IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

JOEY J. BUTNER, **Plaintiff,**

Civil Action No.: 19-C-48
v. **Paul M. Blake, Jr., Judge**

HIGH LAWN MEMORIAL PARK COMPANY,
a West Virginia Corporation, and
HIGH LAWN FUNERAL CHAPEL, INC.,
a West Virginia Corporation, **Defendants.**

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pending before the Court is Defendants, High Lawn Memorial Park Company and High Lawn Funeral Chapel, Inc's *Motion for Summary Judgment* (hereinafter, the "*Motion*").

On February 8, 2021, and February 23, 2021, the Court conducted hearings on the *Motion* whereupon, the Court heard arguments in favor of, and in opposition to, said *Motion*.[1] David A. Dobson, Esq. and Nathan J. Chill, Esq., appeared at both hearings for the Plaintiff. Mark L. Garren, Esq., appeared at both hearings for the Plaintiff.

Upon consideration of the *Motion*, pleadings, memoranda of law and exhibits thereto, and the argument of counsel, the Court is of the opinion the *Motion* should be granted.

[1] The matter came on initially for a TEAMS hearing on the *Motion* on February 8, 2021, however, during the course the hearing the participants experienced technical difficulties that made portions of the hearing difficult to hear and understand. Upon conferring with the Court Reporter following the hearing, the Court was further informed that the Court Reporter also had difficulty hearing portions of the hearing and further informed the undersigned Judge that she would be unable to prepare an accurate, acceptable transcript of the proceedings for purposes of any appeal that may arise from the Courts' ruling on the *Motion*. To give the parties every benefit of the doubt in the presentation of their respective arguments and to further ensure that an accurate record was made for purposes of appeal, the Court conducted a second hearing, in-person, to give the parties the opportunity to re-argue their respective positions on the *Motion*.

I) PROCEDURAL AND FACTUAL HISTORY

Plaintiff is a resident of North Carolina who had been visiting with family members in Fayette County, West Virginia, on the day of the alleged incident. Defendant, High Lawn Memorial Park Company owns and operates a cemetery in Oak Hill, West Virginia. Defendant, High Lawn Funeral Chapel, Inc. owns and operates the separate funeral home and chapel facility in Oak Hill, West Virginia, where body preparation and funeral services are conducted. The present civil action arises from an alleged fall involving the Plaintiff Joey J. Butner while visiting the cemetery owned by High Lawn Memorial Park Company.[2]

Plaintiff brought suit against Defendants, asserting: (1) negligence and (2) willful, wanton, and reckless conduct.

Pursuant to the *Scheduling Order* entered in this matter, the parties engaged in written discovery as well as participated in the depositions of the parties and several witnesses.

Plaintiff has asserted that on July 23, 2017, he decided to stop by Defendant's cemetery, as he was leaving town, to visit a grave site located on the property of the Defendant, High Lawn Memorial Park Company. Plaintiff states he was visiting the grave sites of his brother-in-law and sister. Having visited the cemetery many times, Plaintiff was familiar with the grave site location and Plaintiff had attended his brother-in-law's funeral services at the grave site only two weeks earlier on July 8, 2017.

Plaintiff has testified there was no rain or other weather conditions that affected the condition of the Defendants' property at the time of the Plaintiff's injury. The alleged incident

[2] Since the *Complaint* asserts the same allegations against both Defendants jointly, the Court will reference both Defendants plurally.

occurred during daylight hours and there was nothing preventing Plaintiff from clearly seeing the grave site.

Plaintiff further testified in his deposition that on the day of the alleged incident, he observed no holes surrounding the grave site, the ground appeared firm, and there were no deficiencies of any kind which would cause him to believe that the ground surrounding the grave site was not firm.

While visiting the grave site, Plaintiff alleges that the ground suddenly gave away and his foot fell into a "hidden hole," causing him to fall and sustain a right shoulder injury.

There were no witnesses to Plaintiff's alleged fall.

Plaintiff did not contact either Defendant or anyone on the Defendants' property regarding the accident or the alleged hidden risks of the grave site until several weeks or months later.[3]

Following the alleged fall, Plaintiff continued to drive to his home in North Carolina. While en route, Plaintiff called and requested his niece, Molly Brown ("Ms. Brown"), to take pictures of the grave site on the Defendants' property for his intended lawsuit. Ms. Brown testified in her deposition that she did so the following day.

The photos taken by Ms. Brown show a grave covered by topsoil and sod and approximately three holes along the grave's perimeter. Ms. Brown testified that she did not cause or create any of the holes, the holes were present and visible when she arrived, and that the photos were not edited or modified in any way. No other family member has taken photos of the grave site since the Plaintiff's alleged fall.

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[3] Counsel for Plaintiff states he originally sent a letter of representation to Defendant, High Lawn Memorial Park, on September 11, 2017, five weeks after the alleged incident. When a question arose whether Defendant actually received the original letter of representation, Plaintiff's counsel sent another letter of representation several months later.

