

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 12-0106

WALTER E. HERSH AND MARY L. HERSH,
Petitioners

v.

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

From the Circuit Court of Berkeley County
Civil Action No. 10-C-149
Honorable Gina M. Groh

**BRIEF OF P&H INVESTMENTS, INC. AND TROLLERS ASSOCIATES, LLC
IN RESPONSE TO HERSH PETITIONERS' PETITION FOR APPEAL**

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RESPONDENTS' STATEMENT OF THE CASE

The Petitioners filed their Complaint in the Circuit Court of Berkeley County on or about March 1, 2010, against Ralph Eckenrode to recover for injuries Mr. Hersh sustained when he allegedly fell down a staircase which was located upon property (stairs) owned by defendant Eckenrode. See Complaint ¶5, App. 1-3. On or around March 18, 2010, defendant, Ralph Eckenrode filed a third-party Complaint in which he named P&H Investments, Inc.; Emory Hodges and Kenton Hamaker, Jr. as third-party defendants to the underlying case. See Amended Complaint, App. 4-6, 10-13. Thereafter, Trollers Associates, LLC (hereinafter "Trollers") was identified as a proper party and was substituted for defendants Hodges and Hamaker who were dismissed from this matter.¹ See Order of Substitution, App. 7-9. P&H Investments, Inc. (hereinafter "P&H") is not a property owner and does not own the adjoining property at issue in this matter. See Deeds at App. 194-200. P&H is merely the manager of Trollers Associates and oversees its affairs.

On October 9, 2009, Mr. Hersh was shopping at a shopping plaza on Winchester Avenue in Martinsburg, West Virginia. See Complaint, ¶4, App. 1. When his shopping was completed, Mr. Hersh returned to his car using the same set of stairs he had ascended approximately twenty-five (25) minutes earlier. Hersh Deposition, Vol. II, pg. 40, lines 13-15, App. 928. He admitted walking up the subject stairs while using his cane for balance specifically because there were no handrails as follows:

¹ All references in Mr. Eckenrode's deposition regarding P&H should also include Trollers as it is the owner of the adjacent property. Trollers was not yet identified as a party at the time of Mr. Eckenrode's deposition as it was not known that they were the actual property owner at that time.

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.

Hersh Deposition, Vol. II, pg. 16, lines 12-14, App. 922 [emphasis added].

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.

Hersh Deposition, Vol. II, pg. 18, lines 19-21, App. 922.

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.*

Hersh Deposition, Vol. II, pg. 20, lines 1-4, App. 923 [emphasis added]. Mr. Hersh also admitted walking down the subject stairs while using his cane for balance specifically because there were no handrails as follows:

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

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

Q: Because there was no handrail?

A: Yes.

Hersh Deposition, Vol. II, pg. 48, lines 9-14, App. 930.

Mr. Hersh confirmed that the absence of handrails along either side of the subject stairs was an open and obvious condition. Hersh Deposition, Vol. II, pg. 20, lines 21-23; App. 923; pg. 40, line 22 - pg. 41, line 1, App. 928. Specifically, Mr. Hersh testified:

Q: Looking at Exhibit 7 [Ms. Livengood's photograph], Mr. Hersh, can you tell that there are no handrails on those steps?

A: Yes.

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

A: What do you mean by open condition?

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

A: Yeah.

[. . .]

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

A: No, not from this.

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

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

Hersh Deposition, Vol. II, pg. 24, line 8 - pg. 25, line 11, App. 924 [emphasis added]. Mr.

Hersh also confirmed that nothing obscured his view of the subject stairs or prevented him from recognizing that there were no handrails along either side of the stairs before he fell.

Hersh Deposition, Vol. II, pg. 20, lines 21-23, App. 924; pg. 40, line 22 - pg. 41, line 1, App.

928.

Mr. Hersh confirmed that he was aware of the parking available on the upper lot at the Winchester Avenue property on the day of the incident. App. 926-927. Specifically, he testified:

Q: Before you go into the shops, when you get to the top of the steps, what did you see?

