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.***

# PETITIONER'S REPLY BRIEF

Anthony J. Majestro (WV Bar #5165)
Counsel of Record
Powell & Majestro, PLLC
405 Capitol Street, Suite P-1200
Charleston, WV 25301
Tel: (304) 444-6082 / Fax: (304)346-2895
amajestro@powellmajestro.com

S. Brooks West, II (WVSB 10493)
David A. Dobson (WVSB 12092)
WEST LAW FIRM, L.C.
1514 Kanawha Boulevard East, Suite 2
Charleston, WV 25311
Phone: 304-343-9378
brooks@wvpersonalinjurylawyer.com
david@wvpersonalinjurylawyer.com

Nathan J. Chill (WVSB 8793)
PO Box 687
Poca, WV 25199
Phone: 304-549-8695
nathanjchill@gmail.com
*Counsel for Petitioner*

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Cases** **Page**

**W.Va. Statute and Rules**

## SUMMARY OF THE ARGUMENT

Respondents' assertion that the Circuit Court properly found that the Petitioner could not meet the two-part test for establishing a prima facie case of premises liability against the Respondents rests on a misapplication of the standard of review at the summary judgment stage. The Circuit Court improperly invaded the province of the jury and weighed the evidence in Respondents' favor. Genuine issues of material fact exist with regard to the hidden hazard created by Respondents' method of grave closing and its failure to tamp the ground securely to protect the safety of visitors on the gravesite's premises.

The Circuit Court substituted its judgment for that of the jury when it found that the testimony of Respondents' former employee, Andrew Lambert, did not raise a genuine issue of material fact with respect to Petitioner's claims. Respondents' argument that the evidence presented fails to comply with Rule 56 of the Rules of Civil Procedure, which was raised for the first time on appeal, mischaracterizes the law with respect to admissible evidence under Rule 56(c) of the Rules of Civil Procedure. Further, the testimony of William Stovall, Petitioner's expert, raises a genuine issue of material fact with regard to the foreseeability that harm could result if the duty of care is not exercised. As this Court recently emphasized in *Gable v. Gable,* 245 W.Va. 213, 858 S.E.2d 838, 854 (W.Va. 2021), consideration of the duty of care and the foreseeability of harm are largely questions of fact for a jury.

Thus, Petitioner's evidence, when viewed in its totality, raises a jury question regarding whether Respondents owed a duty of care to protect the Petitioner against injury where the evidence establishes that Respondents had, at the very least, constructive knowledge of the problem with sink holes beneath the surface and where such injury was foreseeable based on the

size of the sink hole, its location, the lack of work done by Respondents' employees prior to the Petitioner's fall, and the severity of the injury Petitioner sustained on the day of the incident.

Notwithstanding Respondents' assertions that *Rivas v. MPII,* No. 13-09-00177-CV, 2011 WL 1106692 (Tex. App. Mar. 24, 2011) is distinguishable, the *Rivas* decision provides guidance on the factors that the Court considered in overturning an award of summary judgment in favor of a cemetery owner based on the constructive knowledge requirement for a hidden hazard that caused the plaintiff injury at a grave site. *Rivas* found that where reasonable and fair-minded individuals could differ in their conclusions regarding whether the hole had existed long enough for the funeral home to discover it, summary judgment was inappropriate. *Id.* at *5. *Rivas* further illustrates that when genuine issues of material fact exist with regard to whether a defendant had constructive knowledge of the hole based on its size, location, the work done by employees to remedy the condition, and the severity of the plaintiff's injuries, summary judgment should not be granted. *Id.* at *5.

Thus, construing all inferences in favor of the Petitioner, genuine issues of material fact exist regarding whether Respondents had constructive knowledge that their tamping methods created a hazardous condition and Petitioner's injury was foreseeable. Therefore, Petitioner respectfully requests that the Circuit Court's decision granting summary judgment be reversed.

## ARGUMENT

### I. Respondents Misapply the Standard of Review by Asserting that No Genuine Issues of Material Fact Exist to Satisfy the Two-Part Test for Establishing a Prima Facie Case of Premises Liability

It is a well-established principle of law that "A circuit court's function at the summary judgment stage is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106

S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986). It is equally as well-settled that this Court must draw any favorable inference from the underlying facts in the light most favorable to the party opposing the motion. *Painter v. Peavy,* 192 W.Va. 189, 192, 451 S.E.2d 755, 758 (1994); *see also Williams v. Precision Coil, Inc.,* 194 W. Va. 52, 61, 459 S.E.2d 329, 338 (1995) (internal citations omitted). In assessing the factual record, the Court must grant the nonmoving party the benefit of inferences, as "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]" *Williams v. Precision Coil, Inc.,* 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995). As discussed more fully below, after drawing all permissible inferences in the light most favorable to the Petitioner, sufficient evidence exists to raise genuine issues of material fact with regard to the two-part test for establishing a prima facie case of premises liability.

The two-part test for imposing liability upon owners of property in a premises liability case, as set forth in *McDonald v. Univ. of W. Virginia Bd. of Trustees,* 191 W.Va. 179, 182, 444 S.E.2d 57, 60 (1994) provides that: 1) the invitee must show that the owner had actual or constructive knowledge of the defective condition and (2) that the invitee had no knowledge of the substance or condition or was prevented by the owner from discovering it. In a premises liability case, the "ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?" Syllabus point 3, *Sewell v. Gregory,* 179 W. Va. 585, 371 S.E.2d 82 (W.Va. 1988).