When the Plaintiff was shown Ms. Brown's photographs during his deposition, Plaintiff admitted to making one of the holes shown in the photographs when he fell. Plaintiff could not explain or identify the cause of the other holes shown in Ms. Brown's photographs which were taken less than 24 hours after the alleged fall. Plaintiff testified that there was no material difference in the state of the grave site when comparing the photographs to the day of his fall, and that the only difference in the appearance of the grave site in the photographs were three holes surrounding the grave's perimeter.

> **Q.** Okay. Were any of the holes -- that I'll describe as holes, that appear to be holes in Exhibits 11, 12 and 13, were any of those there when you arrived at the grave site on July 23, 2017?
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> **A.** Nothing that I could see.[4]

. . ..

> **Q.** You don't see anything that you believe has been changed from the day you fell and the day the photographs were taken, other than the holes that you've described?
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> **A.** Well, I mean, I made one of those holes.
>
> **Q.** Right. But nothing else? In other words, grass hadn't been added? Taken away? No change that jumps out at you?
>
> **A.** Doesn't appear to be.[5]

Plaintiff alleges he injured his right shoulder as a result of the fall at Defendant's cemetery. Nine years prior to the present alleged incident, Plaintiff had consulted with an orthopedic surgeon, Dr. Steven Norris, M.D., who is located at Greensboro Orthopedics in Greensboro, North Carolina, regarding complaints of right shoulder pain. On June 8, 2017, six weeks prior to the present incident, Plaintiff consulted a medical colleague of Dr. Norris at

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[4] Deposition of Joey Butner, Page 37, Lines 2-6.
[5] Deposition of Joey Butner, Page 37, Lines 22-24; Page 38, Lines 1-6.

Greensboro Orthopedics and complained of right shoulder pain. The colleague scheduled an appointment with Dr. Norris for July 25, 2017. Plaintiff alleges he fell and injured his right shoulder at Defendant's cemetery two days prior to this previously scheduled right shoulder appointment with Dr. Norris.

On January 6, 2021, Defendants filed a timely *Motion for Summary Judgment* and *Memorandum of Law* in support thereof, pursuant to West Virginia Code § 55-7-28a and Rule 56 of the *West Virginia Rules of Civil Procedure.*

On January 8, 2021, Plaintiff filed a *Response to Defendants' Motion for Summary Judgment.*

Subsequently, the Court heard oral arguments, both for and against the *Motion*, at two separate hearings in the matter.[6]

II) RELEVANT CONTROLLING LAW

"In a negligence suit, a plaintiff is required to show four basic elements: duty, breach, causation, and damages. The plaintiff must prove that the defendant owed the plaintiff some duty of care; that by some act or omission the defendant breached that duty; and that the act or omission proximately caused some injury to the plaintiff that is compensable by damages."[7]

The crux of Defendant's *Motion* centers around the duty element.

An owner or possessor of land "owes to an invited person the duty to exercise ordinary care to keep and maintain the premises in a reasonably safe condition."[8] This duty extends to

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[6] *See* fn. 1, *supra* at p. 1.
[7] Hersh v. E-T Enterprises, Ltd. P'ship, 232 W. Va. 305, 310, 752 S.E.2d 336, 341 (2013) (superseded by statute).
[8] Syl. Pt. 2, Est. of Helmick by Fox v. Martin, 192 W. Va. 501, 502, 453 S.E.2d 335, 336 (1994) (quoting Syllabus Point 2, Morgan v. Price, 151 W.Va. 158, 150 S.E.2d 897 (1966)); *see also* Burdette v. Burdette, 147 W. Va. 313, 313, 127 S.E.2d 249, 250 (1962), overruled by Hersh v. E-T Enterprises, Ltd. P'ship, 232 W. Va. 305, 752 S.E.2d 336 (2013).

"defects or conditions which are in the nature of hidden dangers, traps, snares, pitfalls and the like".[9]

"Each person has a duty to look, and to look effectively, and to exercise ordinary care to avoid a hazard because if he fails to do so and is injured, his own negligence will defeat recovery of damages sustained."[10] Hence, the customary definition of negligence is "conduct unaccompanied by that degree of consideration attributable to the man of ordinary prudence under like circumstances."[11]

The West Virginia Supreme Court of Appeals has explained, "the law requires that before an owner can be liable under a negligence theory, he must have had actual or constructive knowledge of the defective condition which caused the injury."[12] Thus, to establish a prima facie case for premises liability, 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...."[13]

"West Virginia courts have declined to find the actual or constructive knowledge requirement satisfied when a latent condition is at issue."[14]

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[9] Burdette, 147 W. Va. at 318, 127 S.E.2d at 252 (although abolished by Hersh v. E-T Enterprises, Ltd. P'ship, 232 W. Va. 305, 752 S.E.2d 336 (2013), the open and obvious doctrine was subsequently codified by W. Va. Code § 55-7-28 (2015)).

[10] Birdsell v. Monongahela Power Co., 181 W. Va. 223, 225, 382 S.E.2d 60, 62 (1989) (internal quotations and citations omitted).

[11] Id. at 225-26, 382 S.E.2d at 62-63 (quoting Pack v. Van Meter, 177 W.Va. 485, 494, 354 S.E.2d 581, 590 (1986) and Syllabus Point 4, Patton v. City of Grafton, 116 W.Va. 311, 180 S.E. 267 (1935)).