A: When I looked to the right I saw cars parked there, which was the first time I saw those cars. Did I see those cars as I was coming in? I had no way of knowing how to get in there. How could-

Q: Once you saw those cars did you see that there was a way to park above those steps?

A: Yes.

Hersh Deposition, Part II, p. 34-35, App. 926-927.

On May 5, 2009 - approximately five (5) months before the subject 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.'" Hersh Deposition, pp. 38-60, App. 927-933 and Hersh Exhibit #4, App. 912. Dr. Spilsbury also noted that Mr. Hersh needs "to be very careful about falling." Hersh Deposition, pp. 60-62, App. 933 and Hersh Exhibit #5, App. 914 [emphasis added].

Importantly, neither P&H nor Trollers were involved in the construction of the subject staircase nor did either entity share in the cost of the construction of the staircase. Mr. Eckenrode testified that he built the stairs as a courtesy to his customers. *Id.* at pg. 11 lines 1-21, App. 1101.

The Respondents, P&H and Trollers, were not involved in the maintenance of the staircase as Mr. Eckenrode never requested their assistance or participation in any maintenance of the staircase. Eckenrode deposition, pg. 15, lines 6-9, App. 1102. He recalled that he did not discuss his decision to construct the staircase with P&H or Trollers nor was he authorized by anyone at P&H or Trollers to construct the staircase. Eckenrode Deposition, pg. 11, lines 11-18, App. 1101.

P&H and Trollers object to the Petitioners' assertion that the subject stairs were located on the property of Trollers as there is no evidence in the record to support this contention.

STANDARD OF REVIEW

Upon appeal, a circuit court's entry of a summary judgment is reviewed by this Court *de novo*. *E.g.*, syl. pt. 1, *Koffler v. City of Huntington*, 196 W. Va. 202, 203, 469 S.E.2d 645, 646 (1996); syl. pt. 1, *Cox v. Amick*, 195 W. Va. 608, 609, 466 S.E.2d 459, 460 (1995); syl. pt. 1, *Hose v. Berkeley County Planning Commn.*, 194 W. Va. 515, 517, 460 S.E.2d 761, 763 (1995); syl. pt.1, *Jones v. Wesbanco Bank Parkersburg*, 194 W. Va. 381, 382, 460 S.E.2d 627, 628 (1995); syl. pt. 1, *Miller v. Whitworth*, 193 W. Va. 262, 263, 455 S.E.2d 821, 822 (1995); syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 190, 451 S.E.2d 755, 756 (1994). Therefore, the Court

applies the same standard as the circuit court. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 459 S.E.2d 329, 335 (1995).

Summary judgment should be granted 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 law. The party who moves for summary judgment has the burden of showing there is no genuine issue of fact. When the moving party presents depositions, interrogatories and affidavits or otherwise indicates that there is no genuine issue as to any material fact, to avoid summary judgment, the resisting party must present some evidence of facts or dispute. *Stemple v. Dotson*, 184 W. Va. 317, 400 S.E.2d 561 (1990).

In *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995), the West Virginia Supreme Court of Appeals revisited the standard to be applied in deciding whether to grant or deny a motion for summary judgment. The Court stated that while the facts and evidence are to be considered in the light most favorable to the non-moving party, "the nonmoving party must nonetheless offer some concrete evidence from which a reasonable . . . [finder of fact] could return a verdict in ... [its] favor'." *Id.* at 337, quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), quoting *First National Bank of Arizona v. Cities Service Inc.*, 391 U.S. 253 (1968).

"If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party; (2) produce additional evidence showing the

existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule(f) of the West Virginia Rules of Civil Procedure. *Syl. Pt. 3, Williams v. Precision Coil Inc.*

As the petitioners failed to either rehabilitate the evidence or produce additional evidence showing the existence of a genuine issue for trial, the Circuit Court properly granted summary judgment in favor of the Respondents.

SUMMARY OF ARGUMENT

The Petitioners appeal a well-reasoned decision of the Circuit Court of Berkeley County. In its decision, the Circuit Court thoroughly considered the Petitioners' arguments and applied long-standing West Virginia case law regarding premises liability and the "open and obvious doctrine." The Circuit Court ruled that open and obvious conditions which are known to a plaintiff are not actionable and do not create liability for a West Virginia property owner.

