. at 124. It reasoned that “[a]pplying negligence *per se* in this context would thus in effect turn those subject to administrative rules into insurers of third-party safety, something that violates the basic principles of the open-and-obvious doctrine.” Id. The same distinction between building code violation and statutory violation applies in the present case. Moreover, this Court has previously recognized the same public policy. See Burdette, 147 W. Va. 313, 127 S.E.2d 249 at Syl. pt. 3 (“[t]he owner or the occupant of premises used for business purposes is not an insurer of the safety of an invited person present on such premises . . .”). Ultimately, the Lang Court held that “the open and obvious doctrine may be asserted as a defense to a claim of liability arising from a violation of the Ohio Basic Building Code” because “administrative-rule violations do not create a *per se* finding of duty and breach of duty” like statutory violations. Id. at 125.<sup>12</sup> In this case, analogous reasoning defeats the Petitioners’ attempt to elevate a violation of Martinsburg Building Code to the level of a statutory violation and completely abolish the Sesler “no duty for known defects” rule, the Burdette “open and obvious” rule, and the McDonald *prima facie* premises liability requirements.

---

W. Va. 1993). Not only would such a result expose West Virginia property owners and occupiers to unbounded liability, but it would also significantly increase their cost of insuring against such expanded liability.

<sup>12</sup> As part of its holding, the Lang Court expressly rejected two other arguments advanced by the Petitioners in this case: 1) a private cause of action for known, open, and obvious building code violations is necessary to ensure compliance with building codes; and 2) it is anomalous to excuse liability for a known, open, and obvious building code violation. See Lang, 909 N.E.2d at 125. The Lang Court correctly recognized that building code violations which are not known, open, or obvious are still actionable as negligence. This is true in West Virginia as well. The Lang Court also correctly recognized that “there are numerous statutory penalties that may be levied against landowners who commit violations.” Id. Likewise, the Martinsburg Building Code provides its own enforcement mechanisms and penalties. See generally International Property Maintenance Code § 106. Thus, the Petitioners’ overstated argument that a private cause of action allowing recovery of all manner of tort damages for known, open, and obvious conditions is the only method of enforcing building code regulations should be rejected by this Court for the same reasons these arguments were rejected by the Lang Court.

**IV. THIS HONORABLE COURT SHOULD REJECT THE PETITIONERS' SELECTIVE RELIANCE ON FOREIGN AUTHORITY AND SECONDARY SOURCES IN AN ATTEMPT TO CHANGE WELL-ESTABLISHED WEST VIRGINIA PREMISES LIABILITY LAW.**

It is clear that the Circuit Court correctly applied existing West Virginia premises liability law—the Sesler “no duty for known defects” rule, the Burdette “open and obvious” rule, and the McDonald *prima facie* premises liability requirements—to the undisputed facts in this case. The Circuit Court’s proper application of existing West Virginia premises liability law is confirmed by Helmick, in which the West Virginia Supreme Court of Appeals applied the Burdette “open and obvious” rule as the “controlling” premises liability standard to find that a defendant owed no legal duty with regard to a known, open, and obvious property condition even though it violated WVDOH safety regulations. Recognizing the force of this well-established West Virginia premises liability law, the Petitioners resort to a selective presentation of foreign authority and secondary sources to advocate a drastic change in a West Virginia property owner’s legal duties. These non-binding authorities generally fall into one of two categories: 1) those which equate the “open and obvious” rule to the assumption of risk doctrine and find both abolished by the adoption of a comparative fault system (i.e. the open and obvious nature of the condition becomes part of the overall comparative fault analysis and plaintiff’s potential comparative fault); and 2) those which focus on the foreseeability of harm and adopt the duty analysis set forth in Section 343A of the Restatement (Second) of Torts (i.e. a property owner retains a duty to the plaintiff for known, open, and obvious conditions when the plaintiff’s injury was foreseeable). As demonstrated below, this Court should reject the Petitioners’ selective reliance on these authorities because they are not consonant with over a century of West Virginia premises liability law and do not produce consistent legal duties which property owners can follow readily and courts can apply consistently.

**A. This Court Has Reaffirmed The Burdette “Open And Obvious” Rule Numerous Times Since 1989 When It Abolished Assumption Of Risk As An Absolute Defense In Favor Of Comparative Fault Analysis.**

The Petitioners argue that the Burdette “open and obvious” rule is akin to the “assumption of risk” defense and, therefore, “incompatible with comparative fault principles adopted in West Virginia.” This argument ignores the fact that the West Virginia Supreme Court of Appeals has reaffirmed the Burdette “open and obvious” rule numerous times since 1979 when it adopted a comparative fault system in Bradley v. Appalachian Power Co., 163 W. Va. 332, 256 S.E.2d 879 (1979), and 1989 when it abolished assumption of risk as an absolute defense in King v. Kayak Manufacturing Corp., 182 W. Va. 276, 387 S.E.2d 511 (1989). A closer examination of how the Court has developed and regularly reaffirmed the Burdette “open and obvious” rule—even after King modified the assumption of risk defense in 1989—demonstrates why the adoption of a comparative fault system does not automatically abolish the Burdette “open and obvious” rule and why the Petitioners’ argument must fail.

