IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 21-0387

JOEY J. BUTNER,

Plaintiff Below, Petitioner,

vs.

(Fayette County Civil Action No. 19-C-48)
Honorable Paul M. Blake, Jr.

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

Defendants Below, Respondents.

BRIEF OF PETITIONER

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INTRODUCTION

Petitioner Joey Butner, who was the Plaintiff below ("Plaintiff"), appeals the Circuit Court of Fayette County's order entered April 14, 2021, granting the motion for summary judgment filed by Respondents High Lawn Memorial Park Company and High Lawn Funeral Chapel, Inc. ("Defendants") in a premise liability action arising from Plaintiff's fall at a grave site located in a cemetery owned and operated by Defendants.

The Circuit Court's order failed to consider the evidence in the light most favorable to the Plaintiff, as is required at the summary judgment stage and improperly granted summary judgment based on the open and obvious doctrine. In light of Plaintiff's evidence that the incident was caused by a hidden hazard, the failure to tamp down the refilled dirt in the grave prior to covering it with sod, the Circuit Court erred in concluding that the hazard was open, obvious, and readily apparent as a matter of law. For the reasons more fully set forth below, Plaintiff requests that the Circuit Court's order granting summary judgment be reversed.

ASSIGNMENTS OF ERROR

Plaintiff raises the following assignments of error for the Court's review on appeal:

- Summary judgment was improper because, considering the evidence in the light most favorable to the Plaintiff, the Circuit Court erred in making factual determinations regarding Respondents' duty of care and liability which should be considered by a jury.
- The Circuit Court erred in finding that the open and obvious doctrine barred Plaintiff's claims because the question of whether the hazard was open and obvious under the statute required the resolution of disputed facts by a jury.
- The Circuit Court improperly found that Defendants lacked actual or constructive knowledge of the hidden, hazardous condition at the gravesite.

STATEMENT OF THE CASE

On July 23, 2017, while Plaintiff Joey Butner was visiting his brother-in-law's gravesite at Defendants' cemetery in Oak Hill, the ground beneath him suddenly gave way and he fell into the grave. As a result of the incident, Plaintiff injured his right shoulder which required surgery. (Appx. at 152-155). Plaintiff's brother-in-law was buried two weeks earlier. (Appx. at 152). At that time, the grave was filled by replacing the dirt from the site and covering the grave with sod. (Appx at 93). When Plaintiff visited the site two weeks later, there were no holes surrounding the gravesite, the ground appeared firm, and there were no deficiencies of any kind which would cause him to believe that the ground surrounding the grave was not firm. (Appx. at 82).

The day following the fall, Plaintiff's niece, Molly Brown, took photographs of the location of the gravesite. (Appx at 69-81, 153-154). The photographs taken by Ms. Brown show a grave covered by topsoil and sod and approximately three holes along the grave's perimeter. *Id.* 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. (Appx. at 153). Plaintiff testified that he likely made one of the holes shown in the photographs when he fell. (Appx. at 124). Plaintiff could not identify the cause of the other holes shown in Ms. Brown's photographs; however, he testified that the holes were not present before he fell. (Appx. at 82, 154).

Michael Phares, the owner of High Lawn Memorial Park, testified that there are no warnings to delineate any areas where visitors to the cemetery should avoid walking. (Appx. at 84). As far as Defendants are concerned, once the sod is placed on the ground, visitors can immediately begin walking on or near the gravesites. (Appx. at 84-85).

Andrew Lambert, a former maintenance employee at Highlawn Memorial Park, indicated that Defendants were aware that there were instances of holes at gravesites opening up after sod was placed on them. (Appx. at 88-89, 106-107). He explained that open holes on the side of the graves were a common occurrence at High Lawn. (Appx. at 107). Mr. Lambert further explained that it is common for voids to form around the edges and corners of gravesites at High Lawn. (Appx. at 88-89, 106-107).

