



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

NO. 12-0106

WALTER E. HERSH AND MARY L. HERSH,

Appellants

v.

E-T ENTERPRISES LIMITED PARTNERSHIP, RALPH L. ECKENRODE,
P&H INVESTMENTS, INC. AND TROLLERS ASSOCIATES LLC,

Appellees.

AMICUS CURIAE BRIEF
ON BEHALF OF THE WEST VIRGINIA ASSOCIATION FOR JUSTICE

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II. ASSIGNMENTS OF ERROR

1. The Circuit Court erred by failing to properly apply the syllabus of *Shaffer v. Ace Limestone Company, Inc.*, which clearly holds that proof of a violation of a statute for the protection of the public safety constitutes a *prima facie* case of negligence. *Id.* at syl. pt. 7.
2. The Circuit Court misapplied the “open and obvious doctrine,” which has not been formally adopted in West Virginia and which in any case does not apply where the possessor of land should anticipate the harm to an invitee. *Restatement (Second) of Torts* § 343A.

III. INTRODUCTION AND INTEREST OF *AMICUS CURIAE*, WEST VIRGINIA ASSOCIATION FOR JUSTICE

This *amicus* brief is submitted on behalf of the West Virginia Association for Justice (“WVAJ”) in support of the Appellants, Walter and Mary Hersh.¹

The WVAJ is a private, non-profit organization consisting of attorneys licensed in the State of West Virginia who represent, among other clients, citizens of the State of West Virginia harmed by the wrongful conduct of others. The Membership of WVAJ is particularly interested in protecting ordinary West Virginians and securing for them the rights enshrined in the State Constitution, the West Virginia Code and the decisions of this Court. It has filed *amicus* briefs on more occasions than could conveniently be counted and its briefs have been acknowledged as helpful to this Court on multiple occasions.²

¹ All parties have consented to the filing of this brief.

² See e.g. *Taylor v. Nationwide Mut. Ins. Co.*, 214 W.Va. 324 (2003); *State ex rel. Charles Town General Hosp. v. Sanders*, 210 W.Va. 118 (2001). The WVAJ was previously named the “West Virginia Trial Lawyers Association.”

No party to this appeal has authored or paid for any part of this brief.

IV. STATEMENT OF THE CASE

Your *amicus* relies upon and adopts the statement of the case as set forth by the Appellants in this matter.

V. SUMMARY OF THE ARGUMENT

In this case, the Circuit Court made two related errors that would, if left undisturbed, eviscerate a substantial swath of democratically and legislatively enacted protections for West Virginians reflected in safety statutes. It is longstanding syllabus point law in West Virginia that proof of a violation of a statute intended for the protection of the public safety constitutes a *prima facie* case of negligence. *Shaffer v. Acme Limestone Co., Inc.*, 206 W. Va. 333, 338, 524 S.E.2d 688, 693 (1999), at syl. pt. 7; *see also Pack v. Van Meter*, 177 W. Va. 485, 486, 354 S.E.2d 581, 582 (1986) (landowner can be held liable for failing to have handrail on stairs in violation of code). In the premises liability context, proof that the owner or possessor of the land has violated a statute intended for the protection of invitees on his land is sufficient to satisfy the first element of a tort — breach of a legal duty. *Id.* Thereafter, Plaintiff is required to show causation and damages to prevail.

While giving short shrift to the law of *Shaffer*, the Circuit Court relied primarily on two patent misquotations from *Burdette v. Burdette*, 147 W. Va. 313, 318, 127 S.E.2d 249, 252 (1962) and *McDonald v. University of West Virginia Board of Trustees, post*. The opinion of the Circuit Court twice cites secondary material that was merely quoted by this Court in *Burdette* and *McDonald* and presents it as though it is the language of this Court's opinions. *Cf.* Order appealed from at paragraph 3, page 9 (purporting to quote from *Burdette* at 318, but in fact

quoting 65 *Corpus Juris Secundum* Negligence § 50, which had been quoted by this Court within *Burdette*). Likewise, *see* Order appealed from at paragraph 11, page 14 (where the order purports to quote from *McDonald* at 182 but is in reality quoting a blend of the Court’s introductory language and a block quotation from *S. Speiser, et al., the American Law of Torts*, § 14.14 (1986)).³

Just as the inaccurate quotations from *Burdette* and *McDonald* distort the holdings of those cases, so the theory behind the Circuit Court’s Order distorts the open and obvious doctrine. The *Restatement (Second) of Torts* sets forth the doctrine of open and obvious dangers 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.*
- (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.