In Burdette, the Court considered the claim of a customer injured at an automobile repair shop when he fell from a ladder, acknowledged the bounds of premises liability to a business invitee:

**The owner or the occupant of premises used for business purposes is not an insurer of the safety of an invited person present on such premises and, if such owner or occupant 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 invited person.**

Burdette, 147 W. Va. 313, 127 S.E.2d 249 at Syl. pt. 3 (emphasis added). Then, the Court established the “open and obvious” rule as a common-sense limitation on the duty of reasonable care an owner or occupant of premises owes to business invitees. Id. at 318, 252 (quoting 65 C.J.S. Negligence § 50 and 38 Am. Jur. Negligence § 97 (“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.”)).

Five (5) years after it decided King and modified the assumption of risk defense in 1989, the West Virginia Supreme Court of Appeals affirmed the Burdette “open and obvious” rule in two (2) separate and important cases.

In McDonald, the Court considered the claim of a West Virginia University student who fell and injured herself while running on university property during a class. It affirmed its adoption of the Burdette “open and obvious” rule as a reasonable limitation on the duty of care owed to business invitees as follows:

In Burdette v. Burdette . . . the Court discussed at some length what constitutes negligence in the maintenance of premises. While recognizing that the owner or occupant of premises used for business purposes has some duty to keep the premises safe for invitees, the Court quoted with approval generally accepted principles set forth in 65 C.J.S. Negligence, Section 50, relating to the owner or occupant’s duties.

McDonald, 191 W. Va. at 181–82, 444 S.E.2d at 59–60. After citing the passages from 65 C.J.S. Negligence § 50 and 38 Am. Jur. Negligence § 97 (quoting Burdette), the Court offered this additional explanation of the Burdette “open and obvious” rule:

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 . . . . **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, 444 S.E.2d at 60 (emphasis added). Given this 1994 discussion, the Petitioners’ argument is clearly wrong. Subsequent case law illustrates the Court’s affirmation of the Burdette “open and obvious” rule, even after King modified the assumption of risk defense in 1989.

In Helmick, the Court considered the claim of a plaintiff who alleged her decedent was killed as a result of a negligently designed and maintained restaurant parking lot. Helmick provides the clearest example of the continued validity of the Burdette “open and obvious” rule following King. This case addressed the “sole issue” of whether a “defendant met her duty of care.” Helmick, 191 W. Va. at 503, 453 S.E.2d at 337. The Court specifically held that “the standard of care set forth in Burdette . . . is controlling.” Id. at 505, 339. Moreover, the Court reiterated that a duty to keep premises safe for invitees “applies only to defects or conditions which are in the nature of hidden dangers.” Id. Most notably, the Court found no need to address defenses related to a plaintiff’s fault such as assumption of risk or comparative fault and reaffirmed Burdette five (5) years **after** deciding King. As such, Helmick demonstrates that the Petitioners’ arguments based on assumption of risk and comparative fault are misplaced. In this case, the primary issue is the Respondents’ lack of **duty** for known, open, and obvious conditions on their property, not a comparison of the plaintiff’s **fault** inherent in assumption of risk and comparative fault analysis.

Ten (10) years after it decided King and modified the assumption of risk doctrine in 1989, the West Virginia Supreme Court of Appeals once again reaffirmed the Burdette “open and obvious” rule in two (2) more important cases.

In Mallet v. Pickens, the Court considered the claim of an uninvited social guest who was injured after falling from the temporary steps of a residential dwelling. See Mallet, 206 W. Va. 145, 522 S.E.2d 436 (1999). Under the applicable licensee/invitee analysis, the uninvited social guest was a licensee who could not recover damages from the residential dwelling’s owner because she was not owed the same duty of reasonable care as an invitee. The Court chose to abolish the licensee/invitee distinction and extend the same duty of care to licensees as invitees.

It explained how this extension of the legal duty to maintain premises in a reasonably safe condition to licensees would affect prior case law as follows:

We hold that the invitee/licensee distinction is abandoned. Our cases that rely upon it, including Puffer v. Hub Cigar Store . . . , and their progeny, are overruled to the extent that they rely upon an invitee/licensee distinction.

Id. at 157, 448. It is clear from this 1999 holding that the Court did not intend to abandon the Burdette “open and obvious” rule or any other reasonable limitations on the duty of care owed to business invitees. Rather, it only intended to extend the same duty of care to licensees and overrule prior case law to the extent it applied a lesser duty of care. Thus, neither King, nor Mallet, changed the duty of care owed to Mr. Hersh under Sesler or Burdette. Under either case, the Respondents still owed Mr. Hersh a duty to maintain their business premises in a reasonably safe condition. However, the Respondents’ duty of care is not limitless. Neither King, nor Mallet, altered the reasonable limitations placed on the Respondents’ duty of care to Mr. Hersh under the Sesler “no duty for known defects” rule or the Burdette “open and obvious” rule. Even after King and Mallet, the Respondents still did not owe Mr. Hersh a duty with regard to known, open, and obvious conditions like the missing handrails along the subject stairs.<sup>13</sup>

In Stevens v. West Virginia Inst. of Tech., the Court considered the claim of a college student injured while setting up a volleyball standard at a gymnasium. See Stevens, 207 W. Va.

