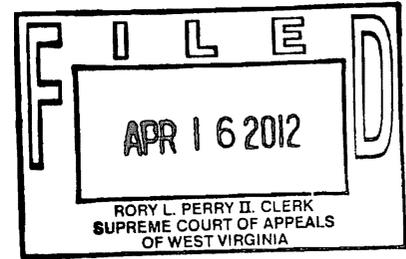


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-0106



**WALTER E. HERSH AND MARY L. HERSH,
Plaintiffs Below, Petitioners**

vs.

**E-T ENTERPRISES, LIMITED PARTNERSHIP,
and RALPH ECKENRODE, Defendants and Third-
Party Plaintiffs Below, and P&H INVESTMENTS, INC.,
and TROLLERS ASSOCIATES, LLC, Third-Party
Defendants Below, Respondents**

PETITIONERS' BRIEF

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TABLE OF CONTENTS

	Page
Table of Authorities	iii
Assignments of Error	1
Statement of the Case	1
Summary of Argument	4
Statement Regarding Oral Argument and Decision	6
Argument	6
I. Standard of Review	6
II. The Trial Court Erred in Holding that Defendants Owed No Duty of Care To Plaintiff Based on an “Open and Obvious” Defense where the Safety Hazard was Created by Defendants and Violated a Municipal Ordinance Enacted for the Protection of the Public.	7
A. Appellees’ violated a municipal safety statute and created the safety hazard by removing the handrails from the stairs	7
B. Violation of the safety statute established the prima negligence of the Appellees	8
III. The Circuit Court erred in its Application of the “Open and Obvious Doctrine” as a Complete Bar to Appellant’s Claim when his injury was Reasonably Foreseeable to Appellees.	9
IV. The Circuit Court’s Employment to the “Open and Obvious Doctrine” as a Complete Bar to Appellant’s Claims Conflicts with the Court’s Adoption of Comparative Assumption of the Risk and is Decidedly Against the Trend of the Majority of Jurisdictions that Have Considered the Issue	12
Conclusion	15
Certificate of Service	16

TABLE OF AUTHORITIES

Cases:	Page
<i>Anderson v. Moulder</i> , 183 W. Va. 77, 394 S.E.2d 61 (1990)	9
<i>Bradley v. Appalachian Power Co.</i> , 163 W. Va. 332, 256 S.E.2d 879 (1979)	12
<i>Coln v. City of Savannah</i> , 966 S.W.2d 34 (Tenn. 1998)	10
<i>Costello v. City of Wheeling</i> , 145 W.Va. 455, 117 S.E.2d 513 (1960)	8
<i>Crago v. Lurie</i> , 166 W. Va. 113, S.E.2d 344 (1980)	8
<i>Evans v. Tanner</i> , 286 Ala. 651, 244 So.2d 782 (1971)	13
<i>Fayette County Nat. Bank v. Lilly</i> , 199 W. Va. 349, 484 S.E.2d 232 (1997)	6
<i>Hale v. Beckstead</i> , 116 P.3d 263 (Utah 2005)	10
<i>Harrison v. Taylor</i> , 115 Idaho 588, 768 P.2d 1321 (1989)	13
<i>Hart v. Ivey</i> , 332 N.C. 299, 303, 420 S.E.2d 174, 177 (1992)	9
<i>Janis v. Nash Finch Co.</i> , 780 N.W.2d 497 (S.D. 2010)	14
<i>Kentucky River Medical Center v. McIntosh</i> , 319 S.W.3d 385 (Ky.2010)	11, 14
<i>King v. Kayak Mfg. Corp.</i> , 182 W. Va. 276, 387 S.E.2d 511 (1989)	12
<i>King Soopers, Inc. v. Mitchell</i> , 140 Colo. 119, 342 P.2d 1006 (1959)	13
<i>Konicek v. Loomis Brothers, Inc.</i> 457 N.W.2d 614 (Iowa 1990)	13
<i>Laesch v. L & H Industries, Ltd.</i> , 161 Wis.2d 887, 469 N.W.2d 655 (Wis.App. 1991)	12, 13
<i>LaFever v. Kemlite Co.</i> , 185 Ill.2d 380, 235 Ill.Dec. 886, 706 N.E.2d 441 (1998)	11
<i>Miller v. Warren</i> , 182 W.Va. 560, 390 S.E.2d 207 (1990)	8
<i>Moore v. Skyline Cab, Inc.</i> , 134 W.Va. 121, 59 S.E.2d 437 (1950)	8
<i>Morris v. City of Wheeling</i> , 140 W.Va. 78 S.E.2d 536 (1954)	8, 9
<i>Oldfield v. Woodall</i> , 113 W.Va. 35, 166 S.E. 691 (1932)	8