Id. (Emphasis supplied).

Furthermore, the comments to the *Restatement* section on the “open and obvious” doctrine make it clear that the open and obvious doctrine does not relieve landowners of their duty to follow the law. Comment d states:

A statute may require a possessor of land to keep it, or anything upon it, in a condition safe for invitees, or even for licensees, or to take particular precautions for the safety of such visitors. *If so, the fact that the visitor knows that the possessor has not complied with the requirements of the statute does not prevent the possessor from being subject to liability for his breach of his statutory duty.* Such knowledge of the violation is material only in determining whether the

³ The Court’s *amicus* is informed that the Order appealed from was not drafted by the Circuit Judge but rather was a proposed form submitted by the Appellees and therefore, the failure to accurately cite the source of the language the Circuit Court relied on did not originate from the Circuit Court itself, but rather with the Appellees herein.

visitor is to be charged with contributory negligence, or assumption of the risk, in coming in contact with the dangerous condition.

Id. (Emphasis supplied). In other words, the open and obvious doctrine does not operate as an all-purpose suspension of laws enacted for the public safety, wherever a landowner can make the contention that his violation of the law was somehow “obvious.”

The doctrine of *Shaffer*, that the violation of a safety statute satisfies the breach of duty requirement in a tort case (unless the statute specifically provides that it should not be so interpreted), forms a bedrock legal principle and a crucial component of the legal environment against which lawmaking bodies in the State of West Virginia operate. Many such statutes have no enforcement mechanism other than the private cause of action known by all to exist when harm results from the violation of a safety statute. Therefore, the Circuit Court’s order, if left undisturbed, threatens the public safety by removing the enforcement mechanism for a broad class of safety statutes applicable throughout our state. In fact, the doctrine adopted by the order appealed from in this case tends to encourage the most *brazen* defiance of the law by creating the perception that the more obvious one’s violation of the law, the *less likely* one is to be held accountable for it.

For these reasons, and the others appearing of record and stated herein, your *amicus* respectfully requests that the summary judgment order from the Circuit Court be REVERSED and that this Court clarify that the violation of a statute enacted for the protection of the public safety continues to constitute *prima facie* proof of negligence. Your *amicus* further respectfully requests that this Court clarify that the open and obvious doctrine is not an “immunity bath” for possessors of land and that where the possessor should anticipate harm, or has violated the law, the doctrine does not provide a complete defense.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The appropriate disposition in this case in respect to oral argument and its Rule 19/20 track frankly depends on the disposition the Court is inclined to make of it. The Circuit Court's order certainly qualifies for a memorandum decision reversing under Syllabus Point 7 of *Shaffer*. The Circuit Court's holding contradicts *Shaffer* and that can certainly be accomplished in the confines of the Rule 19 process. On the other hand, if the Court is disposed to take up the open and obvious doctrine more broadly and to craft a syllabus point on it (something that has not, to date, occurred), then the case is more appropriate for Rule 20 treatment, which is expected where new syllabus points are to be promulgated.

VII. ARGUMENT

A. PROOF OF VIOLATION OF A SAFETY STATUTE CONSTITUTES ACTIONABLE NEGLIGENCE AND IS SUFFICIENT TO SATISFY THE BREACH-OF-LEGAL-DUTY REQUIREMENT OF A TORT CASE.

1. The Circuit Court's conclusion that Appellees' violation of the law is irrelevant contradicts *Shaffer*.

Syllabus Point 7 of *Shaffer v. Acme Limestone Company, Inc.*, 206 W.Va. 333, 524 S.E.2d 688 (1999):

When a statute imposes a duty on a person for the protection of others, it is a public safety statute and a violation of such a statute is *prima facie* evidence of negligence unless the statute says otherwise. A member of a class protected by a public safety statute has a claim against anyone who violates such a statute when the violation is a proximate cause of injury to the claimant.