---

<sup>13</sup> In Mallet, the Court specifically addressed the need to account for certain policy considerations when defining a property owner’s legal duties.

While the existence of a duty is defined in terms of foreseeability, it also involves policy considerations including “the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant.”

Id. at 156, 447. The Mallet Court was specifically mindful of the admonition that, “[a] line must be drawn between the competing policy consideration of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit.” Mallet, 206 W. Va. 145, 522 S.E.2d 436 at n. 15. In drawing that line, the Mallet Court had the opportunity to overrule explicitly the Burdette “open and obvious” rule which it had affirmed in McDonald. It is highly significant that the Mallet Court did not do so. Instead, the Mallet Court implicitly reaffirmed the Burdette “open and obvious” rule as a proper limitation on the duty owed by a West Virginia property owner under its five-part test.

370, 532 S.E.2d 639 (1999). This is the first case the Court considered after deciding Mallet. The Stevens Court explicitly reaffirmed the Burdette “open and obvious” rule and its reasonable limitation on a West Virginia property owner’s legal duties as follows:

In Mallet, we stated that 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].” Syllabus Point 3, Burdette v. Burdette, 147 W. Va. 313, 127 S.E.2d 249 (1962).

Id. at 374, 643 (citations omitted). In light of the Stevens Court’s explicit post-King and post-Mallet reliance on Burdette to limit a West Virginia property owner’s duty, it is clear that the Burdette “open and obvious” rule continues to be the law in West Virginia, regardless of the King modifications to the assumption of risk defense.

Seventeen (17) years after it decided King and modified the assumption of risk defense in 1989, the West Virginia Supreme Court of Appeals once again reaffirmed the Burdette “open and obvious” rule in one more important case.

In Hawkins v. U.S. Sports Assoc. Inc., the Court considered the claims of a softball player who injured his knee on a plastic pipe while sliding toward first base during a tournament. See Hawkins, 219 W. Va. 275, 633 S.E.2d 31 (2006). 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 . . . .”**

Id. at 279, 35 (citing McDonald, 191 W. Va. 179, 444 S.E.2d 57) (emphasis added). Contrary to the Petitioners’ assertions, this most recent affirmation of the Burdette “open and obvious” rule demonstrates that the Court never intended its 1989 modifications to the assumption of risk defense to abolish its reasonable limitations on a property owner or occupier’s duty of care.

In order to avoid the clearly-established Burdette “open and obvious” rule, the Petitioners point to other states which have determined that their own “open and obvious” rule, like assumption of risk, is incompatible with their comparative fault systems. None of these states has developed their premises liability law in the same fashion as West Virginia. The Petitioners’ arguments vis-a-vis Bradley’s adoption of a comparative fault system and King’s modification of the assumption of risk defense completely ignore McDonald, Helmick, Mallet, Stevens, and Hawkins, all of which have affirmed the Burdette “open and obvious” rule since Bradley and King were decided. Moreover, the Petitioners’ arguments fail to acknowledge that the West Virginia Supreme Court of Appeals did not rely upon Bradley or King in any of these cases. Rather, it consistently discussed the Burdette “open and obvious” rule as a reasonable limitation on a West Virginia property owners’ legal duty at least five (5) times after deciding Bradley and King. For these reasons, this Court should reject the Petitioners’ reliance on inapposite law from other states to avoid the Burdette “open and obvious” rule and greatly expand a West Virginia property owner or occupiers’ legal duties.

**B. This Court Has Recognized The Important Distinction Between The Burdette “Open And Obvious” Rule, Which Focuses On The Duty Owed To A Plaintiff, And The Assumption Of Risk And Comparative Fault Doctrines, Which Focus On The Plaintiff’s Fault.**

The Petitioners cite cases in which courts from other states have abolished or modified their own “open and obvious” rule by making it part of the overall comparative negligence analysis. These cases are inapposite because they overlook the initial negligence analysis (i.e. is a duty even owed to the plaintiff?) to focus on a plaintiff’s own comparative fault (i.e. did the plaintiff’s negligence contribute to his injury?) Simply put, if there is no duty owed to a plaintiff, there is no need to compare the plaintiff’s negligence to the defendant’s negligence.