The Petitioners attempt to persuade this Court to abandon nearly fifty years of well reasoned case-law by arguing that the "open and obvious" doctrine conflicts with current West Virginia law regarding comparative negligence and comparative assumption of the risk. However, the open and obvious doctrine is bedrock principle in West Virginia tort law. The Court has applied this principle since 1962 and continued to do so even after the adoption of comparative negligence and comparative assumption of the risk. It is not by chance that the Court has not overruled this doctrine. This Court has firmly held for five

decades that a plaintiff cannot recover damages for injuries he sustained as the result of his encounter with a condition which, by his own admission, he has observed and as such considered. The Circuit Court properly applied and considered *Burdette v. Burdette*, 147 W. Va. 313, 127 S.E.2d 249 (1962) and its progeny and accordingly the Circuit Court's decision should be upheld.

RESPONDENTS' STATEMENT REGARDING ORAL ARGUMENT

Rule 19 argument is appropriate in cases "involving assignments of error in the application of settled law." Respondent respectfully requests oral argument on this matter pursuant to Rule 19(a)(1) of the Rev. R.A.P if the Court does not dismiss the Petitioners' appeal on motion. Because the issue of property owner liability 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" was settled by this Court in *Burdette v. Burdette*, 147 W. Va. 313, 127 S.E.2d 249 (1962) and its progeny, and the Petitioners challenged the Circuit Court's application of *Burdette*, a Rule 19 hearing is appropriate.

ARGUMENT

I. This Court has Continued to Recognize the "Open and Obvious" Doctrine alongside Comparative Negligence and Comparative Assumption of the Risk for Decades

A fair reading of the Petitioners' brief indicates that the law does not support their position. The Petitioners attempt to persuade the Court that the current state of the law is flawed in West Virginia. The Petitioners' argument that this Court should "follow the modern trend" is misleading. The Petitioners cite case law from states around the country

which they allege demonstrate various policy reasons which should persuade this Court to abrogate the “open and obvious doctrine.” Specifically, the Petitioners cite case law from the following states: Florida, Wisconsin, Illinois, Iowa, Idaho, Texas, Alabama, Colorado, New York, Mississippi, Kentucky and Hawaii.

However, it is imperative to note that the Petitioners are essentially comparing apples to oranges upon a review of the comparative fault systems within those particular states. Of the states cited by the plaintiff, only Colorado and Idaho utilize the same comparative fault system as West Virginia. The remaining states utilize either contributory fault systems or different versions of modified comparative fault than the fifty percent bar utilized by our State. As a result, of the cited cases, only Colorado and Idaho are remotely relevant to any analysis of our comparative fault system here in West Virginia.

The Petitioners cite *King Soopers, Inc., v. Mitchell*, 140 Colo. 119, 342 P.2d 1006 (1959), for the proposition that the obviousness of danger is irrelevant 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 if the invitee is aware of it. In *King Soopers, Inc.*, the plaintiff fell on ice in a parking lot adjacent to the defendant’s store which it utilized for its customers. *Id.* at 120, 1007. The plaintiff therein testified that the area at issue was blacktop which had become wet from previous thawing earlier that morning and he either did not see or did not recognize the area as slippery. *Id.*

The instant case can be easily distinguished from *King Soopers* as *King Soopers* is not an “open and obvious” case. The presence of black ice on a property is an entirely different set of facts than the facts presently before this Honorable Court and as a result, this case is not on-point. The *King Soopers* court stated that the “question is whether the plaintiff by his conduct can be said as a matter of law to have exposed himself to an unreasonable risk of harm.” *Id.* at 127. The Court went on to state that the fact that the icy conditions were obvious was not relevant because of the circumstances surrounding the plaintiffs fall which included crossing a parking lot with packages that even with knowledge such a condition and that the “likelihood of injury is not lessened by knowledge and degree of care which he exercised.” *Id.* at 123, 1008. Further, the *King Soopers* court relied upon the Restatement of Torts², not the Restatement (Second) of Torts, of which the Petitioners are proponents.