[12] McDonald v. Univ. of W. Virginia Bd. of Trustees, 191 W. Va. 179, 183, 444 S.E.2d 57, 61 (1994) (referencing *The American Law of Torts*).

[13] Id. at 182, 444 S.E.2d at 60 (quoting 3 S. Speiser, *et al.*, *The American Law of Torts* § 14.14 (1986)); *see also* Hawkins v. U.S. Sports Ass'n, Inc., 219 W. Va. 275, 279, 633 S.E.2d 31, 35 (2006).

[14] Christian v. United States, 48 NDLR P 82, 2013 WL 5913845, at *6 (N.D.W. Va. Nov. 4, 2013); *see also* Hawkins, 219 W. Va. at 279, 633 S.E.2d at 35 (2006).

"In determining whether a defendant in a premises liability case met his or her burden of reasonable care under the circumstances to all non-trespassing entrants, the trier of fact must consider: (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 [premises owner] to guard against injury.[15]

"The mere happening of an accident is legally insufficient to establish liability."[16] "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."[17]

W. Va. Code, §55-7-28 provides, in relevant part,

> [a] possessor of real property, including an owner, lessee or other lawful occupant, owes no duty of care to protect others against dangers that are open, obvious, reasonably apparent or as well known to the person injured as they are to the owner or occupant, and shall not be held liable for civil damages for any injuries sustained as a result of such dangers.[18]

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[15] Syl. Pt. 6, Mallet v. Pickens, 206 W. Va. 145, 146, 522 S.E.2d 436, 437 (1999); Syl. Pt. 8. Hawkins, 219 W. Va. at 277, 633 S.E.2d at 33; *see also* Story v. Worden, 210 W. Va. 218, 221, 557 S.E.2d 272, 275 (2001) (explaining that it was unnecessary to conduct an exhaustive investigation of all five *Mallet* factors at the summary judgment stage as the factors were originally intended for use by a jury).

[16] Burdette, 147 W. Va. at 321, 127 S.E.2d at 254 (citing McAdoo v. Autenreith's Dollar Stores, 379 Pa. 387, 391, 109 A.2d 156, 158 (1954)) overruled on other grounds by Hersh v. E-T Enterprises, Ltd. P'ship, 232 W. Va. 305, 752 S.E.2d 336 (2013); *see also* Syl. Pt. 1, Griffith v. Wood, 150 W. Va. 678, 678, 149 S.E.2d 205, 207 (1966).

[17] Syl. Pt. 3, Est. of Helmick by Fox v. Martin, 192 W. Va. 501, 502, 453 S.E.2d 335, 336 (1994) (quoting Syllabus point 3, Puffer v. The Hub Cigar Store, Inc., 140 W.Va. 327, 84 S.E.2d 145 (1954) and Syllabus Point 3, McDonald v. University of W. Va. Bd. of Trustees, 191 W.Va. 179, 444 S.E.2d 57 (1994)).

[18] W.Va. Code, §55-7-28(a) (2015).

"Possessors of property do not have a duty to eliminate every potential hazard; they only have a duty to take reasonable steps to ameliorate the risk posed by the hazard where it is foreseeable that harm is likely to result from the hazard."[19]

The West Virginia Supreme Court has long held that "the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law."[20] Moreover, "[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove."[21]

Rule 56 of the *West Virginia Rules of Civil Procedure* provides, "[a] party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof."[22] "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[23]

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a

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[19] Hersh v. E-T Enterprises, Ltd. P'ship, 232 W. Va. 305, 317, 752 S.E.2d 336, 348 (2013); *see also* Shropshire v. Kroger Co., No. 3:16-CV-00378, 2017 WL 9534766, at *3 (S.D.W. Va. May 5, 2017), report and recommendation adopted, No. CV 3:16-00378, 2017 WL 2805110 (S.D.W. Va. June 28, 2017).
[20] Syl. Pt. 5, in part, Aikens v. Debow, 208 W. Va. 486, 488, 541 S.E.2d 576, 578 (2000); *see also generally* Fuller v. City of Huntington, No. 19-0881, 2020 WL 4355652, at *4 (W. Va. July 30, 2020) (unreported opinion).
[21] Syl. Pt. 2, Williams v. Precision Coil, Inc., 194 W. Va. 52, 56, 459 S.E.2d 329, 333 (1995).
[22] W. Va. R. Civ. P. 56(b).
[23] W. Va. R. Civ. P. 56(c).

> genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.[24]

The purpose of summary judgment is to dispose promptly of controversies on their merits if no facts are disputed or only a question of law is at issue.[25] If a party moves for summary judgment and presents "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 56 of the *West Virginia Rules of Civil Procedure*."[26]

In clarifying what constitutes a genuine issue, the West Virginia Supreme Court of Appeals established,

> [it] is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed "material" facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.[27]

The non-movant for summary judgment "is entitled to the most favorable inferences that may reasonably be drawn from the evidence" but the non-movant "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another."[28]

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[24] W. Va. R. Civ. P. 56(d).