The West Virginia Supreme Court of Appeals has recognized that these two concepts—a property owner’s lack of legal duty with regard to known, open, and obvious conditions and the general assumption of risk/comparative fault analysis—are not connected. Assumption of risk focuses on a plaintiff’s fault, not the legal duty owed to a plaintiff. See King, 182 W. Va. at 281, 387 S.E.2d at 516. Burdette and its progeny do not discuss a property owner’s exemption from liability for known, open, and obvious conditions in terms of assumption of risk or even comparative negligence. Rather, these cases clearly establish that a West Virginia property owner’s exemption from liability for known, open, and obvious conditions rests on the lack of a legal duty which can create “actionable” negligence. Accordingly, the Burdette “open and obvious” rule is just as applicable to the Petitioners’ case today as it was when Burdette was decided in 1962. This is true regardless of the Petitioners’ attempts to tie it to the King assumption of risk analysis.<sup>14</sup>

The West Virginia Supreme Court of Appeals has also expressly rejected the Petitioners’ argument seeking to avoid the Burdette “open and obvious” rule by tying it to the King assumption of risk and comparative fault analysis. In Walters v. Fruth Pharmacy, Inc., the Court

---

<sup>14</sup> King was a product liability case, not a premises liability case. It did not address a property owner’s legal duty to maintain his premises in a reasonably safe condition under Burdette. Rather, King addressed a product manufacturer’s strict liability for a defective product and its defenses based on a plaintiff’s use of its product with knowledge of the risks. This is an important distinction. The King Court acknowledged that the assumption of risk doctrine focused on the fault of the plaintiff, rather than the legal duty owed the plaintiff. See King, 182 W. Va. at 281, 387 S.E.2d at 516. The King Court also discussed this important distinction in its analysis as follows:

Admittedly, in some of these [spectator injury] cases, courts speak of the spectator assuming the ordinary hazards incident to the particular activity, but such statements are not made in the traditional formulation of assumption of risk. **The more appropriate analysis acknowledges that the owner of the facility has no duty to protect an invitee against the ordinary hazards of the sports activity.** This same analysis extends to a participant. Thus, a ski slope that becomes ice-covered or an ice skating rink where the ice is gouged by other skaters should not usually result in the owner becoming liable to those injured because of these conditions.

Id. at 284, 519 (emphasis added). This discussion demonstrates why the King Court’s modification of the assumption of risk defense has no bearing on the Burdette “open and obvious” rule and a property owner’s legal duties. The King Court recognized the distinction between the legal duty owed by a property owner in a premises liability case and the assumption of risk defense based on the plaintiff’s own fault in other types of cases.

considered the claims of a customer who fell in a drug store parking lot and the validity of a jury instruction based upon Burdette. See Walters, 196 W. Va. 364, 472 S.E.2d 810. The Court specifically discussed the important distinction between issues of legal duty, addressed in Burdette, and defenses based on a plaintiffs' fault (i.e. contributory/comparative negligence or assumption of risk), addressed in King. The plaintiff argued that the defendant's jury instruction, based upon Burdette, misapplied the Court's comparative fault rule. This 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 called for application of comparative fault under Bradley. 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 approved the defendant's argument that the instruction "was meant to describe its **duty** toward invitees and what constituted a breach of those duties." Id. at 368, 814 (emphasis added). The Petitioners' arguments against application of the well-established Burdette "open and obvious" rule are similarly misplaced. In this case, as in Walters, the Petitioners argue that reliance on the Burdette "open and obvious" rule ignores the comparative negligence principles set forth in King and Bradley. The Plaintiffs' argument fails, just as it did in Walters, because it ignores the critical 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 owners'] duty toward invitees," not defenses related to a plaintiff's fault,

such as contributory negligence or assumption of risk. Therefore, assumption of risk and comparative fault should not serve as a justification for abolishing the Burdette “open and obvious” rule. These are two separate concepts.

**C. Other Courts Have Also Recognized The Important Distinction Between The “Open And Obvious” Rule, Which Focuses On The Duty Owed To A Plaintiff, And The Assumption Of Risk And Comparative Fault Doctrines, Which Focus On The Plaintiff’s Fault.**

Like West Virginia, at least three (3) other states have recognized that their own comparative negligence and assumption of risk doctrines are separate and distinct from their “open and obvious” rule. These states have specifically declined to abolish their “open and obvious” rule for reasons directly applicable in the present case.

In Harrington v. Syufy Enterprises, the Nevada Supreme Court considered the claim of a plaintiff who tripped over protruding tire spikes at a flea market held on the grounds of a drive-in theater. See Harrington, 113 Nev. 246, 931 P.2d 1378 (1997). The property owner obtained summary judgment by arguing the tire spikes were an “obvious danger” as a matter of law. Id. at 248, 1380. On appeal, the plaintiff argued that Nevada’s “obvious danger” doctrine was abrogated by the adoption of comparative negligence rules. Id. The court rejected this argument explaining:

NRS 41.141(1) provides that the comparative negligence of the plaintiff does not bar recovery if that negligence was not greater than the negligence of the defendant. [Plaintiff] Harrington contends that the obvious danger rule bars recovery to a negligent plaintiff regardless of her degree of comparative fault, in effect preserving the contributory negligence rule that NRS 41.141 was clearly intended to eliminate. We disagree.

Recovery is barred when the danger is obvious, not because the negligence of the plaintiff is greater than that of the defendant, but because the defendant is not negligent at all. The defendant has no duty to warn against an obvious danger and cannot, therefore, be negligent in failing to give such a warning. Thus, the defendant in Gunlock did not escape liability for its negligence; the defendant escaped liability because it was not negligent at all . . . . Obviously, where there

is no negligence on the part of the defendant, there can be no “comparative negligence.” . . . We conclude, therefore, that the obvious danger rule survives the adoption of comparative negligence statutes.