The *King Soopers* case was decided prior to this Court’s adoption of the “open and obvious” doctrine. However, upon this Court’s adoption of the “open and obvious” doctrine in 1962, the Court declined to analyze the *King Soopers* case or give it any deference in reaching its decision. Since 1959, when *King Soopers* was decided, this Court has considered the “open and obvious” doctrine numerous times and declined to acknowledge *King Soopers* or follow the trend of other jurisdictions when determining a fair balance of the interests of property owners and occupiers and the rights of injured parties

² The *Restatement of the Law of Torts* § 343, sets forth the standards applicable to the relationship of landowner and business visitor with respect to a hazardous condition (as distinguished from active forces). It declares that the landowner is subject to liability for harm caused by the natural or artificial condition if (a) he knows or by the exercise of reasonable care could discover the condition, (b) has no reason to believe that the condition will be discovered, (c) invites entry upon the land without (1) making the condition safe, or (2) giving a warning. *Restatement of Torts* § 343 (1934).

here in West Virginia.

The Petitioners have also directed the Court's attention to *Harrison v. Taylor*, 115 Idaho 588, 768 P.2d 1321 (1989), for the proposition that the "open and obvious" doctrine was abolished when a plaintiff sustained an injury due to a hole in the sidewalk which was observed by the plaintiff.

In *Harrison*, the plaintiff tripped and fell when her shoe caught the lip of a hole in the sidewalk. *Id.* at 589, 1322. Another witness also offered testimony that he had previously fallen in the same hole and notified the defendants, thus putting them on notice of the dangerous condition. The Court analyzed the invitee and licensee designations and determined that based on the state of the law and the law of neighboring jurisdictions, the "open and obvious" doctrine was no longer reflective of their existing law. *Id.*

While abolishment of the "open and obvious" doctrine may have been the right decision for Idaho and Colorado in light of their comparative negligence regimes, abolishment of the doctrine is not appropriate for West Virginia. For over fifty years, West Virginia has recognized that individuals are responsible to keep a lookout for dangerous conditions occurring upon property and exercise caution in the face of those conditions. This common sense rule has stood the test of time and has been recognized as the standard for individuals in West Virginia when visiting the property of another. Even after the *Harrison* decision in 1989, this Court has continued to uphold the "open and obvious doctrine." It is clear that our state's common law imposes a duty upon each individual to

protect themselves from dangers that are open, obvious or reasonably apparent. Eradication of the "open and obvious" doctrine in West Virginia would exonerate persons from protecting their own welfare against conditions which are easily apparent.

The mere fact that a person is injured while on the property of another does not necessarily illustrate liability on the part of the property owner. Each person has an obligation to conduct themselves reasonably in light of their own personal restrictions and the circumstances at hand. There is nothing inherently negative about this obligation. Personal responsibility has long been a part of West Virginia jurisprudence. To permit an individual to profit from their own reckless behavior would run afoul of the long-standing jurisprudence in this State and hold property owners to an unreasonable standard which would require them to monitor and oversee their property at all times. It would be inherently unfair to eradicate our current common sense approach to dangerous conditions occurring upon property and shift the burden entirely to property owners and occupiers. The proportionate balance which has worked throughout the years would be eliminated. Ordinary homeowners would become responsible for the safety of others when those persons fail to exercise sound judgment. The abolishment of the "open and obvious" doctrine may occasionally right a wrong but it would far more often hurt property owners and occupiers by rendering them liable for the poor judgment of another. As such, West Virginia should continue to balance the interests of property owners and injured persons by holding each of us accountable for open, obvious conditions when visiting the property of another as set forth within the "open and obvious" doctrine.

Next, the Petitioners' assertion that the employment of the "open and obvious" doctrine conflicts with comparative assumption of the risk is unfounded. This Court has continued to apply the "open and obvious" doctrine following its adoption of these schemes for over two decades without issue. Specifically, this Court adopted the open and obvious doctrine in 1962 via *Burdette v. Burdette*, in which it held 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." *Id.* at 318, 252.