Id. The Circuit Court's holding that the Appellants failed to meet their burden to show the breach of a legal duty in this matter is disposed of by *Shaffer*. The law given in Syllabus Point 7 does not contain an exception for so-called "open and obvious" dangers. Moreover, this Court has not, in any other syllabus point, adopted the "open and obvious" doctrine or described it as

an exception to the rule of law announced in *Shaffer*. Furthermore, this Court has never held that a violation of the law is mitigated *much less totally excused* because the violation of the law was brazen or obvious.⁴

In *Pack v. Van Meter, supra*, this Court specifically allowed liability against an employer for injuries to an employee caused by the failure to have a legally-required handrail. This Court itemized long-standing principles allowing liability to be imposed on a premises owner who fails to keep his property in a reasonably safe condition:

W.Va.Code, 21-3-1, is the introductory section in the part of our Code relating mainly to the safety and welfare of employees in the workplace and contains this provision with regard to the owner of certain premises: “Every employer and *every owner of a place of employment*, place of public assembly, or a public building, now or hereafter constructed, shall so construct, repair and maintain the same as to render it reasonably safe.” (Emphasis added). This language clearly imposes a duty on both the employer and the owner of a place of employment, *place of public assembly, or a public building* to maintain such places in a reasonably safe condition.

.....

Thus, under W.Va.Code, 21-3-1, the employer and the owner of a place of employment, place of public assembly, or a public building is affixed with a statutory responsibility to maintain such place in a reasonably safe condition.

.....

The specific question raised in this case, however, is whether the owner of a place of employment leased to an employer is liable to his tenant's employee for violating that portion of W.Va.Code, 21-3-6, which requires handrails on stairways and safe treads on steps. We recognize that some of the provisions in

⁴ Of course, the *prima facie* case a plaintiff may establish through *Shaffer* can be rebutted by competent evidence:

“[t]he *prima facie* presumption of negligence created upon violation of a traffic statute or safety regulation may be rebutted by evidence tending to show that the person violating the statute did what might reasonably have been expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law.” Syl. pt. 3, *Waugh v. Traxler*, 186 W.Va. 355, 412 S.E.2d 756 (1991).

Gillingham v. Stephenson, 209 W. Va. 741, 746, 551 S.E.2d 663, 668 (2001). Accordingly, the matter is one for trial to the jury.

W.Va.Code, 21-3-1 through -18, involve safety requirements that are clearly the responsibility of an employer because they involve machines or other instrumentalities directly related to the employment activity over which the owner of the place of employment exercises no control.

However, we believe that in the present case, the failure to maintain the stairway with handrails and the steps with a safe tread is a responsibility reasonably shared by the employer and the owner of the place of employment. The Van Meters could have corrected these structural problems prior to renting the store to Nelson's Dress Shop. *To hold otherwise would render the language added to W.Va. Code, 21-3-1, by the 1937 amendment meaningless and would absolve owners of places of employment from any responsibility under this statute.*

Pack v. Van Meter, 177 W. Va. 485, 489-91, 354 S.E.2d 581, 585-587 (1986) (emphasis supplied). The building code relied on by the Hershes prescribes a duty to the general public, no less than W.Va. Code § 21-3-1 prescribes a duty to employees (indeed, this Court has not held that the duty of § 21-3-1 is even limited to employees). Accordingly, the Hershes showed clear grounds for their case to go to the jury and the Circuit Court's summary judgment order was incorrect.

The doctrines of the assumption of the risk, last clear chance and contributory negligence have been abolished or subsumed into the law of comparative negligence in West Virginia. *King v. Kayak Mfg. Corp.*, 182 W.Va. 276, 387 S.E.2d 511 (1989) (assumption of the risk no longer bars recovery unless it rises to over fifty percent comparative fault); *Ratlief v. Yokum*, 167 W.Va. 779, Syl. Pt. 5, 280 S.E.2d 584 (1981) (abolishing last clear chance); *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979) (comparative negligence adopted in preference to harsh rule of contributory negligence). The Circuit Court's rationale re-establishes these discarded doctrines by focusing the inquiry solely on the plaintiff and ignoring the negligence of the defendant.

The Appellees' contention that the stairway where the Appellant fell was obviously dangerous constitutes at most evidence sufficient to raise the defense of comparative negligence

before the jury. Like most tort cases presenting questions of due care, negligence, proximate cause, etc., this case is therefore inappropriate for disposition by summary judgment.⁵ *See Evans v. Farmer*, 148 W. Va. 142, 143, 133 S.E.2d 710, 711 (1963) (“The questions of negligence, contributory negligence, proximate cause, intervening cause and concurrent negligence are questions of fact for the jury where the evidence is conflicting or when the facts, though undisputed, are such that reasonable men draw different conclusion from them.”). The Appellant, Mr. Hersh, has established the Appellees’ breach of a legal duty, in failing to comply with the law requiring a railing on the subject staircase, as well as providing evidence supporting proximate cause and damages. It is for the jury to decide whether Mr. Hersh was himself negligent in using the staircase on the Appellees’ property provided to get the Appellees’ customers from the parking lot into the store.