Pack v. Van Meter, 177 W.Va. 485, S.E.2d 581 (1986) 4, 8

Parker v. Highland Park, Inc., 565 W.W.2d 512 (Texas 1978)13

Reed v. Phillips, 192 W. Va. 392, 452 S.E.2d 708 (1994) 8

Regency Lake Apartments Associates, Ltd. V. French, 590, So.2d 970 (Fla. DCA 1991)12

Saretsky v. 85 Kemmar Realty Corp., 85 A.D.3d 89, 924 N.Y.S.2d 32 (2011) 13

Sewell v. Gregory, 179 W. Va. 585, 371 S.E.2d 82 (1988) 9

Skaff v. Dodd, 130 W.Va. 540, 44 S.E.2d 621 (1947) 8

Shaffer v. Acme Limestone Co., Inc. 206 W. Va. 333, S.E.2d 688 (1999)4, 8

Simmons v. American Drug Stores, Inc., 329 Ill.App.3d 38, 263 Ill.Dec. 286, 768 N.E.2d 46 (2002) . 11

Spurlin v. Nardo, 145 W. Va. 408, 114 S.E.2d 913 (1960) 9

Steigman v. Outrigger Enterprises, Inc., 267 P3d 1238 (Haw. 2011)14, 15

Tarr v. Keller Lumber and Construction Co., 106 W.Va. 99, 144 S.E. 881 (1928) 8

Tharp v. Bunge Corp., 641 So.2d 20 (Miss. 1994)14

Ward v. K Mart Corp., 136 Ill.2d 132, 143 Ill.Dec. 288, 554 N.E.2d 223 (1990)13

Miscellaneous:

§ 343A Restatement (Second) of Torts (1965)5, 10, 12, 13

ASSIGNMENTS OF ERROR

1. The Circuit Court erred in holding Appellees owed no duty of care where the record establishes violation of a municipal ordinance that constitutes prima facie negligence.

2. The Circuit Court erred in applying the “open and obvious doctrine” where the record establishes that Appellant’s injury was reasonably foreseeable to Appellees.

3. The Circuit Court’s use of the “open and obvious doctrine” as a complete bar to Appellants’ claim conflicts with comparative assumption of the risk and is contrary to the majority of jurisdictions that have considered the issue.

STATEMENT OF THE CASE

Appellants Walter E. Hersh and Mary L. Hersh appeal from orders of the Circuit Court entered on December 15, 2011 dismissing their claims arising from injuries which Mr. Hersh sustained when he fell down stairs located on the property of the Appellees. [App. 797-816; 817-838] The Circuit Court granted summary judgment finding that the lack of a handrail was “open and obvious” thereby absolving Appellees from any duty of reasonable care despite their violation of a municipal statute requiring a handrail for the protection of the public.

On October 9, 2009, at approximately 10:30 a.m., Mr. Hersh drove to a shopping plaza on Winchester Avenue in Martinsburg, West Virginia. He parked his car in parking lot of the shopping plaza at the bottom of a small embankment near a set of wooden steps which lead from the lower parking lot to a smaller upper parking lot. [App. 168] The lower parking lot was owned

and operated by P&H Investments, Inc. and Trollers Associates, LLC. The upper parking lot was owned and operated by Ralph Eckenrode as the general partner of E-T Enterprises Limited Partnership. [App. 7-9] The stairs were on the real property of both sets of Appellees but had been constructed and were maintained by Ralph Eckenrode and E-T Enterprises Limited Partnership.