Mr. Lambert further noted the hazard caused by the failure to properly tamp down the grave before placing the sod on it was one that was hidden. (Appx. at 89). Mr. Lambert explained that there were quite a few occasions where after two weeks, holes would open at a grave site at High Lawn. *Id.* He described his personal experience with the hidden hazard caused by Defendants' methods:

> [A]ny kind of moisture in the air or anything will cause it to settle and if it ain't tamped tight it's gonna give. And once it gives it all floats to the bottom and starts filling in cracks and stuff and what happens is when they put sod on it, it will look like it's fine, but as soon as you step on it that grass that's growing there is like an inch or so it gives and once it gives you fall in. I actually fell in a grave out at Highlawn one time because of the sod, it fell through.

(Appx. at 107). Indeed, Mr. Lambert hurt his wrist during the incident recounted above and required care at a hospital. (Appx. at 89).

Mr. Lambert further indicated there are alternative methods of closing a grave that did not create the hidden hazard. (Appx. at 104-105). While at High Lawn Memorial Park, he would tamp the grave by hand, beating it with a grave board; however, at his current employer, Blue Ridge Memorial Gardens, a mechanical air tamper was used that would prevent the voids. (Appx. at 101-107). Corners and sides of the graves were the most notorious areas of recently filled graves for voids to occur at High Lawn Memorial Park Company, and in many instances, it was necessary to go back and fill in sinkholes. (Appx. at 106).

After he left Defendant's employ, Mr. Lambert attended trainings on how to properly tamp a grave site while working for Blue Ridge. (Appx. at 105). While at High Lawn, however, he did not complete the same level of training and classes that he has completed while working for his current employer. *Id.*

Plaintiff also presented evidence on the proper method to fill a grave from Brian Brooks, the location manager at Blue Ridge and one other cemetery in West Virginia. (Appx. at 89-91). To combat potential sinkage of backfilled graves in known problem areas, it is Blue Ridge's practice to backfill around the corner and sides of the graves with sand due to the superior compaction of sand. (Appx. at 90-91). Using sand decreases the occurrence of sinkage, voids, holes, and collapses. *Id.*

Finally, Plaintiff's retained expert, William Stovall, a funeral and home cemetery expert, with over thirty years of experience owning and maintaining three cemeteries, reported the following three conclusions: 1) Respondent's workers did not properly and adequately pack the dirt back into the subject grave before they replaced the sod; 2) High Lawn Memorial Park has no set of written practices and procedures for closing a grave, and it is important to have those practices written out "so that there is a guideline to always maintain the company's standards and be able to evaluate their success in following them"; and 3) the cemetery was not pro-active in revisiting the gravesite to check to see if there still remained problems there with how the grave was closed. (Appx. at 93-94).

PROCEDURAL HISTORY

On January 11, 2021, Defendants filed a motion for summary judgment arguing that: there was 1) no evidence that Defendants had any duty of care that they have breached; 2) under W.Va. Code § 55-7-28(a), the Defendants owe no duty of care to Plaintiff for any open and obvious

defects that existed at the grave site; and 3) even if the holes were hidden from view, there are no facts that show that Defendants could have had any actual knowledge of the hidden defects at the grave site. (Appx. at 47-54).

On January 12, 2021, Plaintiff filed a response thereto, asserting that summary judgment should be denied as disputed issues of material fact exist that should be presented to a jury and Defendants failed to meet their burden of proof. (Appx. at 59-93). Further, Plaintiff asserted that the jury should be permitted to consider 1) the foreseeability that an injury might occur; 2) the severity of the 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. (Appx. at 67).