⁵ A federal Court agreed with this Court’s long-standing reluctance to allow summary judgment in disputed cases of this nature and explained its holding thus:

The defendant urges that the situation was obvious and hence the defendant was not negligent in inviting the plaintiff into it. The plaintiff quotes from a leading text, as follows:

On the other hand, the fact that a condition is obvious- i.e., it would be clearly visible to one whose attention was directed to it- does not always remove all unreasonable danger. In one line of cases, people . . . are likely to have their attention distracted as they approach it . . .

2 Harper and James, *The Law of Torts*, 27.13. In *Murphy v. El Dorado Bowl, Inc.*, 2 Ariz.App. 341, 409 P.2d 57 (1965) the Court cited with approval 343 A, Subsection (1), of Restatement of Torts, Second, which says:

Known or Obvious Dangers. (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.

Every case involving the question of whether a condition existing on land presents an unreasonable risk of harm to an invitee to that land is, almost necessarily, a unique case, so far as its facts are concerned. *The decision of the trier of fact, if supported by substantial evidence, should mark the end of the litigation.*

Morgan v. Armour & Co., 425 F.2d 233, 234 (9th Cir. 1970) (emphasis supplied).

The only syllabus point language relied on by the Circuit Court is from Syllabus Point 3 of *Puffer v. The Hub Cigar Store, Inc.*, 140 W.Va. 327, 84 S.E.2d 145 (1954), which states:

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 negligence or willful or wanton misconduct and no nuisance exists, he is not liable for injuries there sustained by such invited person.

Id. This language demonstrates the fallacy in the reasoning of the Circuit Court. The exculpatory concept of Syllabus Point 3 from *Puffer* requires that the Defendant be “not guilty of negligence.” *Id.* Since, in this case, the Defendant is clearly guilty of negligence; in particular the very specific negligent act of failing to comply with a law made for the safety of invitees on the Appellees’ premises, there is no relief for the Appellee in this case under *Puffer*.

The Circuit Court clearly erred in treating the misquotations of secondary material from *Burdette* and *McDonald* as though they were the syllabus point law of this Court. This Court does not adopt and change the fundamental tort law of the State of West Virginia merely by referencing and referring to scholarly treatises, but rather through the promulgation of syllabus points in accordance with the Constitution of the State of West Virginia. “[N]ew points of law – will be articulated through syllabus points as required by our state constitution.” Syllabus Point 2, in part, *Walker v. Doe*, 210 W.Va. 490, 558 S.E.2d 290 (2001).” *State ex rel. Med. Assurance of W. Virginia, Inc. v. Recht*, 213 W. Va. 457, 461, 583 S.E.2d 80, 84 (2003). In light of the fact that the order being appealed from is a tendered order, the possibility cannot be discounted that the Circuit Court was simply unaware that the primary quotations on which its opinion relied were not in fact the words of this Court, but rather those of cited commentators. In any case, as to the issue of duty, *Shaffer* controls, and the order below granting summary judgment to the Appellees should be REVERSED.

2. **The Appellees' authorities are inapposite and do not control here.**

The case of *McDonald v. Univ. of W. Virginia Bd. of Trustees*, 191 W. Va. 179, 182, 444 S.E.2d 57, 60 (1994) involved a small depression in a lawn – something against which, obviously, there are no rules, statutes or regulations, and of which it may be expected a landowner will have no knowledge whatsoever. It has absolutely no similarity or relevance to a business owner's disregard of the clear requirements of the building code, as occurred in this case. Likewise *Senkus v. Moore*, 207 W. Va. 659, 661, 535 S.E.2d 724, 726 (2000), does not help the Appellees because there is of course, no statute or building code prohibiting a medical or veterinary facility from keeping a scale on the floor and there was thus no showing of negligence in the first place in that case. *Alexander v. Curtiss*, 808 F.2d 337 (4th Cir. 1987) has the same fact pattern – no statutory violation is even alleged; the victim had used the rustic ladder dozens of times before; and the Fourth Circuit made specific and case-unique findings about the latency of the defects that would not apply in this case. *Id.* at 339.