Mr. Hersh and his wife had recently moved to the neighborhood and Mr. Hersh was looking for furnishings for their new home. [App. 920] He ascended the stairs and entered a store called "Second Time Around" where he spent approximately twenty-five minutes browsing. [App. 148] He then left the store intending to return to his car. As he was descending the top of the stairs he fell down the remaining stairs to the parking lot below and sustained a severe head injury. [App. 172] Mr. Hersh had never been to the lower parking lot, the upper parking lot, or ascended or descended the stairs prior to October 9, 2009. [App. 933] He also was unaware that there was an alternative means of accessing the upper parking lot from the street. [App. 927]

Mr. Hersh was initially taken to the Emergency Department of City Hospital in Martinsburg. Diagnostic testing showed an acute subarachnoid hemorrhage with a subdural component at the base of the left frontal lobe. [App. 1481-1495] Mr. Hersh was transferred immediately to Winchester Medical Center. A repeat CT scan on October 10, 2009 showed multifocal areas of traumatic subarachnoid bleeding with bilateral inferior frontal hemorrhagic contusions, and a subarachnoid hemorrhage overlying the left and right frontal lobes. [App. 1481-1495] He was discharged on October 14, 2009 and admitted to HCR Manorcare for rehabilitation services. Mr. Hersh has ongoing cognitive and linguistic impairments secondary to

his traumatic brain injury. He now depends on a wheelchair for mobility. Prior to the fall, he had been independent with day-to-day activities. He is now dependent upon others for day-to-day activity and mobility. He currently receives supervision and care twenty-four hours a day. [App. 936]

On October 9, 2009, there were no handrails attached to stairs. [App. 15-16] The lack of a handrail was violation of the City of Martinsburg building code. [App. 1258-1259] Mr. Eckenrode had removed the handrails months before Mr. Hersh fell in order to discourage skateboarders from using the stairs. [App. 1107] Mr. Eckenrode has admitted that he was responsible for maintaining the stairs in a reasonably safe condition. He also admits that customers frequenting the shopping center were entitled to assume the stairs were in a reasonably safe condition for their intended use. [App. 1107; 1109; 1112] He further admits that he should have ensured that the stairs complied with the applicable safety codes; that the stairs should have had a handrail for guidance and support; and that it was reasonably foreseeable that someone might need a hand rail while using the stairs [App. 1108; 1113] He admits that the failure to have a handrail was a potential hazard to the Appellant and others members of the public. [App. 1111] The cost bring the stairs back into compliance with the municipal code would have been under \$2000.00. [App. 1262-1263]

Mr. Hersh did not look at the stairs before he went up them nor did he have any particular concerns about the stairs because he assumed other people had gone up and down them and they were safe. [App. 927]. He also had no recollection of having noticed the lack of handrails before he started down the stairs. [App. 170] He stated that if he had had any concerns for his safety

before he began descending the stairs he would not have used them. [App. 171]

SUMMARY OF ARGUMENT

The Circuit Court failed to give proper legal effect to the undisputed fact that Appellees had removed handrails from the stairs where Mr. Hersh fell in direct violation of a municipal safety statute requiring a handrail. Ralph Eckenrode deliberately removed the hand rails to discourage local skate boarders from using the stairs. At the time he removed the handrails, the Martinsburg municipal code required the stairs to have at least one handrail. Mr. Eckenrode has admitted that it was his responsibility to maintain the steps in a reasonably safe condition and that he should have ensured that the stairs complied with the applicable safety codes. In granting summary judgment, the Circuit Court failed to properly acknowledge the legal principle that proof of a violation of a statute intended for the protection of 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).

The Circuit Court also erred in relying upon the “open and obvious doctrine” as a complete bar to Appellant’s claim despite the fact that his injury was reasonably foreseeable to the Appellees. The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result? In the present case, the fact that a lack of

handrails may be known to the Appellant does not eliminate liability as a matter of law. Instead, the landowner has a duty, and comparative negligence principles apply, when the landowner should anticipate harm from the known or obvious danger on his land. Appellee Ralph Eckenrode acknowledged that the stairs should have had a handrail for guidance and support and that it was reasonably foreseeable that someone might need a handrail while using the stairs. He further acknowledged that the failure to have a handrail could be a hazard to Mr. Hersh and others using the stairs.