Following arguments by counsel, the Circuit Court of Fayette County, by order entered on April 14, 2021, granted Respondents' Motion for Summary Judgment and dismissed Petitioner's case with prejudice. (Appx. at 151-172). The Circuit Court first concluded that the holes as shown in Plaintiff's photographs taken by Plaintiff's niece, Molly Brown, establish that they "squarely fall under the open and obvious statute" and Respondent "cannot be held liable for any civil damages or injuries sustained by Plaintiffs as a result of falling into one of these open and obvious holes." (Appx. at 161-162). The Circuit Court, after improperly weighing the evidence, further found that Defendants had no duty to protect Plaintiff from the alleged danger, which "the Court has found under the fact and evidence as it exists, was either open and obvious or admittedly not visible and not discernible to anyone." (Appx. at 170-171). The Circuit Court concluded that Plaintiff failed to establish a prima facie case for premises liability because Defendants lacked actual or constructive knowledge of the hidden hole that caused Plaintiff's injury, and Defendants

could not have prevented the Plaintiff from discovering this defect or condition. *Id.* It is from this order that Plaintiff appeals.

SUMMARY OF ARGUMENT

The Circuit Court of Fayette County misapplied the standard of review at the summary judgment stage by failing to view the evidence in the light most favorable to the non-moving party. The Circuit Court erred in holding that the alleged hazard "was open and obvious." This Court has recently determined that the issue of whether a danger is open, obvious, reasonably apparent or as well known to the person injured as it was to the owner or occupant presents a question of fact. Syl. Pt. 13, *Gable v. Gable,* 858 S.E.2d 838 (W. Va. 2021). Because the Circuit Court improperly weighed the evidence and drew factual conclusions against the Plaintiff, Plaintiff request that the Circuit Court's order be reversed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to R.A.P. 10(c)(6), oral argument is necessary as the dispositive issues would be significantly aided by oral argument. Petitioner requests that the Court set this matter for Rule 19 argument because the case involves a result against the weight of the evidence. Petitioner does not believe that this case is appropriate for a memorandum decision.

ARGUMENT

I. STANDARD OF REVIEW

A circuit court's entry of summary judgment is reviewed *de novo.*" Syl. Pt. 1, *Painter v. Peavy*, 451 S.E.2d 755 (W.Va. 1994). "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *Andrick v. Town of Buckhannon,* 421 S.E.2d 247, 249 (W.Va. 1992). "A party is not entitled to summary judgment unless the facts established

show a right to judgment with such clarity as to leave no room for controversy and show affirmatively that the adverse party cannot prevail under any circumstances." *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York,* 133 S.E.2d 770, 777 (W.Va. 1963).

Summary judgment is not favored, and on appeal from an order granting summary judgment, the facts will be viewed in the light most favorable to the losing party. *Andrick v. Town of Buckhannon,* 421 S.E.2d 247, 249 (1992) (citing *Masinter v. WEBCO Co.,* 262 S.E.2d 433 (W.Va. 1980)). Syllabus point five of *Jividen v. Law,* 461 S.E.2d 451 (W.Va. 1995), defines "genuine issue" in the following manner: "Roughly stated, a 'genuine issue' for purposes of West Virginia Rule of Civil Procedure 56(c) 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."

II. SUMMARY JUDGMENT WAS IMPROPER BECAUSE, CONSIDERING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF, THE CIRCUIT COURT ERRED IN MAKING FACTUAL DETERMINATIONS REGARDING RESPONDENTS' DUTY OF CARE AND LIABILITY WHICH SHOULD BE CONSIDERED BY A JURY.

A. An Owner of Land is Under the Duty to Keep and Maintain His Premises in a Reasonably Safe Condition That is Free from Hazards That He Either Knows or Should Have Known Exist.

It is well established in West Virginia that an owner of land is under the duty to keep and maintain his premises in a reasonably safe condition that is free from hazards that he either knows or should have known exists. Not less than three months ago, this Court reaffirmed these principles in a premises liability action. *Gable v. Gable,* 858 S.E.2d 838 (W.Va. June 1, 2021).