Later, in 1979, this Court adopted comparative negligence as a regime in West Virginia via *Bradley v Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979). Thereafter, in 1989, the Court adopted comparative assumption of the risk in *King v. Kayak Mfg. Corp.*, 182 W. Va. 276, 387 S.E.2d 511 (1989). Upon this Court's adoption of comparative assumption of the risk, the Court stated in *King* that "the majority of jurisdictions which have adopted comparative contributory negligence have also adopted comparative assumption of the risk." *Id.* at 516, 281. The Court went on to reason that while some jurisdictions have merged assumption of the risk into their comparative contributory negligence doctrine, there was no need to do so in West Virginia as there are not substantial similarities in these doctrines in our state. *Id.* at 517, 282.

This Court has consistently applied the "open and obvious doctrine" and cited to the *Burdette* decision numerous times following the adoption of comparative negligence and comparative assumption of the risk on numerous occasions in premises liability cases. See *Miller v. Monongahela Power Co.*, 184 W. Va. 663, 403 S.E.2d 406, (1991)(employee injured

when he came into contact with an energized power line on company's property); *Andrick v. Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247, (1992)(plaintiff fell on uneven portion of sidewalk while walking toward restaurant); *Estate of Helmick by Fox v. Martin*, 192 W. Va. 501, 453 S.E.2d 335 (1994)(decedent injured when vehicle in which he was riding involved in accident while exiting parking lot of diner); *Walters v. Fruth Pharmacy, Inc.*, 196 W. Va. 364, 472 S.E.2d 810 (1996) (Customer fell in drug store parking lot); *McDonald v. Univ. of W. Va. Bd. of Trustees*, 191 W. Va. 179, 444 S.E.2d 57 (1994) (Student fell and injured herself while running on university property); *McMillion v. Selman*, 193 W. Va. 301, 456 S.E.2d 28 (1995)(plaintiff injured while trying to walk down rain-drenched slope while attempting to retrieve her purse from store premises); *Cole v. Fairchild*, 198 W. Va. 736, 482 S.E.2d 913 (1996)(child killed in motorcycle accident on premises); *Adkins v. Chevron, et al.*, 199 W. Va. 518, 485 S.E.2d 687, (1997)(truck driver injured when driveway collapsed causing truck tire to fall into sinkhole); *Self v. Queen*, 199 W. Va. 637, 487 S.E.2d 295 (1997)(daughter injured in fall on mother's property); *Senkus v. Moore*, 207 W. Va. 659, 535 S.E.2d 724 (2000)(trip and fall case where plaintiff tripped over scale in veterinary office); *Carrier v. City of Huntington*, 202 W. Va. 30, 501 S.E.2d 466 (1998) (woman injured on sidewalk, premises liability law not applicable against political subdivisions); *Stevens v. W. Va. Inst. Of Tech.*, 207 W. Va. 370, 532 S.E.2d 639 (1999) (student injured while setting up volleyball equipment on campus); *Mallet v. Pickens*, 206 W. Va. 145, 522 S.E.2d 436 (1999)(plaintiff injured when she fell down a set of temporary stairs at friend's home); *Hawkins v. U.S. Sports Assoc., Inc.*, 219 W. Va. 275, 633 S.E.2d 31 (2006) (softball player injured while sliding toward first base during

tournament).

Of these cases, only *McDonald*, *Helmick*, *Senkus*, and *Walters* are cases where the “open and obvious” doctrine was upheld after this Court’s adoption of comparative negligence and assumption of the risk. This small number of decisions demonstrates that the “open and obvious” doctrine is applied infrequently and is very rarely an obstacle to a plaintiff’s recovery when he/she is injured on the premises of another. This also demonstrates that the application of the “open and obvious” doctrine is controlling in only a very limited set of circumstances.