Stevens v. West Virginia Inst. Of Tech., 207 W.Va. 370, 532 S.E.2d 639 (1999) does not come close. A student setting up a volleyball net was injured and failed to show that any negligence or defect caused her injury at all. *Id.* at 644, 375 (“Except for Stevens and these two women, no other witnesses were listed by the plaintiff to support her allegation of defective equipment. No attempt was made by Stevens to examine the volleyball standard that caused the injury to determine if it was defective, nor was there any evidence offered below through depositions, answers to interrogatories or stipulations indicating how the equipment was to be set up or maintained.”).

Appellees' other sports case, *Hawkins v. U.S. Sports Ass'n, Inc.*, 219 W. Va. 275, 276, 633 S.E.2d 31, 32 (2006), is equally inapplicable as it concerns an injury that occurred while

sliding into *first base* – in fact, the Court went out of its way to explain that *Hawkins* and *McDonald* are premised on the absence of any negligence or violations by the premises owner – the opposite of what we have here, where the landowner clearly violated a safety statute:

This Court examined the *Puffer* standard and found that *if the owner was not guilty of negligence* or willful or wanton misconduct, and if no nuisance existed, there would be no liability. This Court concluded that the student in *McDonald* had failed to establish that the university was negligent concerning any irregularity in the lawn which allegedly precipitated the fall.

Hawkins v. U.S. Sports Ass'n, Inc., 219 W. Va. 275, 279, 633 S.E.2d 31, 35 (2006) (emphasis supplied). Where, as here, there is clear negligence in failing to have a railing as required by law, *Puffer* does not allow summary judgment.

The *per curiam* opinion of *Estate of Helmick by Fox v. Martin*, 192 W. Va. 501, 502, 453 S.E.2d 335, 336 (1994), is likewise not controlling. In *Helmick*, the Court applied the *Puffer* syllabus which explicitly requires that there be no negligence on the part of the defendant. *Id.* The case emphasized that the invitees there were repeat customers who had been explicitly warned of the condition. Moreover, as a *per curiam* opinion, it should not be read as establishing controlling law. “[N]ew points of law . . . will be articulated through syllabus points as required by our state constitution.’ Syllabus Point 2, in part, *Walker v. Doe*, 210 W.Va. 490, 558 S.E.2d 290 (2001).” *State ex rel. Med. Assurance of W. Virginia, Inc. v. Recht*, 213 W. Va. 457, 461, 583 S.E.2d 80, 84 (2003).

VIII. THE OPEN AND OBVIOUS DOCTRINE DOES NOT APPLY WHERE THE POSSESSOR OF LAND SHOULD ANTICIPATE THE HARM TO ITS INVITEE.

As indicated above, this Court has never promulgated a syllabus point recognizing the “open and obvious” doctrine as a part of West Virginia tort law. The only syllabus point law even relating to the issue is that of *Puffer, supra*, which contains exceptions, including where the

landowner is “guilty of negligence.” If the Court is disposed to adopt the open and obvious doctrine in West Virginia, your *amicus* respectfully submits that the doctrine should be adopted in the form promulgated in *Restatement (Second) of Torts* at § 343A. That section states:

(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.*

(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.

Id. The commentary to *Restatement* § 343A specifically contemplates and addresses the interaction of the doctrine with safety statutes. Comment d states:

A statute may require a possessor of land to keep it, or anything upon it, in a condition safe for invitees, or even for licensees, or to take particular precautions for the safety of such visitors. If so, the fact that the visitor knows that the possessor has not complied with the requirements of the statute does not prevent the possessor from being subject to liability for his breach of his statutory duty. Such knowledge of the violation is material only in determining whether the visitor is to be charged with contributory negligence, or assumption of the risk, and coming in contact with the dangerous condition.

Id. (Emphasis supplied). Furthermore, the *Restatement* makes it clear that:

Whether the plaintiff knows of the existence of the risk, or whether he understands and appreciates its magnitude and its unreasonable character, is a question of fact, usually to be determined by the jury under proper instructions from the court.

Id. at Comment e. Under the *Restatement*'s complete recitation of the doctrine, *Shaffer* remains viable and this case goes to the jury.