[25] Crum v. Equity Inns, Inc., 224 W. Va. 246, 258, 685 S.E.2d 219, 231 (2009); Larew v. Monongahela Power Co., 199 W. Va. 690, 693, 487 S.E.2d 348, 351 (1997); Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994); Williams v. Precision Coil, Inc., 194 W. Va. 52, 58, 59, 459 S.E.2d 329 (1995); *see also generally* W. Va. R. Civ. P. 56(c).

[26] Syl. Pt. 3, Williams, 194 W. Va. at 56, 459 S.E.2d at 333.

[27] Syl. Pt. 5, Jividen v. Law, 194 W. Va. 705, 708, 461 S.E.2d 451, 454 (1995); Marcus v. Holley, 217 W. Va. 508, 516, 618 S.E.2d 517, 525 (2005) (quoting Syl. Pt. 5, Jividen v. Law, 194 W. Va. 705, 461 S.E.2d 451 (1995).

[28] Marcus, 217 W. Va. at 516, 618 S.E.2d at 525 (quoting Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985); *see also* Dellinger v. Pediatrix Med. Grp., P.C., 232 W. Va. 115, 122, 750 S.E.2d 668, 675 (2013); Barbina v. Curry, 221 W. Va. 41, 49, 650 S.E.2d 140, 148 (2007); Chafin v. Gibson, 213 W. Va. 167, 174, 578 S.E.2d 361, 368 (2003).

"[U]nsupported speculation is not sufficient to defeat summary judgment."[29] "[T]he nonmoving party must, at a minimum, offer more than a "scintilla of evidence" to support his claim."[30] Immaterial facts are irrelevant, and summary judgment is required if the non-movant cannot establish an essential element of the case.[31]

For purposes of determining whether there is a genuine issue of material fact sufficient to preclude summary judgment, "[f]actual disputes that are irrelevant or unnecessary will not be counted."[32] A non-movant contending that the issues are in dispute is insufficient to deter the trial court from granting summary judgment.[33] Moreover, factual assertions contained in the brief of the non-movant and self-serving assertions without factual support in the record, are insufficient to shield a non-movant from the award of summary judgment.[34]

Upon the burden shifting, if the non-movant is unable to demonstrate "that, indeed, there is a trialworthy issue[,]" summary judgment must be granted.[35]

III) FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

The Court has reviewed and considered the *Defendants' Motion for Summary Judgment* and *Memorandum in Support Thereof* and *Plaintiff's Response in Opposition to the Motion*, the

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[29] Williams, 194 W. Va. at 61, 459 S.E.2d at 338 (quoting Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987); Chafin, 213 W. Va. at 174, 578 S.E.2d at 368.
[30] Jividen, 194 W. Va. at 713, 461 S.E.2d at 459; Williams, 194 W. Va. at 60, 459 S.E.2d at 337.
[31] *See* Syl. Pt. 1, Mumaw v. U.S. Silica Co., 204 W. Va. 6, 7, 511 S.E.2d 117, 118 (1998); Syl. Pt. 4, Painter, 192 W. Va. at 190, 451 S.E.2d at 756; Syl. Pt. 2, Williams, 194 W. Va. at 56, 459 S.E.2d at 333.
[32] Jividen, at 714, 461 S.E.2d at 460 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)).
[33] DeRocchis v. Matlack, Inc., 194 W. Va. 417, 421, 460 S.E.2d 663, 667 (1995); Miller v. Hatton, 184 W. Va. 765, 769, 403 S.E.2d 782, 786 (1991); *see also* W. Va. R. Civ. P. 56(e).
[34] Syl. Pt. 3, Guthrie v. Nw. Mut. Life Ins. Co., 158 W. Va. 1, 1, 208 S.E.2d 60, 61 (1974); Folio v. Harrison-Clarksburg Health Dep't, 222 W. Va. 319, 324, 664 S.E.2d 541, 546 (2008); Syl. Pt. 6, McCullough Oil, Inc. v. Rezek, 176 W. Va. 638, 640, 346 S.E.2d 788, 791 (1986); Williams, 194 W.Va. at 61 fn. 14, 459 S.E.2d at 338 fn. 14.
[35] Williams, 194 W. Va. at 60, 459 S.E.2d at 337.

parties oral arguments, the record, and the authorities cited by the parties in the pleadings and at oral argument.

Plaintiff asserts that Defendants: (1) were negligent in monitoring of their property[36] and (2) that Defendants "acted in a malicious, willful, wanton, reckless and/or grossly negligent manner by failing to keep their premises in a reasonably safe condition."[37]

W. Va. Code, §55-7-28(a)[38] applies to two categories of premises dangers: (1) those that are open, obvious and/or reasonably apparent, and/or (2) those that are as well known to the person injured as they are to the owner or occupant. In regard to both categories of danger, the statute expressly states that the premises owner (a) owes no duty of care to protect others against either type of danger, and (b) shall not be held liable for civil damages for any injuries sustained as a result of either type of danger.

In reviewing *Defendants' Motion for Summary Judgment*, the Court must first consider which type of statutory danger allegedly existed on the date of the alleged incident. The photographs attached to the *Motion* show what appear to be surface holes or voids along the perimeter of the grave site that are clearly noticeable and discernible. These holes or voids would fall into the category of being open, obvious and reasonably apparent.