The remaining decisions cite the *Burdette* decision favorably regarding the duty owed by a property owner. In each of those cases, the Court had the opportunity to address the “open and obvious doctrine” relative to comparative assumption of the risk and comparative negligence and declined to do so. In the instant case, Mr. Hersh was fully aware of the absence of handrails on the staircase at the shopping plaza but still chose to utilize the staircase on two separate occasions even after having knowledge of the existing conditions. Thus, the application the “open and obvious” doctrine, was correct in this instance as Mr. Hersh admitted that he was aware of the absence of handrails and still to use the stairs.

Even when considering the instant facts under the § 343A Restatement (Second) of Torts, the Petitioners’ argument fails. The Restatement Second, comment on subsection 2(g) states as follows:

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.

Mr. Hersh knew there was an upper parking lot at the subject property which was a reasonable alternative to using the subject staircase. *See* App. 926-927. Mr. Hersh also knew that there were no handrails prior to using the staircase. *See* App. 922-923, 930. He also knew that there was increased potential for tripping on stairs due to his doctor's prior diagnosis regarding his instability. *See* App. 927-933. Thus, it is clear that due to his personal limitations and his observation that there were no handrails present on the staircase, Mr. Hersh should have exercised additional care or avoided the staircase completely.

This Court was correct in each of its prior decisions wherein it held that property owners should not be held responsible for open and obvious conditions on their property. Moreover, the "open and obvious" doctrine has coexisted with comparative negligence and comparative assumption of the risk for over two decades without any weakening by this Honorable Court. Therefore, we respectfully request that this Court **REJECT** Petitioners' Petition for Appeal on this ground.

- II. **It is not necessary for this Court to address whether or not a statute was violated as the Petitioners' argument is excluded by the "open and obvious" doctrine and the plaintiff is unable to establish a prima facie case of actionable negligence.**

The Petitioners argue that the Respondents violated a municipal safety statute and created a safety hazard by removing the handrails on the staircase at issue and this removal established prima facie negligence against the Respondents. To make an important factual distinction, it is undisputed that neither P&H nor Trollers was involved in Mr. Eckenrode's decision to remove the handrails nor did either entity participate in said removal. See Eckenrode deposition at pg. 11 lines 1-21, App. 1101, pg. 15, lines 6-9, App. 1102.

The Petitioners' first assignment of error must fail because West Virginia law is clear that even in the event that a municipal ordinance is violated, a plaintiff must prove a case of actionable negligence. *Morris v. City of Wheeling*, 140 W. Va. 78, 82 S.E.2d 536 (1954). "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 the plaintiff's injuries, that is, it is a case that has proceeded upon sufficient proof to the stage that it must be submitted to a jury and not decided against the plaintiff as a matter of law." *Id.* at 93.

The Petitioners are unable to prove *actionable negligence* as "open and obvious" conditions are not actionable at law. The existence of an "open and obvious" condition, such as missing handrails, cannot establish a "state of facts which will support a jury finding that the defendant was guilty of negligence" because Mr. Hersh admitted knowing there were no handrails on the subject staircase prior to his fall. *Morris v. City of Wheeling*, 140 W. Va. 78, 93, 82 S.E.2d 536 (1954), App. 922, 923, 930.

In order to establish 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." *Hawkins v. U.S. Sports Assoc., Inc. et al.*, 219 W. Va. 275, 279, 633 S.E.2d 31 (2006) *citing* *McDonald v. Univ. of W. Va. Bd. of Trustees*, 191 W. Va. 179, 182, 444 S.E.2d 57 (1994) (emphasis added).

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

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

Burdette v. Burdette, 147 W. Va. 313, 318, 127 S.E.2d 249, 252 (1962)[emphasis added]. A property owner is only liable "if he allows some hidden, unnatural condition to exist which precipitates the fall." *McDonald v. University of West Virginia Board of Trustees*, 191 W. Va. 179, 181-182, 444 S.E.2d. 57, 59-60 (1994) (acknowledging that "[t]he owner . . . of premises used for business purposes is not an insurer of the safety of an invited person" and, thus, is not liable for injuries in the absence of actionable negligence.)