The *Gable* Court first emphasized that "in any negligence or tort case, a plaintiff is required to show four basic elements: duty, breach, causation, and damages." *Id.* at 850. In analyzing the duty of care, the Court recognized that, as set forth in *Mallet v. Pickens,* 522 S.E.2d 436, 446 (1999), in any premise liability case, the duty of care is guided by Justice Cardozo's maxim "[t]he risk reasonably to be perceived defines the duty to be obeyed." *Id.* (citing *Palsgraf v. Long Island R. Co.,* 248 N.Y. 339, 162 N.E. 99, 100 (1928). Thus, it is well-settled West Virginia law that the owner or occupant of a premises owes to an invited person the duty to exercise ordinary care to keep and maintain the premises in a reasonably safe condition. *See* Syllabus Point 2, *Morgan v. Price,* 150 S.E.2d 897 (W.Va. 1966); see also *Burdette v. Burdette,* 127 S.E.2d 249 (W. Va. 1962), overruled by *Hersh v. E-T Enterprises, Ltd., P'ship,* 752 S.E.2d 336 (2013). One who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created an unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm. Syl. Pt. 2, *Robertson v. LeMaster,* 301 S.E.2d 563 (W.Va. 1983).

The *Gable* Court recognized that, to determine whether the owner or possessor of business premises has met its duty of reasonable care, 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 defendant to guard against injury." Syl. Pt. 8, *Gable v. Gable,* 858 S.E.2d 838 (W. Va. 2021)(citing Syl. pt. 6, *Mallet v. Pickens*, 522 S.E.2d 436 (1999))(emphasis added). Finally, before an owner or occupier may be held liable for negligence, "he must have had actual or constructive knowledge of the defective condition which caused the injury." *Neely v. Belk Inc.*, 668 S.E.2d 189, 199 (W.Va. 2008) (quoting *Hawkins v. United States Sports Assoc., Inc.*, 633 S.E.2d 31, 35 (W.Va. 2006).

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. *Gable, supra,* at 851. "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,* 371 S.E.2d 82 (W.Va. 1988). Syl Pt. 7, *Gable, supra,* at 851 (W. Va. 2021). As the *Gable* Court emphasized, these issues are largely questions of fact for a jury. *Id.* at 854. Whether measures taken by a Defendant suffice to meet the reasonable care standard is a question for the jury that cannot be decided by the Court at the summary judgment stage. *McNeilly v. Greenbrier Hotel Corp.,* 16 F.Supp. 3d 733, 739-740 (S.D. W.Va. 2014).

Here, the Circuit Court based its order on its conclusion that the hazards were either open and obvious or hidden and unknown to the Defendants. Because either of these conclusions requires the resolution of disputed material facts, summary judgment was inappropriate.

B. The Circuit Court Erred in Finding that the Open and Obvious Doctrine Barred Plaintiff's Claims Because the Question of Whether the Hazard was Open and Obvious Under the Statute Required the Resolution of Disputed Facts by a Jury.

The Circuit Court based its grant of summary judgment on the recently codified "open and obvious" doctrine. Under this doctrine, the liability of a possessor of real property for injuries caused by open and obvious hazards is limited by statute:

> 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.

W.Va. Code § 55-7-28(a) ("the Act"). Here, the Circuit Court improperly determined that "the hole was as equally well known to both Plaintiff and Defendant" and concluded that "the

Defendants had no duty of care to Plaintiff" (Appx. at 170). In doing so, the Court improperly resolved numerous factual issues that should have been left for the jury.

First, the Circuit Court improperly concluded that the holes shown in the post-accident pictures taken the next day were both present at the time of Plaintiff's fall and were the cause of his fall. (Appx. at 161-162). As noted above, Plaintiff testified that he did not see holes present when walked over the newly covered grave site. (Appx. at 82). He further testified that the fall was caused by the ground giving way when he walked across it. (Appx. at 82, 153). Based on this testimony, a reasonable jury could conclude either that the holes were not present before Plaintiff fell or that Plaintiff's fall was caused by ground giving away and not the existence of the holes. Indeed, the Circuit Court recognized that the issue of the existence of the three holes was a jury question. (Appx. at 162).