The Michigan Court of Appeals carefully explained the logic to be applied in *Temple v. Salem*, 203835, 1999 WL 33327248 (Mich. Ct. App. Dec. 7, 1999) (emphasis supplied):

In the case before us, plaintiff in visiting her physician who occupied defendant's building was apparently required to descend the staircase on which she fell. We

accept that plaintiff may be charged with knowledge of the general danger presented by steps, and acknowledge that plaintiff had previously traversed the very steps on which she fell. Nonetheless, we find that no matter how carefully plaintiff or other visitors to defendant's building chose to negotiate the steps, it was foreseeable that some would, for one reason or another, lose their footing on the steps. The dissent's position ignores that *mere awareness of the risk posed by the stairs lacking a handrail does not eliminate the danger the stairs pose to many individuals who, due to age, disability or medical condition, are unable to safely traverse the unavoidable stairs irrespective of how carefully they proceed*. Just as defendant should have reasonably envisioned that occasional pedestrians would lose their footing, defendant should have also reasonably determined, especially in light of an applicable statute or ordinance requiring a stairway handrail, that his provision of a handrail would constitute a simple safety measure permitting these unfortunate pedestrians to avoid injury and reclaim their equilibrium. *The risk of harm posed by the absence of a handrail qualifies as unreasonable despite its obvious nature given the simplicity of the remedial measure that could have been taken and the severity of harm that handrail installation would potentially avoid. Therefore, whether defendant should have taken reasonable precautions to eliminate the risk of harm posed by the stairs represents an issue for the jury, and we conclude that the trial court incorrectly granted defendant summary disposition on the basis that the open and obvious doctrine relieved him of any duty to protect plaintiff.*

Id. As in *Temple*, the Appellees may carry their arguments to the jury, but the case is not subject to summary disposition. The Circuit Court's reliance on *King v. Kayak, supra*, and *Walters v. Fruth Pharmacy*, 196 W.Va 276, 282, 387 S.E.2d 511, 517 (1989), is particularly inapposite since *Walters* makes it clear that this Court was reviewing a *jury's determination* in respect to the legal effect of the supposed obviousness of the danger, whereas the matter here was decided on summary judgment in defiance of the view taken in the *Restatement*, as well as in *Evans, supra*, that such matters are *for the jury*.

It is imperative that the open and obvious doctrine be given only its proper scope and application so that it is not converted into a method by which the abrogated defenses of assumption of the risk, last clear chance and contributory negligence are resurrected in every

case. The Circuit Court, in this case, focused extensively on whether it is “obvious” that the staircase in question lacks a railing. Of course, in retrospect, it is perfectly easy to look at a picture of a staircase and say that it “obviously” has no railing, but from the perspective of the invitee, the question is not so much whether the railing, or lack of it, is obvious but whether *the need for a railing is obvious*. Considerable research and effort has been expended over the last half century in developing appropriate building codes and regulations for public accommodations. There are specific requirements for staircases; depending on the height, width, number of steps, and other factors, a single railing, a double railing, or other safety precautions such as landings may be required. The whole purpose of building codes of this nature is to protect the general public from unsafe conditions by relieving the public of the impossible task of determining, throughout the property of another, whether or not that property complies with the codes and standards that have been adopted legislatively. The Circuit Court’s analysis wholly frustrates this important purpose.

The testimony cited in the Circuit Court’s order focuses entirely on whether looking at a picture of the staircase after the fact of his fall, Mr. Hersh could observe the staircase lacked a railing and tries to get from that testimony to the conclusion that the danger was “obvious.” But the appropriate question is not retrospective in nature. Rather the question is whether, when Mr. Hersh approached the staircase provided on Appellees’ premises for his use, if it was obvious to him that it would be dangerous to use that staircase in the condition that it was in — a quintessential jury question. The Appellees completely failed to establish that Mr. Hersh appreciated that the staircase violated the law, that it was not in compliance with the building code, or that it was dangerous for him under the circumstances. The Circuit Court’s analysis and application of the open and obvious doctrine is therefore not in compliance with West Virginia

law and not analytically sound under the *Restatement*. The Circuit Court's summary judgment order should therefore be REVERSED.

IX. CONCLUSION

WHEREFORE, your *amicus* respectfully requests that the decision of the Circuit Court granting summary judgment be REVERSED and that this Court clarify the vitality of *Shaffer's* syllabus point 7.

VERY RESPECTFULLY SUBMITTED,

AMICUS CURIAE WEST VIRGINIA ASSOCIATION
FOR JUSTICE

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CERTIFICATE OF SERVICE

Service of the foregoing AMICUS CURIAE BRIEF ON BEHALF OF WEST VIRGINIA ASSOCIATION FOR JUSTICE was had upon the defendants by mailing a true copy thereof, by United States Mail, postage-prepaid, to their attorneys at their last-known addresses shown below, this 13th day of April, 2012 as follows:

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