Plaintiff's niece, Molly Brown, took the photographs the day following the alleged incident at the specific request of Plaintiff. Ms. Brown testified in her deposition that she did not cause or create any of the holes, she did not enlarge any of the holes, and that the photographs were not edited or modified in any way. Consequently, less than 24 hours after the alleged

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[36] *Complaint*, p. 3, par. 14.
[37] *Complaint*, p. 5, par. 22.
[38] The Court may also refer to W. Va. Code, §55-7-28, herein, as the "Open and Obvious Statute".

incident, several surface holes or voids were clearly visible and present around the perimeter of the grave site.

Plaintiff testified in his deposition that the grave site shown in Molly Brown's photographs showed no changes from the prior day other than the presence of the multiple holes surrounding the grave site. Plaintiff admits that he created one of the holes when the ground beneath him gave away causing one of his legs to fall into a hole. Plaintiff has no explanation for who or what created the other holes shown in the photographs.

The Court finds the surface holes and voids shown in the photographs taken by Molly Brown are clearly open, obvious and reasonably apparent to anyone present at the grave site. Therefore, the danger caused by the holes and voids would squarely fall under the "Open and Obvious Statute".

Plaintiff agrees that W. Va. Code § 55-7-28(a) applies to such open and obvious danger. Plaintiff visited the grave site during daylight hours and agrees there was nothing that would have prevented him from seeing the holes and voids represented in the pictures. Instead, Plaintiff argues that the surface holes and voids shown in Ms. Brown's photographs were not present at the time he visited the grave site. Nevertheless, should a jury determine that the holes and voids were present, as depicted in the photographs taken following the incident, the Court finds there would be no duty of care upon the Defendants to protect Plaintiff from the obvious and apparent danger presented by the same. As such, pursuant to W. Va. Code §55-7-28(a), the Court finds and concludes Defendants could not be held liable for any civil damages or injuries sustained by Plaintiff as a result of falling into one of these open and obvious holes.

The Court next must consider the other type of danger referenced in W. Va. Code §55-7-28(a); those dangers that are as well known to the person injured as they are to the landowner or occupant.

Plaintiff alleges that the cause of his fall and injury was the presence of a ***hidden*** hole or void that was not visible or discernible to him as he walked to, and stood at, the grave site. The question under the "Open and Obvious Statute" is whether those hidden surface holes and voids were dangers that were "as well known to the person injured as they are to the premises owner or occupant . . .."[39]

In his *Complaint*, Plaintiff asserts that Defendants: (1) were negligent in the monitoring of their property[40] and (2) that Defendants "acted in a malicious, willful, wanton, reckless and/or grossly negligent manner by failing to keep their premises in a reasonably safe condition."[41]

Plaintiff's allegations appear to be based upon the opinions expressed by retained cemetery expert, William Stovall. Mr. Stovall offers three (3) opinions in his written report:

> (1) My impression is that the workers did not properly and adequately pack the dirt back into the grave before they replaced the sod. The critical areas to be packed (or tamped) are around the periphery where likely there would be a void around the location of the vault. It would be difficult or impossible to visually determine that the dirt under that sod was not solid.
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> (2) In their response to Interrogatories, the Defendant admits that the cemetery does not have a set of written practices and procedures for the task of closing a grave. . ..
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> (3) In reading through the response to Interrogatories, it appeared to me that the cemetery was not pro-active in revisiting the gravesite to check to see if there still remained problems there with how that grave was closed.[42]

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[39] W. Va. Code, §55-7-28(a), in part.
[40] *Complaint*, p. 3, par. 14.
[41] *Complaint*, p. 5, par. 22.
[42] Defendant's Exhibit C.

The Court notes that Plaintiff's expert does not reference any supporting authority for his three (3) opinions nor has Plaintiff cited any legal or industry authority which supports Mr. Stovall's expert opinion.

In regard to Mr. Stovall's first opinion that the workers did not properly and adequately pack the dirt back into the grave before they replaced the sod, the basis of that opinion is not clear. No evidence has been presented that Mr. Stovall or anyone inspected the soil or ground surrounding the grave site following the alleged July 23, 2017 fall. In fact, Plaintiff never notified Defendant of the alleged fall until weeks or months later. Mr. Stovall does not identify any inspection of the property or reference any scientific or technical requirements that he believes would govern or control the placing of dirt and sod upon a closed grave site. Further, Mr. Stovall specifically states in his opinion that "***[i]t would be difficult or impossible to visually determine that the dirt under that sod was not solid.***" (***emphasis added***).

As it relates to Mr. Stovall's first opinion, there is no evidence that Defendants had any actual or constructive knowledge of the defective condition (i.e. hidden holes) that it is alleged caused the injury.[43] Plaintiff testified in his deposition that on the day of the alleged incident, he observed no holes surrounding the grave site, the ground appeared firm, and there were no deficiencies of any kind which would cause him to believe that the ground surrounding the grave site was not firm. Taking Plaintiff at his word, the Court fails to see how Defendants could be expected to see something that Plaintiff himself could not see. In fact, Plaintiff's expert, Mr. Stovall, even states as much in his report: "It would be ***difficult or impossible to visually determine*** that the dirt under that sod was not solid."[44]

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[43] *See* McDonald v. Univ. of W. Virginia Bd. of Trustees, 191 W. Va. 179, 183, 444 S.E.2d 57, 61 (1994).
[44] Defendant's Exhibit C.