Second, even assuming that the holes both pre-existed the fall and were the cause of it, the question of whether liability is barred by the Act was still for the jury. In *Gable,* this Court conclusively resolved the issue of who determines whether a hazard was open and obvious under the Act: "Under West Virginia Code § 55-7-28(a) (2015), whether a danger was open, obvious, reasonably apparent or as well known to the person injured as it was to the owner or occupant is a question of fact." Syl. pt. 13, *Gable, supra.* Thus, as in *Gable,* "whether the hazards were seen or seeable from the perspective of the plaintiff are questions of fact for future resolution." *Id.* at 854.

Other courts interpreting the Act have held that issues regarding the applicability of the Act are for a jury. For instance, photographs of wrinkles in a carpet taken after a fall do not preclude liability as a matter of law as the question of whether "defects in the carpet were dangers not 'open, obvious, [or] reasonably apparent' to the person injured created a material factual

dispute for the jury. *Martin v. Belk,* 2:18-CV-01075, 2019 WL 3504277, at *4-5 (S.D. W. Va. Aug. 1, 2019).

Similarly, in *Medley v. Lowe's Home Centers, LLC,* No. 1:18CV224, 2020 WL 2616399, at *1 (N.D.W. Va. May 22, 2020), the Court determined that reliance on the photographs of a pothole "did not conclusively resolve questions about the pothole's size and appearance." *Id.* The Court found that "lighting and weather conditions at the time of the fall could impact a factfinder's consideration of whether the pothole was an open and obvious danger." *Id.* Thus, the Court held that material questions of fact existed as to whether the pothole was open and obvious and whether the Plaintiff failed to look effectively to avoid the pothole. *Id.* at 3.

The holes at issue here presented a hidden danger analogous to the hidden hazard in *Tichnell v. Wal-Mart Stores East,* No. 1:20CV30, 2021 WL 1617710, at *3 (N.D.W. Va. Apr. 26, 2021). In *Tichnell,* Plaintiff slipped and fell on a puddle of water at the entrance of a Wal-Mart store. Defendant moved for summary judgment on the basis that the puddle of water in the store was "open and obvious." *Id.* The Court found that "there remains a genuine dispute of material fact as to whether the water puddle was open and obvious." *Id.* at 2. The *Tichnell* Court distinguished this set of facts from *Senkus v. Moore,* 535 S.E.2d 724 (W.Va. 2000) (upholding circuit court's grant of summary judgment where plaintiff tripped on a scale in plain view at a veterinary hospital) and *Aitcheson v. Dolgencorp, LLC.,* No. 3:18-CV-174, 2020 WL 411037 (N.D.W. Va. Jan. 24, 2020), *aff'd subnom. Aitcheson v. Dolgencorp, LLC,* 830 F. App'x 723 (4th Cir. 2020) (upholding circuit court's grant of summary judgment where Plaintiff tripped over an eight-foot ladder which had fallen across the defendant store's entrance finding that the ladder was an "open, obvious and reasonably apparent hazard to incoming patrons"). The Court found that the "obviousness of an eight-foot ladder or veterinary clinic scale, and a puddle of water on the

floor is an incongruent set of facts, one that is a triable question of fact for the jury to determine." *Id.* at 3. The Court further determined that "a reasonable juror could conclude that the puddle of water was a hidden- or at least a difficult to appreciate- danger, one that was not an open, obvious, and reasonably apparent hazard to incoming patrons." *Id.*