In *Mallet v. Pickens*, 206 W. Va. 145, 522 S.E.2d 436 (1999), this Court set forth five

factors to be examined when determining whether a defendant has exercised reasonable care under the circumstances. This Court held that the trier of fact must consider the following: (1) the foreseeability that an injury might occur; (2) the severity of injury; (3) the time, manner and circumstances under which the injured party entered the premises; (4) the normal or expected use made of the premises; and (5) the magnitude of the burden placed upon the defendant to guard against injury. Syl. Pt. 4, *Mallet v. Pickens*, 206 W. Va. 145, 522 S.E.2d 436 (1999). In the instant case, such an analysis under *Mallet* was not necessary because of the “open and obvious doctrine” as set forth in *Burdette*, which states that the duty to keep premises safe for invitees *applies only to defects or conditions which are in the nature of hidden dangers, traps, snares, pitfalls, and the like, in that they are not known to the invitee, and would not be observed by him in the exercise of ordinary care.* *Burdette*, 147 W. Va. 313, 318, 127 S.E.2d 249, 252 (1962)[emphasis added]. Mr. Hersh admitted that he was aware of the absence of handrails, which negated the need for any analysis of reasonable care of the defendants.

Notably, this Court has previously upheld summary judgment in favor of a property owner where a property owner was found to have violated a statute. In *Estate of Helmick by Fox v. Martin*, 192 W. Va. 501, 453 S.E.2d 335 (1994), plaintiff alleged that her decedent was killed as the result of a negligently designed and maintained parking lot. The plaintiff alleged that the parking lot’s design violated West Virginia Department of Highways regulations. *Id.* at 503, 337. During the course of discovery, a witness from the Department of Highways testified that because of the parking lot’s failure to comply with the WVDOH

regulations, the parking lot would not have been issued a permit to allow entry on a state highway from the parking lot. *Id.*

The Court upheld summary judgment in favor of the property owner on the grounds of the “open and obvious” doctrine because that standard was controlling. *Id.* at 505, 339. The Court explained that the evidence was clear that the dangers of the lot were as well known to the person injured as they were to the owner or occupant. *Id.*

Similar to *Helmick*, Mr. Hersh was fully cognizant of the relevant circumstances, the absence of handrails on the subject staircase. He is unable to make a prima facie case for negligence under *McDonald* or *Burdette*. As noted in *Helmick*, violation of a statute alone cannot stand to support a finding of negligence on the part of a property owner where an “open, obvious and known condition” exists. *Helmick*, 192 W. Va. 501, 453 S.E.2d 335 (1994). The Petitioners’ attempt to circumvent the “open and obvious doctrine” by alleging the violation of a municipal ordinance is unpersuasive. The law is clear that where an invitee has knowledge of the substance or condition, he is unable to establish a prima facie case of negligence in a slip and fall case. Therefore, we respectfully request that this Court REJECT Petitioners’ Petition for Appeal on this ground.

III. **The Circuit Court’s application of the “open and obvious” doctrine was proper as the lack of handrails on the subject staircase was obvious, reasonably apparent, and well known to Mr. Hersh.**

The Petitioners wrongly contend that *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988), provides guidance to the Court on the issue of duty. In *Sewell*, the plaintiffs filed

suit alleging negligent design, breach of the warranty of inhabitability and construction of a home they had purchased. *Id.* at 84, 587. On appeal, this Court found that the plaintiffs would be permitted to sue the builder, despite allegations that there was a lack of privity between the subsequent homebuyer and the builder of the home. The *Sewell* case addresses foreseeability in the context that as it was foreseeable that there would be subsequent owners of the home. *Id.* at 85, 588.