At best, the Court finds Mr. Stovall offers a speculative question as to whether Defendants adequately packed the dirt back into the grave before they replaced the sod. An expert's opinion that is wholly conclusory and devoid of reasoning is not proper summary judgment evidence and the Court is permitted to disregard the expert's opinion.[45] Nevertheless, even if true, Mr. Stovall's opinion does not answer the statutory question as to whether the Defendants could see the alleged hidden danger when Plaintiff testified he could not.

As to the second opinion that the Defendant cemetery does not have a set of written practices and procedures for the task of closing a grave, again the opinion does not address the statutory question whether the hidden surface holes and voids were dangers that were "as well known to the person injured as they are to the premises owner or occupant . . .."[46]

"A material fact is one 'that has the capacity to sway the outcome of litigation under the applicable law.'"[47] For purposes of determining whether there is a genuine issue of material fact sufficient to preclude summary judgment, "[f]actual disputes that are irrelevant or unnecessary will not be counted."[48] The Court finds the presence or absence of written rules or regulations addressing the closing of grave sites is not a material fact since it does not answer the relevant statutory question. Consequently, the alleged absence of written rules addressing the closing of grave sites is neither determinative nor persuasive regarding the present *Motion*.

As to the third opinion offered by Plaintiff's expert, Mr. Stovall states that "it appeared . . . the cemetery was not pro-active in revisiting the grave site to check to see if there still remained

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[45] Jividen, 194 W. Va. at 716, 461 S.E.2d at 462.
[46] W. Va. Code, §55-7-28(a).
[47] Jividen, 194 W. Va. at 714, 461 S.E.2d at 460 (quoting Williams, 194 W. Va. at 60 fn. 13, 459 S.E.2d at 337 fn. 13.
[48] Id. at 714, 461 S.E.2d at 460 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)).

problems there with how that grave was closed."[49] In oral argument, Defendants' counsel referenced Mr. Stovall's deposition testimony in which he states there is no West Virginia or federal statute or regulation which requires a cemetery owner to re-visit a grave site.[50] There is no required number of visits and no certain period of time that Mr. Stovall advocates should apply to re-visiting a grave site. Nevertheless, Mr. Stovall opines that any revisit to a grave site need only involve a visual inspection of the same.[51] Otherwise, no formal soil compaction test[52] or physically stomping on the grave site is necessary.[53] Importantly, Mr. Stovall agrees that if the visual inspection did not reveal a hidden hole or void, nothing further needed to be done.[54]

In the present case, the frequency of Defendant going back to the grave site is irrelevant on the issue of liability under W. Va. Code §55-7-28(a) because, according to Plaintiff's sworn testimony, there was no visual sign of a hidden hole. Consequently, based upon Plaintiff's sworn testimony, even if Defendant cemetery owner was standing next to Plaintiff on the day of the incident, neither Plaintiff nor Defendant would have been aware of the existence of any hidden hole. Therefore, the Court finds that on the day of the incident the alleged hidden dangers at the grave site were as well known to Plaintiff as they were to the Defendants.

Given Plaintiff's sworn testimony that there was no visual sign of any hidden hole that Plaintiff or Defendants could see, Plaintiff argues that Defendants should have had constructive knowledge of the "possibility" of a hidden hole. Plaintiff bases this argument upon the anticipated testimony of Defendant's former employee, Andrew Lambert, and the anticipated testimony of Brian Brooks, who is a supervisor at a national chain of cemeteries. It is asserted

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[49] Defendant's Exhibit C.
[50] Stovall Deposition p. 54.
[51] Id. at pp. 56-57, 65.
[52] Id. at pp. 56-57, 62.
[53] Id. at pp. 65-66.
[54] Id. at pp. 67-68.

by Plaintiff that Mr. Lambert will purportedly testify that when he took a subsequent job with Blue Ridge Memorial Park Company (hereinafter "Blue Ridge"), Brian Brooks instructed him in using grave filling procedures which were different from those employed at Defendant, High Lawn Memorial Park Company. Specifically, Mr. Lambert will purportedly testify that Blue Ridge uses construction sand as a back-fill medium around its grave sites to minimize hidden holes or voids. Mr. Lambert will purportedly opine that using sand as a backfill medium is superior to Defendant's re-using the original soil from the grave site. It is also asserted that Mr. Lambert will also say that hidden voids around Defendant's grave sites were not uncommon and he allegedly fell because of a hidden hole at a grave site.

Plaintiff acknowledges that Mr. Lambert ***actually closed*** the grave site at Defendant's cemetery which is at issue in this case. Consequently, Mr. Lambert is essentially criticizing his own workmanship. Setting aside the fact that Mr. Lambert's anticipated testimony at this point consists primarily of hearsay, the Court finds that the anticipated testimony of both Mr. Lambert and Brian Brooks go towards the possible cause of the hidden hole and not to its visibility on the date of the alleged incident.