In *Huron v. Bojangles' International LLC,* 2019 WL 1119638 (S.D. W.Va. 2019), the court considered whether a change in the curb's elevation between the sidewalk and parking lot of a restaurant, which caused plaintiff's fall, presented an open and obvious hazard and whether Defendants were entitled to summary judgment as a matter of law. *Id.* at *1. The court found that, viewing the evidence in the light most favorable to the nonmoving party, where there was a lack of contrast and only a six-inch rise from the parking lot to the sidewalk, the change in elevation between the sidewalk and parking lot/drive through lane was not open and obvious. *Id.* at *3. Thus, the Court denied Defendant's motion for summary judgment. *Id.*

Here, the Circuit Court improperly concluded that no genuine issues of material fact exist with respect to whether the hole was open and obvious. As in *Medley,* the photographs of the grave site taken by Ms. Brown do not conclusively resolve the question regarding whether the holes presented an open and obvious danger. Mr. Butner's testimony establishes that he did not notice the holes around the grave site prior to the fall and that he did not notice any deficiencies of any kind which would lead him to believe that the ground on the grave site was not firm. (Appx. at 82). While the fall occurred during daylight hours, Mr. Butner further testified that the "hidden hole" appeared to be solid sod, and the ground beneath him suddenly gave way, causing his leg to go forward and him to fall backward. (Appx. at 82, 153). As in *Huron,* the hazard was difficult to detect. As in *Tichnell,* a reasonable juror could conclude that the hole was hidden and not within the Plaintiff's plain view. Yet the fact that Respondents were aware, as indicated by Mr. Lambert,

that all recently dug graves were prone to opening up, raises a genuine issue of material fact as to whether Respondent's breach their duty of care to the Petitioner. (Appx. at 88-89, 106-107).

Simply put, the Circuit Court's grant of summary judgment based on the Act improperly invaded the province of the jury because there are factual disputes regarding how the accident occurred and whether the holes appearing in the post-accident pictures meet the definition of an open and obvious condition under the Act.

C. The Circuit Court Improperly Found That Defendant Lacked Actual or Constructive Knowledge of the Hidden, Hazardous Condition at the Gravesite.

In addition to basing summary judgment on the open and obvious doctrine, the Circuit Court found as a matter of law that the Defendant lacked actual or constructive knowledge of the hazard and, as such, that the hazard was as well-known to the person injured as it was to the owner of the property. (Appx. at 165). In so holding, the Court ignored the facts establishing that the hidden hazardous condition was not naturally occurring -- it was created by the Defendants' use of a method that was susceptible to causing hidden subsurface voids. (Appx. at 101-105). The Court also improperly ignored evidence that these voids had frequently appeared at Defendants' other gravesites which established actual or constructive knowledge of the hazards created by their conduct. (Appx. at 106-107). As such, the Court's alternative basis for summary judgment was also in error.

The Circuit Court improperly disregarded the testimony of Respondent's former employee, Andrew Lambert because he closed the grave site at Defendant's cemetery. The Circuit Court found that he would be "essentially criticizing his own workmanship". (Appx. at 167). In doing so, the Circuit Court substituted its own judgment for that of a jury. The testimony of Mr. Lambert and Mr. Brooks, Mr. Lambert's current supervisor at SCI, establishes the standard practice in the

industry with regard to properly tamping a grave. Mr. Lambert's testimony establishes that holes and voids frequently occurred on Respondents' recently dug and filled graves while he was an employee at High Lawn Memorial Park Company. (Appx at 106-107). Also, Mr. Lambert's testimony establishes that the Respondents were aware that holes and voids were a frequent problem on its recently dug and filled graves. *Id.* The Circuit Court offered no explanation why Lambert's involvement in filling the actual grave at issue here makes the evidence inadmissible -- at best this goes to the weight the evidence not its admissibility. *See Martin v. Belk,* 2:18-CV-01075, 2019 WL 3504277, at *5 (S.D. W. Va. Aug. 1, 2019)(noting that weighing credibility is not permitted at the summary judgment stage).