The Petitioners cite the *Sewell* decision as authority that there was a duty owed by the Respondents in the instant case and that the “open and obvious doctrine” was misapplied. However, West Virginia law is clear that there is no duty owed by a property owner as to defects and conditions which are known or can be observed in the exercise of ordinary care. *Walters v. Fruth Pharmacy*, 196 W.Va. 364, 367, 472 S.E.2d 810, 814 (1996) citing *Burdette v. Burdette*, 147 W. Va. 313, 127 S.E.2d 249, 252 (1962). In fact, West Virginia law explicitly provides that “the owner. . . of premises used for business purposes is not an insurer of the safety of an invited person.” *McDonald v. Univ. of W. Va. Bd. of Trustees*, 191 W. Va. 179, 181-182, 444 S.E.2d 57, 59-60 (1994). An invitee “assumes all normal, obvious or ordinary risks attendant on the use of the premises, and the owner or occupant is under no duty to reconstruct or alter the premises so as to obviate known and obvious dangers. *Burdette v. Burdette*, 147 W. Va. 313, 127 S.E.2d 249 (1962).

The Petitioners next turn to the Restatement (Second) of Torts and case law from several states across the country which Petitioners’ purport supports their position. Because there is no authority supporting their position in West Virginia, the Petitioners

offer case law from foreign jurisdictions which have no precedential value in West Virginia. Whatever persuasive value these cases may have, if any, is limited to the specific facts of those cases.

Petitioners contend that in these foreign jurisdictions, the fact that a danger is “open and obvious” does not eliminate liability as a matter of law. Unfortunately for the Petitioners, in West Virginia, a plaintiff’s knowledge of a condition eliminates their ability to recover for damages as a result of that same condition. *McDonald v. Univ. of W. Va. Bd. of Trustees*, 191 W. Va. 179, 181-182, 444 S.E.2d 57, 59-60 (1994). As stated herein, the law is well-settled that a property owner is not responsible for open, obvious conditions which occur upon his premises. As such, even in a negligence case, summary judgment is appropriate where the plaintiff is unable to establish the essential elements to establish a prima facie case.

Mr. Hersh’s own admissions regarding the absence of handrails demonstrate his clear knowledge of the alleged dangerous condition. Mr. Hersh testified that he utilized his cane on the stairs for just this reason. Hersh Deposition, Vol. II, pg. 20, lines 1-4, App. 923. While the Petitioners’ quotations of foreign case law are informative, those quotations are not reflective of the state of the law in West Virginia. The Petitioners’ attempts to apply the instant facts to the legal standards of foreign jurisdictions are futile and non-dispositive. The Circuit Court’s application of “open and obvious” doctrine was correct and well supported by numerous prior decisions of this Court.

Therefore, we respectfully request that this Court **REJECT** Petitioners’ Petition for

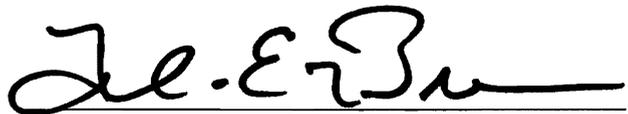
Appeal on this ground.

CONCLUSION

In the present case, Mr. Hersh admitted that he was aware of the condition of which he complains and still chose to descend the staircase at issue. Abrogating the existing state of the law to permit a plaintiff to recover for a known, open and obvious condition which he admittedly recognized on the subject property would contravene long-standing West Virginia case law and public policy. Accordingly, in light of the open and obvious nature of the absence of handrails on the subject staircase and Mr. Hersh's own admission that he was aware of the lack of handrails, the Petitioners have no viable claim against these Respondents and the Circuit Court correctly and properly dismissed Petitioners' claims against Respondents in this matter.

RELIEF REQUESTED

WHEREFORE, the Respondents, P&H Investments, Inc. and Trollers Associates, LLC, by and through counsel of record, respectfully prays that this Honorable Court deny Petitioners' Petition for Appeal.



Johnnie E. Brown, Esquire
(WVSB #4620)

Jeffrey W. Molenda, Esquire
(WVSB# 6356)

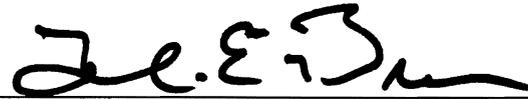
Kameron T. Miller, Esquire
(WVSB #10774)

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Respondents, P&H Investments, Inc. and Trollers Associates, LLC do hereby certify on this 31st day of May, 2012, that a true copy of the foregoing "" was served upon opposing counsel by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

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