Id. at 249–50, 1380–1381 (citations omitted). For these same reasons, the Burdette “open and obvious” rule survived West Virginia’s adoption of comparative fault in Bradley and should not now be abolished at the Petitioners’ urging.

In O’Sullivan v. Shaw, the Supreme Judicial Court of Massachusetts considered the claim of a social guest who sought to recover from homeowners after diving headfirst into the shallow end of their swimming pool. See O’Sullivan, 431 Mass. 201, 726 N.E.2d 951 (2000). The homeowners obtained summary judgment under the Massachusetts “open and obvious” rule because they had no duty as a matter of law to warn their guest about the dangers of diving headfirst into a swimming pool. On appeal, the plaintiff-guest argued that the Massachusetts “open and obvious” rule was implicitly abolished by its comparative negligence statute which expressly abolished the assumption of risk defense. Like the Petitioners in this case, the plaintiff-guest further argued that the “open and obvious” rule is merely a “corollary” of the assumption of risk defense and a jury should properly decide whether the homeowner-defendant was liable under comparative fault principles. Id. at 205, 955. In rejecting these arguments, the court observed:

Landowners are relieved of the duty to warn of open and obvious dangers on their premises because it is not reasonably foreseeable that a visitor exercising (as the law presumes) reasonable care for his own safety would suffer injury from such blatant hazards. . . . Stated otherwise, where a danger would be obvious to a person of ordinary perception and judgment, a landowner may reasonably assume that a visitor has knowledge of it and, therefore, “any further warning would be an empty form” that would not reduce the likelihood of resulting harm . . . .

[. . .]

Although we have not previously addressed this precise issue, Massachusetts courts have continued to apply the open and obvious danger rule in cases decided after the Legislature’s abolition of the assumption of risk defense, thereby at least implicitly recognizing the rule’s continuing viability. . . .

[. . .]

**Thus, the superseded common-law defense of assumption of risk goes to a plaintiff's failure to exercise due care for his own safety, whereas the open and obvious danger rule concerns the existence of a defendant's duty of care, which the plaintiff must establish as part of his prima facie case before any comparative analysis of fault may be performed. . . .** we conclude that the Legislature's express abolition of "the defense of assumption of risk" in G.L. c. 231, § 85, does not alter the plaintiff's burden in a negligence action to prove that the defendant owed him a duty of care in the circumstances, and thus leaves intact the open and obvious danger rule, which operates to negate the existence of a duty of care . . . .

Id. at 205–06, 955–56 (internal citations omitted) (emphasis added). Analogous reasoning supports retention of the Burdette "open and obvious" rule in West Virginia. West Virginia law presumes that every person will exercise due care for his/her own safety. See Birdsell v. Monongahela Power Co., Inc., 181 W. Va. 223, 382 S.E.2d 60 (1989) ("Each person has a duty 'to look, and to look effectively, and to exercise ordinary care to avoid a hazard' because if he fails to do so and is injured, his own negligence will defeat recovery of damages sustained."). It is not reasonably foreseeable that a person exercising reasonable care for his own safety would suffer injury from known, open, and obvious hazards (e.g. injury from using stairs which he knows do not have handrails, especially when he also knows he "falls almost daily" due to numbness in his feet). Foreseeability defines the duty owed. Syl. pt. 3, Sewell v. Gregory, 179 W. Va. 585, 371 S.E.2d 82 (1988). West Virginia's superseded common-law defense of assumption of risk, like Massachusetts', goes to a plaintiff's failure to exercise due care for his own safety. Meanwhile, the Burdette "open and obvious" rule addresses the threshold question of whether a defendant owes a duty of care, which a plaintiff must establish as part of his *prima facie* case before any comparative analysis of fault may be performed. Thus, there is no reason to abolish those reasonable limitations placed on a property owner's duties based upon unrelated comparative fault concepts.

Finally, in Armstrong v. Best Buy Co., Inc., the Supreme Court of Ohio considered the claim of a customer who tripped over the bracket of a store shopping-cart guardrail. See Armstrong, 99 Ohio St. 3d 79, 788 N.E.2d 1088 (2003). The store obtained summary judgment by arguing that the guardrail was an open and obvious condition for which it owed the customer no duty of care. On appeal, just as the Petitioners argue in this case, the customer-plaintiff argued that prior case law abrogated Ohio's "open and obvious" rule as a complete bar to recovery by analyzing causation, not legal duty, and requiring that comparative negligence principles should determine liability. Id. at 79, 1089. The court rejected this approach by first observing the rationale underlying the "open and obvious" rule:

[T]he open and obvious nature of the hazard itself serves as a warning. Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves.

Id. at 80, 1089 (citation omitted). Then, the court explained:

We are cognizant of the fact that some courts have abolished the open-and-obvious rule in favor of a comparative-negligence approach. These courts, like that of Schindler, look at obviousness of the hazard as one factor to be taken into account in determining a plaintiff's comparative negligence . . . . Other courts have adopted Restatement of the Law 2d, Torts (1965), Section 343A, which finds liability when the landowner should have anticipated harm caused by obvious dangers . . . .