Finally, the Circuit Court's use of the open and obvious doctrine as a complete bar to Appellant's claim is incompatible with comparative fault principles adopted in West Virginia and is contrary to the majority of those jurisdictions which have considered the issue. This Court long ago adopted comparative negligence as well as comparative assumption of the risk. Many states have limited the use of the open and obvious doctrine by holding that a plaintiff's knowledge of a dangerous condition does not preclude recovery, and, in some instances, states have expressly abolished the open and obvious doctrine after the adoption of comparative negligence. Many other states have adopted or cited as a basis for their decision § 343A Restatement (Second) of Torts which states in part that a possessor of land is not liable to his invitees for physical harm caused by an activity or condition that is known or obvious to them *unless the possessor should anticipate the harm despite such knowledge or obviousness.*

Public policy considerations militate against the use of the open and obvious doctrine as a complete bar to recovery where the harm is reasonably foreseeable to the landowner. Courts should discourage unreasonably dangerous conditions rather than fostering them in their obvious

forms. It is anomalous to find that a defendant has a duty to provide reasonably safe premises and at the same time deny a plaintiff recovery from a breach of that same duty. The party in the best position to eliminate a dangerous condition should be burdened with that responsibility. The doctrine as it was applied by the Circuit Court in this case would provide no incentive for landowners to maintain premises in compliance with safety standards even when the dangers of non-compliance are readily foreseeable.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Appellants believe oral argument is appropriate under Rule 20 as the Circuit Court's grant of summary judgment in reliance upon the open and obvious doctrine in a case involving defendants' *per se* negligence for violation of a safety statute appears to be one of first impression. The ongoing viability of the open and obvious doctrine in light of the Court's adoption of comparative fault principles would also appear to be an issue of first impression.

ARGUMENT

I. STANDARD OF REVIEW

The Court's review of a circuit court's entry of summary judgment is *de novo*. *Fayette County Nat. Bank v. Lilly*, 199 W. Va. 349, 352, 484 S.E.2d 232, 235 (1997).

II. THE TRIAL COURT ERRED IN HOLDING THAT DEFENDANTS OWED NO DUTY OF CARE TO PLAINTIFF BASED ON AN “OPEN AND OBVIOUS” DEFENSE WHERE THE SAFETY HAZARD WAS CREATED BY DEFENDANTS AND VIOLATED A MUNICIPAL ORDINANCE ENACTED FOR THE PROTECTION OF THE PUBLIC

A. Appellees’ violated a municipal safety statute and created a safety hazard by removing the handrails form the stairs

Ralph Eckenrode originally constructed the stairs with handrails on both sides. Several months prior to Mr. Hersh’s fall, Mr. Eckenrode deliberately removed the hand rails to discourage skate boarders from using the stairs. At the time he removed the handrails, the Martinsburg municipal code required the stairs to have at least one handrail. Mr. Eckenrode admitted that it was his responsibility to maintain the steps in a reasonably safe condition and that he should have ensured that the stairs complied with the applicable safety codes. He also admitted that the stairs should have had a handrail for guidance and support and that it was reasonably foreseeable that someone might need a handrail while using the stairs. He acknowledged that the failure to have a handrail could be a hazard to Mr. Hersh and others using the stairs. Therefore, it should have been clear from the record before the Circuit Court that Mr. Eckenrode affirmatively created the hazardous condition that cause or contributed to Mr. Hersh’s injury and that in doing so he violated a municipal safety statute intended to protect members of the public.

B. Violation of the safety statute established the prima negligence of the Appellees

Appellees' failure to have a handrail attached to the steps violated the International Property Maintenance Code Section 306 adopted by the municipal code of the City of Martinsburg. This Court has consistently recognized that the violation of a valid municipal ordinance constitutes prima facie actionable negligence when it is the proximate cause of an injury. *Crago v. Lurie*, 166 W. Va. 113, 115-16, 273 S.E.2d 344, 345 (1980); *Costello v. City of Wheeling*, 145 W.Va. 455, 117 S.E.2d 513 (1960); *Morris v. City of Wheeling*, 140 W.Va. 78, 82 S.E.2d 536 (1954); *Moore v. Skyline Cab, Inc.*, 134 W.Va. 121, 59 S.E.2d 437 (1950); *Skaff v. Dodd*, 130 W.Va. 540, 44 S.E.2d 621 (1947); *Oldfield v. Woodall*, 113 W.Va. 35, 166 S.E. 691 (1932); *Tarr v. Keller Lumber and Construction Co.*, 106 W.Va. 99, 144 S.E. 881 (1928).