Mr. Lambert further establishes that there were no policies, procedures, or specific requirements for inspections on recently dug and filled graves. (Appx at 88-90,). Moreover, Mr. Lambert fell and injured his wrist as a result of the hidden hazard created by Defendants' method of grave closing. (Appx at 89, 108).

The evidence from Mr. Lambert establishes that it is common knowledge in the funeral and cemetery business that if you do not properly tamp a grave site, the corners and sides are prone to sinkholes, voids, holes, or collapse. (Appx. at 106-107). Further, Mr. Lambert indicated that it was hard to keep up with fixing and refilling graves because the Respondent "didn't have the workers." (Appx. at 108). Mr. Phares also admitted that the cemetery does not have any formal inspection procedures. (Appx. at 83-84).

The Circuit Court also discredited the opinions of Plaintiff's cemetery expert, William Stovall, that the grave site should be revisited after it is closed. (Appx. at 166). The Circuit Court improperly determined that 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."

(Appx. at 165). The Court incorrectly found that 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 the sworn testimony, there was no visual sign of a hidden hole." (Appx. at 166).

Mr. Stovall, a funeral owner for over thirty-five years, is intimately familiar with the care, maintenance, and upkeep of grave sites. Mr. Stovall offered three opinions in his expert report: 1) that the workers did not properly pack the dirt back in the grave before it was replaced with sod; 2) that the Defendant did not have a set of written practices and procedures for closing a grave; and 3) that the cemetery was not proactive in revisiting the gravesite to check to see if there still remained problems there with how the grave was closed. (Appx. at 93-94, 163).

The Circuit Court erred in determining that "the danger was as well-known to the person injured as to the owner or occupant" because Petitioner could not reasonably expect that the ground would easily give way at a grave site. Petitioner was visiting the gravesite of his brother-in-law. (Appx. at 152). He didn't work at the gravesite or know that these problems frequently occur at this gravesite. Respondents had actual or constructive notice that such problems can and do frequently occur. (Appx. at 106-107). Respondent had dug the grave, filled the grade back in, put the sod back on the grave, and has a duty to protect visitors against this type of harm. (Appx. at 83-84). Further, Respondent failed to use any warning flags to caution visitors of this type of hazard. *Id.* As Mr. Phares indicated, there was nothing wrong where the Plaintiff was standing. *Id.*

The terms "actual or constructive knowledge" have the ordinary meaning "learns or should have learned" or "knows or reasonably should know" to express the same requirement. *Hawkings v. U.S. Sports Ass'n, Inc.*, 633 S.E.2d 31, 279, fn 3 (W.Va. 2006). Actual knowledge exists where a party has "direct and clear knowledge" of a fact, constructive knowledge is an operation of law.

Blanton v. Huntington Mall Co., No. 3:2015-cv-10113, 2017 WL 4581798 at *3 (S.D. W.Va. 2017). Constructive knowledge does not require that a party be actually aware of the fact. *Id.* citing *Mace v. Ford Motor Co.*, 653 S.E.2d 660, 666 (W.Va. 2007). Black's Law Dictionary defines "constructive knowledge" as "knowledge that one using reasonable care or diligence should have, and therefore that is attributable by law to a given person." *Id.*

Genuine issues of material fact exist with regard to whether Defendants had actual or constructive notice of the hazard. Mr. Lambert indicated that all recently dug graves were prone to opening, thus Defendants were aware of this ongoing problem. (Appx. at 106-107). Also, there were no inspections following the sod being placed down. (Appx. at 108). Mr. Stovall, funeral and cemetery expert, indicated that Respondent had no policies and procedures relating to opening up a grave, filling graves, or tamping graves and no procedures for inspection. (Appx. at 93-94). The cemetery was not pro-active in revisiting the gravesite to check to see if there still remained problems there with how the grave was closed. (Appx. at 94). This evidence, when properly viewed in a light most favorable to the Plaintiff, was sufficient to establish that the Defendants had actual or constructive knowledge of the hazards caused by the Defendants' methods of closing a gravesite.