However, we decline to follow these cases because we believe that the focus in these decisions is misdirected. The courts analyzing the open-and-obvious nature of the hazard as an element of comparative negligence focus on whether the plaintiff's negligence in confronting an open-and-obvious danger exceeds any negligence attributable to the defendant. . . . Under this approach, the open-and-obvious rule does not act as an absolute defense. Rather, it triggers a weighing of the parties' negligence.

**What these courts fail to recognize is that the open-and-obvious doctrine is not concerned with causation but rather stems from the landowner's duty to persons injured on his or her property. By failing to recognize the distinction between duty and proximate cause, we believe that these courts have prematurely reached the issues of fault and causation.** The Illinois Supreme Court recognized this distinction in Bucheleres v. Chicago Park Dist., 171 Ill.2d

435, 216 Ill. Dec. 568, 665 N.E.2d 826 (1996), a decision upholding the viability of the open-and-obvious doctrine in that state. The court stated: “The existence of a defendant's legal duty is separate and distinct from the issue of a plaintiff's contributory negligence and the parties' comparative fault. **The characterization of the open and obvious doctrine as a ‘defense’ that should be submitted to the jury as part of the comparison of the relative fault of the parties overlooks the simple truism that where there is no duty there is no liability, and therefore no fault to be compared.**”

Id. at 82–83, 1090–91 (citations omitted) (emphasis added). Ultimately, the court held:

We continue to adhere to the open-and-obvious doctrine today. In reaching this conclusion, we reiterate that when courts apply the rule, they must focus on the fact that the doctrine relates to the threshold issue of duty. By focusing on the duty prong of negligence, the rule properly considers the nature of the dangerous condition itself, as opposed to the nature of the plaintiff's conduct in encountering it. **The fact that a plaintiff was unreasonable in choosing to encounter the danger is not what relieves the property owner of liability. Rather, it is the fact that the condition itself is so obvious that it absolves the property owner from taking any further action to protect the plaintiff . . . . Even under the Restatement view, we believe the focus is misdirected because it does not acknowledge that the condition itself is obviously hazardous and that, as a result, no liability is imposed.**

Id. (emphasis added). Again, the same reasoning applies in the present case. West Virginia property owners and occupiers should also be able to “reasonably expect that persons entering [their] premises will discover [known, open, and obvious] dangers and take appropriate measures to protect themselves.” A focus on causation, rather than duty, as the Petitioners suggest, ignores the purpose of the Burdette “open and obvious” rule: to define fairly a property owner’s legal duty to entrants while retaining an element of personal responsibility. This Court should not interchange causation with legal duty and remove this element of personal responsibility from West Virginia’s tort law by adopting the Petitioners’ argument that West Virginia’s comparative fault system is somehow inconsistent with a fairly-defined legal duty.<sup>15</sup>

---

<sup>15</sup> The Burdette “open and obvious” rule is broader than the Sesler “no duty for known defects” rule. In addition to known conditions, it finds no duty for conditions which the entrant “should have known” or “should have recognized” because of their open and obvious character. Even if this Honorable Court sees merit in the Petitioners’ argument for making the Burdette “open and obvious” rule a part of the overall comparative negligence

**D. The Burdette “Open And Obvious” Rule Fairly Limits A West Virginia Property Owner’s Duty Of Care And Should Not Be Replaced With The Subjective Restatement Foreseeability Analysis Suggested By The Petitioners.**

Section 343 of the Restatement (Second) of Torts (1965) defines a property owner’s legal duty as follows:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, **but only if, he**

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

**(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and**

(c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts § 343 (1965) (emphasis added). Comment a to Section 343 explicitly states that it “should be read together with [Section] 343A, which deals with the effect of the fact that the condition is known to the invitee, or is obvious to him” and “limits the liability” stated in Section 343. *Id.* at cmt. a. The Petitioners focus solely on Section 343A as a replacement for the Burdette “open and obvious” rule. This portion of the Restatement adds further subjectivity to the duty analysis by defining a property owner’s legal duty as follows:

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, **unless the possessor should anticipate the harm despite such knowledge or obviousness.**

---

analysis, it should limit this change to those conditions which the entrant “should have known” or “should have recognized.” This Honorable Court should not also abolish the narrower Sesler “no duty for known defects” rule because, if nothing else, a West Virginia property owner should be able to “reasonably expect that persons entering [their] premises will discover [known] dangers and take appropriate measures to protect themselves.” *See Armstrong*, 99 Ohio St. 3d at 80, 788 N.E.2d at 1089. This would allow the McDonald *prima facie* premises liability requirements to remain largely intact and avoid imposing a duty on West Virginia property owners to protect entrants from known conditions. In this case, the Petitioners’ claims fail under the narrower Sesler “no duty for known defects” rule because Mr. Hersh has affirmatively admitted that he knew there was no handrail along the subject stairs, and that he needed his single-point cane to preserve his balance, when he first ascended the stairs and when he later began to descend the stairs just before he fell. Thus, there is no dispute that Mr. Hersh knew of the condition (i.e. missing handrails) and also appreciated the danger that condition presented (i.e. increased risk of falling), especially when coupled with his own peculiar knowledge of his medical condition (i.e. increasing numbness in his feet which caused him to “fall almost daily).