The Court has also held that failure to comply with a fire code or similar set of regulations constitutes *prima facie* negligence, if an injury proximately flows from the non-compliance and the injury is of the sort the regulation was intended to prevent. Syl. Pt. 1, in part, *Miller v. Warren*, 182 W.Va. 560, 390 S.E.2d 207 (1990); quoted in *Reed v. Phillips*, 192 W. Va. 392, 393, 452 S.E.2d 708, 709 (1994). The Court has acknowledged that a statute may create a cause of action in favor the class of persons it is designed to protect. *See, Pack v. Van Meter*, 177 W. Va. 485, 490, 354 S.E.2d 581, 586 (1986).

In *Shaffer v. Acme Limestone Co., Inc.*, 206 W. Va. 333, 339, 524 S.E.2d 688, 694 (1999) the Court clearly stated that the violation of a statute designed for the safety of the public constitutes prima facie evidence of negligence unless the statute says otherwise:

We hold that “[w]hen 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.” *Hart v. Ivey*, 332 N.C. 299, 303, 420 S.E.2d 174, 177 (1992).

Id. at 347, 524 S.E.2d at 702.

The injury that befell Mr. Hersh is precisely the type of injury the Martinsburg safety statute was intended to prevent. Once a *prima facie* case of actionable negligence against Appellees was established based on the violation of the safety statute, Appellants’ case should have been submitted to a jury and not decided as a matter of law. Pt. 6, syllabus, *Morris v. City of Wheeling*, 140 W.Va. 78, 82 S.E.2d 536 (1954); Syllabus Point 2, *Spurlin v. Nardo*, 145 W.Va. 408, 114 S.E.2d 913 (1960); Syl. Pt. 3, *Anderson v. Moulder*, 183 W.Va. 77, 394 S.E.2d 61 (1990).

III. THE CIRCUIT COURT ERRED IN ITS APPLICATION OF THE “OPEN AND OBVIOUS DOCTRINE” AS A COMPLETE BAR TO APPELLANT’S CLAIM WHEN HIS INJURY WAS REASONABLY FORESEEABLE TO APPELLEES.

It is well settled West Virginia law that the foreseeability of an injury is dispositive of the duty owed:

The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?

Syl. pt. 3, *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988)

Under the Restatement (Second) of Torts § 343A (1965) the fact that a danger is known or obvious does not eliminate liability as a matter of law. Instead, a landowner has a duty, and comparative negligence principles apply, when the landowner should anticipate harm from a known or obvious danger on his land:

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

Under this framework, the fact that a danger is known or obvious does not eliminate liability as a matter of law. In those states following the Restatement, the fact that a plaintiff was injured due to a known or obvious danger does not automatically bar the plaintiff's claim; instead the landowner retains a duty if the plaintiff's injury was foreseeable. The following quotes illustrate the point:

As in any negligence action, we think a risk is unreasonable and gives rise to a duty to act with due care if the foreseeable probability and gravity of harm posed by a defendant's conduct outweigh the burden upon the defendant to engage in alternative conduct that would prevent the harm. Applying this analysis, if the foreseeability and gravity of harm posed by the defendant's conduct, even if 'open and obvious,' outweigh the burden upon the defendant to engage in alternative conduct, the defendant has a duty to act with reasonable care and the comparative fault principles apply (citations omitted);

Coln v. City of Savannah, 966 S.W.2d 34, 36 (Tenn. 1998) (emphasis added)

The open and obvious danger rule in particular simply defines the reasonable care that possessors of land must show toward invitees. Under that definition, a possessor of land must protect invitees against dangers of which they are unaware, may forget, or may reasonably encounter despite the obviousness of the danger.