Plaintiff further argues that since Mr. Lambert is expected to testify that hidden holes were a common occurrence at Defendants' cemetery, that, in and of itself, created constructive knowledge with Defendant of the "possibility" of a hidden hole at the actual grave site at issue in this case.

Plaintiff has offered no other evidence which would give historical context to Mr. Lambert's anticipated testimony. For example, the dates and locations of other alleged sink holes in relation to the present grave site are not identified. The similarity of the soil or backfill material involved in other alleged sink holes is not identified nor is the percentage of grave sites

having sink holes. Regardless of these relevant details, the substance of the anticipated testimony of Mr. Lambert and Mr. Brooks goes towards their preference for other grave closing methodologies and not to whether on the day of the incident the alleged hidden dangers at the grave site were as well known to Plaintiff as they were to the Defendants.

Moreover, in support of his argument, Plaintiff cites *Hawkins v. U.S. Softball Associates,* 219 W. Va. 275, 633 S.E.2d 31 (2006). In *Hawkins*, the Defendant, Marion County Softball Association, was aware that men's softball leagues use longer distances from home plate to first base than girls' high school softball teams.[55] However, Defendant denied knowledge of a pipe, buried several feet in front of first base to secure the base for girls' softball, which injured the Plaintiff.[56] Based upon the latent condition of the pipe, the *Hawkins* Court declined to find the actual or constructive knowledge requirement met and further ruled the Defendant had no duty to investigate the buried pipe in front of the mens' first base.[57]

The *Hawkins* case further provides that when determining if Defendant met the burden of care in a premises liability case, the trier of fact may consider several factors including: the magnitude of the burden placed upon the premises owner to guard against injury.[58] While it is unnecessary to support this Court's finding that summary judgment is appropriate under the given circumstances in this matter, the Court notes that Plaintiff's argument wholly ignores the magnitude of the burden Plaintiff requests this Court to place upon the cemetery owner.

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[55] Hawkins, 219 W. Va. at 277–78, 633 S.E.2d at 33–34.
[56] Id. at 280–81, 633 S.E.2d at 36–37.
[57] Id. at 281, 633 S.E.2d at 37. Much like the *Hawkins* court, the *McDonald* court likewise was adverse to finding the actual or constructive knowledge requirement satisfied when a latent condition is at issue. McDonald, 191 W. Va. 179, 444 S.E.2d 57 (1994); *see also* Christian, 48 NDLR P 82, 2013 WL 5913845 (N.D.W. Va. Nov. 4, 2013) (discussing *Hawkins* and *McDonald*).
[58] Hawkins, 219 W. Va. at 280, 633 S.E.2d at 36; *see also* Mallet v. Pickens, 206 W. Va. 145, 522 S.E.2d 436 (1999). In the case of Story v. Worden, the *Story* Court explained that it was unnecessary to conduct an exhaustive investigation of all five *Mallet* factors at the summary judgment stage as the factors were originally intended for use by a jury. *See* Story v. Worden, 210 W. Va. 218, 221, 557 S.E.2d 272, 275 (2001); *see also* Hawkins, 219 W. Va. at 280, 633 S.E.2d at 36.

Defendant's cemetery covers many acres of land and includes hundreds of grave sites. Plaintiff is proposing that Defendants had a duty to return to each grave site for an indeterminate period of time to perform an indeterminate number of visual inspections in hopes of seeing a possible hidden danger that Plaintiff's own expert states would be difficult or impossible to see. The Court finds Plaintiff's proposed duty of care exceeds any reasonable magnitude of burden that should be placed upon a cemetery owner.

Plaintiff also argues that based upon Andy Lambert's anticipated testimony, it was foreseeable that a sink hole ***might occur*** with any grave closing and, therefore, Defendant had a duty of care to protect Plaintiff from this potential hidden danger. The Court finds this proposed duty of care is contrary to W. Va. Code, §55-7-28(a) which expressly states there is no duty of care to visitors in regards to those dangers that are as well known to the person injured as they are to the owner or occupant.

The Court further finds Plaintiff's proposed duty of care is also contrary to the opinion of Plaintiff's own expert, William Stovall, who testified that if a visual inspection did not reveal a hidden hole or void, nothing further needed to be done by the cemetery owner.[59] In the case at bar, Plaintiff testified there was no visual signs of any hidden hole. Again, the statutory question is whether the Defendants could see the alleged hidden danger when Plaintiff testified he could not. Consequently, the Court finds that Mr. Lambert's anticipated testimony that holes had occurred in the past at other unidentified grave sites does not create an overarching duty contrary to W. Va. Code, §55-7-28(a).

The statutory question is whether the hole was visible and apparent at the current grave site on the day of Plaintiff's alleged fall and likewise visible, apparent, and as well-known to the

[59] Stovall Deposition pp. 67-68.

Defendant as it was to the Plaintiff. In the present case, the evidence reveals that at the time of the incident, the danger of the hidden hole was not visible to Plaintiff, or to anyone else, including Defendants. Consequently, the Court finds any hidden hole was as equally well known to both Plaintiff and Defendant. Therefore, the Court finds and concludes that, on the day of the incident, the Defendants had no duty of care to Plaintiff. Accordingly, under W. Va. Code §55-7-28(a), Defendants cannot be held liable for any civil damages or injuries suffered by Plaintiff as a result of those hidden dangers.