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

Restatement (Second) of Torts § 343A (1965) (emphasis added).

When §§ 343 and 343A are read together, the rule generated is that if the particular activity or condition creates a risk of harm only because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger. On the other hand, **if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions. The issue then becomes the standard of care and is for the jury to decide.**

Bertrand v. Alan Ford, Inc., 449 Mich. 606, 611–12, 537 N.W.2d 185, 187 (1995) (emphasis added). Thus, when these two Restatement sections are read together, one is left with a malleable and subjective legal duty which is contingent, uncertain, and unworkable both for West Virginia property owners who wish to comply with the law and for Courts who wish to apply legal duties consistently in all cases. When should the property owner “anticipate the harm despite such knowledge or obviousness?” When does the risk of harm “remain unreasonable?” What additional “reasonable precautions” is the property owner required to take? These shortcomings demonstrate why this Court should refrain from abolishing the well-established Burdette “open and obvious” rule in favor of the subjective Restatement foreseeability analysis advocated by the Petitioners.

The comments to Section 343A further demonstrate the uncertainty inherent in the subjective Restatement approach advocated by the Petitioners. Comment b on Subsection (1) of Section 343A provides:

b. The word “known” denotes not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves. Thus the condition or activity must not only be known to exist, but it must also be

recognized that it is dangerous, and the probability and gravity of the threatened harm must be appreciated. "Obvious" means that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment.

Restatement (Second) of Torts § 343A, cmt. b(1). Meanwhile, comment f on Subsection (1) of Section 343A states:

f. There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.

Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk. (See §§ 466 and 496D.) It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances.

Restatement (Second) of Torts § 343A, cmt. f(1). Finally, comment g on Subsection (2) of Section 343A explains:

g. In determining whether the possessor of land should expect harm to invitees notwithstanding the known or obvious character of the danger, the fact that premises have been held open to the visitor, and that he has been invited to use them, is always a factor to be considered, as offering some assurance to the invitee that the place has been prepared for his reception, and that reasonable care has been used to make it safe. There is, however, a special reason for the possessor to anticipate harm where the possessor is a public utility, which has undertaken to render services to members of the public, so that they are entitled to demand the use of its facilities, and to expect reasonable safety while using them. The same is true of the government, or a government agency, which maintains land upon which the public are invited and entitled to enter as a matter of public

right. Such defendants may reasonably expect the public, in the course of the entry and use to which they are entitled, to proceed to encounter some known or obvious dangers which are not unduly extreme, rather than to forego the right.

**Even such defendants, however, may reasonably assume that members of the public will not be harmed by known or obvious dangers which are not extreme, and which any reasonable person exercising ordinary attention, perception, and intelligence could be expected to avoid. This is true particularly where a reasonable alternative way is open to the visitor, known or obvious to him, and safe.**

Restatement (Second) of Torts § 343A, cmt. g(1) (emphasis added). As these comments demonstrate, the Restatement foreseeability analysis only creates more uncertainty regarding when and how a known, open, and obvious condition is actionable and when it is not.<sup>16</sup>

In West Virginia, “[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.” Syl. pt. 5, Aikens v. Debow, 208 W. Va. 486, 541 S.E.2d 576 (2000). Nevertheless, the Petitioners advocate jury determination of the nature and scope of a property owner’s legal duty on a case-by-case basis through the Restatement Section 343A foreseeability analysis. Not only is this contrary to existing West Virginia law, but it is also completely unworkable and invites bad public policy. “While the existence of a duty is defined in terms of foreseeability, it also involves policy considerations including ‘the likelihood of injury, the magnitude of the burden of

---

<sup>16</sup> It is important to note that the Petitioners’ claims would also fail under the Restatement Section 343A foreseeability analysis and comment g because the Respondents “may reasonably assume that members of the public will not be harmed by known or obvious dangers which are not extreme, and which any reasonable person exercising ordinary attention, perception, and intelligence could be expected to avoid . . . particularly where a reasonable alternative way is open to the visitor, known or obvious to him, and safe.” Restatement (Second) of Torts § 343A, cmt. g(1) (1965). In this case, there is no dispute that 1) the open and obvious missing hand rails along the Respondents’ stairs were not an “extreme” danger (i.e. no one else had fallen on the stairs before Mr. Hersh); 2) Mr. Hersh, as a reasonable person exercising ordinary attention, perception and intelligence, could have been expected to avoid the Respondents’ stairs with open and obvious missing handrails, especially given his particular knowledge of his own medical conditions (i.e. he “falls almost daily” due to worsening numbness in his feet); and 3) Mr. Hersh recognized a safe, reasonable alternative way to avoid the Respondent’s stairs before he fell (i.e. walk to Winchester Avenue and down the sidewalk).

guarding against it, and the consequences of placing that burden on the defendant.” Mallet, 206 W. Va. at 156, 522 S.E.2d at 447. Given its subjectivity, this Court should reject the Restatement Section 343A foreseeability analysis suggested by the Petitioners and retain the well-established, common-sense Burdette “open and obvious” rule which fairly and more objectively limits a West Virginia property owner’s legal duty in premises liability cases.