Hale v. Beckstead, 116 P.3d 263, 269 (Utah 2005)

By concluding that a danger was open and obvious, we can conclude that the invitee was negligent for falling victim to it, unless for some reason ‘to a reasonable man in his position the advantages of [encountering the danger] would outweigh the apparent risk.’ But this does not necessarily mean that the land possessor was not also negligent for failing to fix an unreasonable danger in the first place. Under our rule of comparative fault, the defendant should be held responsible for his own negligence, if any. (citation omitted)

Kentucky River Medical Center v. McIntosh, 319 S.W.3d 385, 390 (Ky.2010)

The possessor of land may reasonably anticipate harm when he has “reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable [person] in [that] position the advantages of doing so would outweigh the apparent risk.” *Simmons v. American Drug Stores, Inc.*, 329 Ill.App.3d 38, 44, 263 Ill.Dec. 286, 768 N.E.2d 46 (2002), citing *LaFever v. Kemlite Co.*, 185 Ill.2d 380, 391, 235 Ill.Dec. 886, 706 N.E.2d 441 (1998). Moreover, where a hazard is known and obvious, “liability stems from the knowledge of the possessor of the premises, and what the possessor ‘had reason to expect’ the invitee would do in the face of the hazard. [citations.]” *LaFever*, 185 Ill.2d at 392, 235 Ill.Dec. 886, 706 N.E.2d 441.

Appellee Ralph Eckenrode acknowledged it was reasonably foreseeable that someone might need a handrail while using the stairs. He further acknowledged that the failure to have a handrail was a hazard to Mr. Hersh and other members of the public. Indeed, Mr. Eckenrode stated that it had been his intention to install new handrails but Mr. Hersh’s fell but before he could do so. Appellees reasonably anticipated that business invitees, such as Mr. Hersh, would use the stairs even without the handrails because the advantages of doing so would outweigh the apparent risk.

IV. THE CIRCUIT COURT’S EMPLOYMENT OF THE “OPEN AND OBVIOUS DOCTRINE” AS A COMPLETE BAR TO APPELLANTS’ CLAIMS CONFLICTS WITH THE COURT’S ADOPTION OF COMPARATIVE ASSUMPTION OF THE RISK AND IS DECIDEDLY AGAINST THE TREND OF THE MAJORITY OF JURISDICTIONS THAT HAVE CONSIDERED THE ISSUE.

This Court has adopted comparative negligence principles as well as comparative assumption of the risk. *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979) (abolishing contributory negligence rule and adopting modified comparative negligence principles); *King v. Kayak Mfg. Corp.*, 182 W.Va. 276, 387 S.E.2d 511 (1989) (abolishing assumption of risk and adopting comparative assumption of risk). The Circuit Court’s grant of summary judgment based upon the open and obvious doctrine is incompatible with these principles and is against the majority view of those jurisdictions which have considered the issue.

Emerging from other jurisdictions is a modern trend toward holding that the obviousness of a danger does not necessarily relieve the owner's duty of care. Many states have limited the use of this doctrine by holding that a plaintiff's knowledge of the obviousness of a dangerous condition does not preclude recovery, and, in some instances, states have expressly abolished the open and obvious doctrine after the adoption of comparative negligence. Many other states have adopted or cited as a basis for their decision § 343A Restatement (Second) of Torts which states in part that a possessor of land is not liable to his invitees for physical harm caused by an activity or condition that is known or obvious to them *unless the possessor should anticipate the harm despite such knowledge or obviousness*. See, *Regency Lake Apartments Association, Ltd. v. French*, 590 So.2d 970, 973-74 (Fla. DCA 1991) (comparative negligence applied when plaintiff tripped over exposed tree roots within apartment complex while walking dog in designated area that she had used twice daily for three months); *Laesch v. L & H Industries, Ltd.*, 161 Wis.2d