Although there are no cases decided by this Court addressing a premises liability action arising from a fall from a hidden hazard on a gravesite, the Texas Appellate Court addressed a similar set of facts involving constructive knowledge of a grave site hazard in *Rivas v. MPII, Inc.*, No. 13-09-00177-CV, 2011 WL 1106692 (Tex. App. Mar. 24, 2011). The Court in *Rivas* examined whether a funeral home had constructive knowledge of a dangerous condition on its premises when the Plaintiff fell into a hole at the grave site during a funeral service. *Id.* at 1. The Court determined that constructive knowledge "requires analyzing the combination of proximity, conspicuity, and

longevity." *Id.* at 5. The Court found that "based on circumstantial evidence that the hole, concealed by Astroturf and located right beside the grave, was big enough for Rivas's whole leg and hip to go into, a jury could reasonably infer that it is more likely than not that the dangerous condition existed long enough to give Mission Park a reasonable opportunity to discover the condition." *Id.* The Court found that "the evidence is more than meager circumstantial evidence." *Id.*

Applying the summary judgment standard of reviewing the evidence in the light most favorable to the non-movant and disregarding all evidence and inferences to the contrary, the Court in *Rivas* concluded that "the evidence is more than a scintilla of probative evidence to raise a genuine issue of material fact as to Mission Park's constructive knowledge of the hole." *Id.* at 5. The Court further concluded that "reasonable and fair-minded individuals could differ in their conclusions regarding whether it existed long enough to give Mission Park a reasonable opportunity to discover and remedy it based on the size of the hole, its location, and the work done by Mission Park's employees either the day of or the day before the burial service." *Id.* at 5.

Similar to *Rivas,* Plaintiff has established that genuine issues of material fact exist that Defendants had constructive knowledge of the hole and reasonable minded individuals could differ regarding whether the Defendants had sufficient time to discover and remedy this hazard. The Circuit Court here erred in finding that "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." (Appx. at 166). As in *Rivas,* summary judgment is improper because the evidence established that the funeral home's employees could have discovered the hole upon inspection based on reasonable care or diligence.

The Circuit Court improperly disregarded Plaintiff's expert, William Stovall's opinion because it "does not answer the statutory question as to whether Defendants could use the alleged hidden danger when Plaintiff testified he could not." (Appx. at 165). The Circuit Court failed to consider that Mr. Stovall's opinion sets forth that the Defendants had constructive knowledge and should have known that a failure to take a simple step such as placing a marker on a recently tamped gravesite could warn visitors that there could be hidden holes in the area and to proceed with caution when walking around this area.

The Circuit Court also failed to consider that Mr. Stovall's opinion with regard to custom and industry practice would aid the trier of fact in determining whether the duty of care was met. *See Bates v. Sirk,* 230 S.E.2d 738, 741 (W.Va. 1976)(custom and common practice of an industry may constitute evidence of negligence). The Circuit Court improperly determined that whether Defendant has a written set of practices or procedures fails to address the relevant statutory question. (Appx. at 165). Notwithstanding the Circuit Court's determination, common industry practices and procedures for closing a grave is relevant to establish whether Defendants had a duty of care and whether they took affirmative steps to protect visitors from harm. These practices also are relevant for establishing whether Defendants had constructive knowledge that voids of this nature can occur if steps are not taken to properly pack the dirt back into the grave before replacing the sod.

CONCLUSION

The Circuit Court improperly weighed the evidence at the summary judgment stage and made findings of fact more appropriate for consideration by the jury. Because genuine issues of material fact exist with regard to whether the hazard was open and obvious and known to the Defendant, Plaintiff was entitled to the most favorable inferences that may be reasonably drawn from the evidence. Therefore, Plaintiff respectfully requests that the Circuit Court's order be reversed, and Plaintiff's case be reinstated.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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