### CONCLUSION

In Lemley v. U.S., the District Court considered an accident very similar to Mr. Hersh’s October 9, 2009 fall and made the following observations which are still entirely appropriate forty-two (42) years later:

That visibility at the time and place of the accident in the instant case was excellent is undisputed, and the plaintiff admits he saw the missing plywood from the section of the scaffold and the unsupported condition of the plank from which he fell before he attempted to walk on the plank. Under such circumstances, the plaintiff should have known that these conditions were conditions from which it was likely that he would fall and be injured. **He cannot shut his eyes to a known danger and act oblivious to it and then expect to recover at law for the consequences of his carelessness.**

Lemley, 317 F. Supp. at 361 (citing Sesler v. Rolfe Coal Co., 51 W. Va. 318, 41 S.E. 216) (emphasis added). Mr. Hersh knew he “falls almost daily” due to the worsening numbness in his feet when he decided to ascend the Respondents’ stairs. He specifically used his single-point cane for balance “because there was no handrail” as he ascended the Respondents’ stairs. Twenty-five (25) minutes later, after rejecting a safe alternate route to his car, Mr. Hersh once again used his single-point cane for balance “because there was no handrail” as he began to descend the Respondents’ stairs. Only then, after rejecting a safe alternate route and twice exposing himself to stairs he knew had no handrails, did Mr. Hersh fall. There is no doubt that Mr. Hersh “shut his eyes to a known danger and act[ed] oblivious to it.” By asking this Honorable Court to drastically change West Virginia premises liability law, there is also no

doubt that Mr. Hersh now hopes “to recover at law for the consequences of his carelessness.” Understandable sympathy for Mr. Hersh might tempt such a result; however, a sympathetic result cannot create good West Virginia law or sound West Virginia public policy.

Under well-established West Virginia premises liability law, West Virginia property owners or occupiers are not liable for known, open, or obvious conditions on their premises. The fundamental premises liability principles established by the Sesler “no duty for known defects” rule, the Burdette “open and obvious” rule, and the McDonald *prima facie* premises liability requirements have withstood the test of time. They have been affirmed since the assumption of risk doctrine was replaced by the comparative negligence doctrine. They have been affirmed in cases involving violations of safety regulations. Most importantly, these fundamental premises liability principles have maintained an important element of personal responsibility in our tort law, while striking a fair and proper balance between the interests of West Virginia property owners and occupiers and the interests of injured persons, for over one hundred ten (110) years. The alternatives offered by the Petitioners fail because they forsake the basic legal duty analysis for a premature comparison of fault and invite subjectivity and uncertainty into the basic legal duty analysis. For these reasons, this Honorable Court should resist the Petitioners’ invitation to change fundamental West Virginia premises liability law so drastically; should uphold the Sesler “no duty for known defects” rule, the Burdette “open and obvious” rule, and the McDonald *prima facie* premises liability requirements; and should affirm the Circuit Court’s proper application of these fundamental legal principles to the undisputed facts of this case.

WHEREFORE the Respondents respectfully pray this Honorable Court to AFFIRM the Circuit Court’s December 15, 2011 summary judgment orders and dismiss this appeal.

DATED the 31st day of May, 2012.

**RESPONDENTS**  
**RALPH L. ECKENRODE and**  
**E-T ENTERPRISES,**  
**LIMITED PARTNERSHIP**  
**By Counsel**

 *Bar # 11106 For*

**Joseph L. Caltrider WWSB #6870**  
**Bowles Rice McDavid Graff & Love LLP**  
**Post Office Drawer 1419**  
**Martinsburg, West Virginia 25402-1419**  
**(304) 264-4214**  
**jcaltrider@bowlesrice.com**

**CERTIFICATE OF SERVICE**

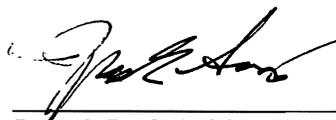
I certify that I served the foregoing RESPONDENTS' BRIEF upon all counsel of record by depositing a true and accurate copy in the United States mail, first class, postage pre-paid in an envelope addressed as follows:

Harry P. Waddell, Esq.  
300 West Martin Street  
Martinsburg, West Virginia 25401

Christopher J. Regan, Esq.  
Bordas & Bordas, PLLC  
1358 National Road  
Wheeling, West Virginia 26003

Jeffrey W. Molenda, Esq.  
Pullin, Fowler, Flanagan, Brown & Poe  
Post Office Box 1970  
Martinsburg, West Virginia 25402

on the 31st day of May, 2012.

 *Bar # 11106 For*  
\_\_\_\_\_  
Joseph L. Caltrider WWSB #6870