887, 469 N.W.2d 655, 659 (Wis.App.1991) (open and obvious defense rejected based upon § 343A when rails piled along and parallel with abandoned railroad right-of-way caused injury); *Ward v. K Mart Corp.*, 136 Ill.2d 132, 143 Ill.Dec. 288, 296, 554 N.E.2d 223, 231 (1990) (court abolished open and obvious doctrine stating that “the manifest trend of the courts in this country is away from the traditional rule of absolving, ipso facto, owners and the occupiers of land from liability for injuries resulting from known or obvious conditions ...”); *Konicek v. Loomis Brothers, Inc.*, 457 N.W.2d 614, 618-19 (Iowa 1990) (comparative negligence used when injury occurred from open and obvious opening in roof); *Harrison v. Taylor*, 115 Idaho 588, 768 P.2d 1321, 1328 (1989) (open and obvious doctrine abolished when injury was sustained due to hole in sidewalk observed by plaintiff); *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 517 (Texas 1978) (comparative negligence employed and open and obvious defense abolished when dark stairway at apartment complex caused injury); *Evans v. Tanner*, 286 Ala. 651, 244 So.2d 782, 786-87 (1971) (comparative negligence applied to open and obvious danger known to plaintiff); *King Soopers, Inc. v. Mitchell*, 140 Colo. 119, 342 P.2d 1006 (1959) (irrelevancy of obviousness of danger “where the condition is one which the invitee would not expect to find in the particular place, or his attention is distracted by something on the premises, or the condition is one ... which cannot be encountered with reasonable safety even though the invitee is aware of it”); *Saretsky v. 85 Kemmare Realty Corp.*, 85 A.D.3d 89, 90, 924 N.Y.S.2d 32, 33 (2011) (we reiterate the well established principle that a finding of “open and obvious” as to a hazardous condition is never fatal to a plaintiff’s negligence claim. It is relevant only to plaintiff’s comparative fault).

The Supreme Court of Mississippi in abolishing the open and obvious defense noted its perverse effect as a matter of public policy:

This Court should discourage unreasonably dangerous conditions rather than fostering them in their obvious forms. It is anomalous to find that a defendant has a duty to provide reasonably safe premises and at the same time deny a plaintiff recovery from a breach of that same duty. The party in the best position to eliminate a dangerous condition should be burdened with that responsibility. If a dangerous condition is obvious to the plaintiff, then surely it is obvious to the defendant as well. The defendant, accordingly, should alleviate the danger.

Tharp v. Bunge Corp., 641 So. 2d 20, 25 (Miss. 1994).

The Kentucky Supreme Court recently agreed with Mississippi's analysis. It cited Mississippi's reasoning for support that abolishing the known or obvious danger defense in favor of comparative negligence "makes good policy sense." *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385, 391–92 (Ky.2010). This is because a landowner's duty "is predicated upon [his] superior knowledge concerning the dangers of his property," which places the landowner in a better position to anticipate and take action to prevent injury. *Id.* at 392 (quoting *Janis v. Nash Finch Co.*, 780 N.W.2d 497, 502 (S.D.2010)).

The Supreme Court of Hawaii also recently held that the open and obvious doctrine conflicts with the principle of comparative negligence. *Steigman v. Outrigger Enterprises, Inc.*, 267 P.3d 1238, 1240 (Haw. 2011). The Court's list of reasons for abolishing the open and obvious doctrine as a complete bar to an injured plaintiff's claim included: (1) courts have difficulty applying the known or obvious danger defense consistently; (2) the defense is incompatible with the modern policy values that tort law seeks to effect; (3) the defense is in opposition to the average person's concept of justice because it mandates that a plaintiff must go uncompensated for her injuries, even if she acted with precaution and the defendant did not; and (4) the doctrine provides no incentive for landowners to maintain premises in compliance with

safety standards even when the dangers of non-compliance are readily foreseeable. *Id.* at 1243-1246.

In states where the known or obvious defense has been completely abolished, the jury need not make a finding regarding whether the danger was known or obvious because such a determination does not operate as an absolute bar to a plaintiff's recovery. Instead, a jury may consider all the facts and circumstances of the injury, and apportion liability by comparing the fault of the landowner and the injured plaintiff.

CONCLUSION

WHEREFORE, Appellants Walter Hersh and Mary Hersh respectfully request that the decision of the Circuit Court granting summary judgment be REVERSED.

RESPECTFULLY SUBMITTED,

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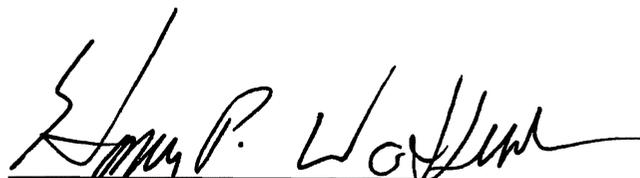
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CERTIFICATE OF SERVICE

I, Harry P. Waddell, hereby certify that I have caused to be served a true copy of the foregoing *Petitioners' Brief* upon the following counsel of record, by first class mail, postage prepaid, this 13th day of April, 2012:

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