Accordingly, based upon the foregoing, the Court finds and concludes Plaintiff cannot meet the two-part test of *McDonald* to establish a prima facie case for premises liability in the case at bar. The Court finds the Defendants had no actual or constructive knowledge of the hidden hole that allegedly caused Plaintiff's injury. Since the Defendants had no knowledge of the defect or dangerous condition on their property, the Court finds it would be impossible for Defendants to have prevented the Plaintiff from discovering the defect or condition.

While this Court is sympathetic to Plaintiff's alleged situation and plight, such misfortune cannot serve as the basis under W. Va. Code, §55-7-28(a), to establish Defendants owed a duty to protect Plaintiff from the alleged danger which, the Court has found under the facts and evidence as it exists, was either open and obvious or admittedly not visible and not discernible to anyone.[60]

In the foregoing order, the Court has thoroughly analyzed whether 1) the Defendants had actual or constructive knowledge of the foreign substance or defective condition and (2) whether

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[60] Syl. Pt. 1, Griffith v. Wood, 150 W. Va. at 678, 149 S.E.2d at 207; Burdette, 147 W. Va. at 321, 127 S.E.2d at 254 (citing McAdoo v. Autenreith's Dollar Stores, 379 Pa. 387, 391, 109 A.2d 156, 158 (1954)) overruled on other grounds by Hersh v. E-T Enterprises, Ltd. P'ship, 232 W. Va. 305, 752 S.E.2d 336 (2013).

the Plaintiff had no knowledge of the substance or condition or was prevented by the Defendants from discovering it.[61]

As the Court discussed *supra*, if Ms. Brown's next day photographs of the site accurately show the state of the Defendants' property at the time of Plaintiff's alleged fall, under W. Va. Code §55-7-28(a), the Defendants owed no duty of care to Plaintiff for open and obvious holes that existed at the grave site.

Further, as the Court discussed *supra*, even if the holes were hidden from view as Plaintiff claims, there are no facts that show that Defendants had any actual or constructive knowledge of the hidden defects at the grave site on the day of the alleged incident. The Court has likewise found that such hidden holes were as well known to the Plaintiff as they would have been to the Defendants.

Accordingly, based upon the specific facts as they exist in this case, the findings of this Court, and pursuant to W. Va. Code §55-7-28(a), the Court finds and concludes the Defendants owed no duty of care to Plaintiff and cannot be held liable for civil damages for any injuries suffered by Plaintiff as a result of such dangers.

As the Plaintiff has alleged two counts of negligence against the Defendants but has no evidence that Defendants had any duty of care that they have breached, the Court finds granting *Defendants' Motion For Summary Judgment* is both appropriate and necessary.[62]

Therefore, based upon all of the foregoing, the Court finds and concludes there is no genuine issue of material fact in regard to Defendants' duty of care to Plaintiff or Defendants'

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[61] *See* McDonald, 191 W. Va. at 182, 444 S.E.2d at 60; *see also* Hawkins, 219 W. Va. at 279, 633 S.E.2d at 35; Morse v. Aldi Inc., No. 2:18-CV-01298, 2019 WL 4384143, at *1 (S.D.W. Va. Sept. 12, 2019) (quoting McDonald v. University of West Virginia Bd. Of Trustees, 444 S.E.2d 57, 60 (1994)).

[62] Syl. Pt. 2, Williams, 194 W. Va. at 56, 459 S.E.2d at 333 (summary judgment appropriate when a plaintiff fails to prove an essential element of the case).

liability for the injuries incurred by the Plaintiff has a result of the incident. Therefore, because there is no genuine issue of material fact Defendants are entitled to judgment as a matter of law and *Defendants' Motion for Summary Judgment* should be granted.

NOW, THEREFORE, for the reasons stated herein, the Court hereby **GRANTS** Defendants, High Lawn Memorial Park Company and High Lawn Funeral Chapel, Inc.'s, *Motion for Summary Judgment*. It is therefore **ORDERED** and **ADJUDGED** that the above styled matter should be, and hereby is, **DISMISSED**, with prejudice, and shall be stricken from the Court's active docket.

This *Order Granting Defendants' Motion for Summary Judgment* is a **FINAL ORDER**.

The **objections and exceptions** of the parties are **noted and preserved** for purposes of appeal.

The Clerk of this Court shall forward an attest copy of this *Order Granting Defendants' Motion for Summary Judgment* to: **Nathan J. Chill, Esq.,** P.O. Box 299, Poca, WV 25159; **S. Brooks West, II, Esq.** and **David A. Dobson, Esq.,** *West Law Firm, LC*, 1514 Kanawha Boulevard East-Suite 2, Charleston, WV 25311; and **Mark L. Garren, Esq.,** *Kesner & Kesner, PLLC*, P.O. Box 2587, Charleston, WV 25329.

ENTERED this 14th day of April 2021.

PAUL M. BLAKE, JR.
JUDGE

Paul M. Blake, Jr., Judge

A TRUE COPY of an order entered
April 14, 2021
Teste: Julie A. B. Hendricks
Circuit Clerk Fayette County, WV