"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 defendant to guard against injury." Syllabus point 6, *Mallet v. Pickens,* 206 W. Va. 145, 522 S.E.2d 436 (1999) (emphasis added). *See also* syllabus point 8 of *Gable v. Gable,* 245 W.Va. 213, 858 S.E.2d 838 (W.Va. June 1, 2021).

This Court held that, " A court's task --- in determining 'duty'—is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party." *Neely v. Belk, Inc.,* 222 W.Va. 560, 569, 668 S.E.2d 189, 198 (W.Va. 2008). This Court further recognized that, "the jury, by contrast, considers 'foreseeability... in more focused, fact specific settings...The jury may consider the likelihood of foreseeability of injury in determining whether, in fact, the particular defendant's conduct was negligent in the first place." *Id.*

Respondents assert that under W.Va. Code Section 55-7-28(a) (2015), "if the purported hazard was as equally visible or apparent to the Petitioner as it was to the Respondents, a premises liability claim could not exist against them under W.Va. Code § 55-7-28(a)." (Respondent's Brief, pp. 12-13). 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,* 245 W.Va. 213, 858 S.E.2d 838 (W. Va. 2021). As set forth below, genuine issues of material fact exist with regard to whether the hazard was as equally apparent to the Petitioner

and whether Respondents were negligent in the maintenance of the gravesite premises. Thus, such issues should be presented to the jury.

## II. The Totality of the Evidence Establishes that Genuine Issues of Material Fact Exist Regarding Whether Respondents were Negligent in the Maintenance of the Gravesite Premises

The totality of the evidence establishes that genuine issues of material fact exist with regard to whether Respondents were negligent in failing to properly tamp the grave in order to prevent sink holes on the gravesite premises. The Circuit Court improperly disregarded the following evidence:

> a. Holes and voids frequently occurred on Defendants' recently dug and filled graves while Andrew Lambert was an employee at High Lawn Memorial Park Company;[1]
>
> b. There were no policies, procedures, training, or specific requirements for inspections on recently dug and filled graves while Mr. Lambert was an employee at High Lawn Memorial Park Company;[2]
>
> c. On one occurrence, Mr. Lambert fell into a hidden hole on one of Defendants' gravesites that appeared to be solid and covered with sod, injuring his wrist and requiring medical treatment;[3]
>
> d. It is common knowledge in the funeral and cemetery business that the corners and sides of dug and filled graves are the areas most prone to sink holes and collapse) and that if you do not properly tamp a gravesite, the corners and sides are prone to sink holes, voids, holes, or collapse;[4]

---

[1] Statement of Andrew Lambert, (A.R. 106) (Q: So do you remember any instances where after two weeks at a grave site at Highlawn there would be holes that would open up? A: Yeah on quite a few occasions).

[2] Statement of Andrew Lambert, (A.R. 101, 108, 109) (Q: Ok, did you ever have that backfilling training at High Lawn? A: No I didn't); (Q: So it was just up to you guys if you noticed something then to backfill it right? A: Yes, if they would see it, they would come tell us to do it…But they didn't get out and actually cruise the cemetery, they just drove the road.)(Q: So based on your training you would say that Highlawn wasn't filling in graves the right way? A: …Honestly, once I learned how to do it, it kind of baffled me how we was doing it or the way we was doing it…). *See generally,* Testimony of Phares (owner of cemetery), A.R. at 82-83 (Q: After the sod is placed back on top of the grave site, is there an area at the time where you are not allowed to walk near it or around it? A: No, sir.).

[3] Statement of Andrew Lambert, (A.R. 108) (Q: So…you actually fell in a grave there? A: Yeah, I actually did and I went to the hospital over it.).

[4] Statement of Andrew Lambert, (A.R. at 106, 107) (Q: But you're saying it's the edges or the corners because you only have a few inches around the edges and corners? A: Yep, and that's the one's that gets washed the most because if you don't do the tamping correctly, because at Blue Ridge my graves are tight and they're right, we don't have to go back and backfill them and stuff. If you look at the work orders through Highlawn you'll see there's

e. Regarding inspection procedures, it was hard to keep up with fixing and refilling graves because of a lot of times the Defendant "didn't have the workers."[5]

The Circuit Court made improper credibility determinations with respect to Mr. Lambert's testimony. (Circuit Court's Order, pp. 16-17; A.R. at 166-167) (finding that Mr. Lambert actually closed the grave at the Defendant's cemetery and is criticizing his own workmanship; also finding that the testimony goes to the cause of the hidden hole and not its visibility). *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986), "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."

The Circuit Court further misapprehended Respondents' duty to protect visitors at its gravesite and concluded that "Plaintiff's proposed duty of care exceeds any reasonable magnitude of burden which should be placed upon a cemetery owner." (Respondents' Brief, p. 20, citing A.R. 169). Respondents assert that imposing such a standard of care with respect to hidden defects would be overly burdensome to the Respondents. *(Id.)* The Circuit Court disregarded the testimony of Andrew Lambert indicating that a simple fix, such as filling the edges of the grave with sand could prevent the edges from gapping and holes from forming. (Circuit Court's Order, p. 17; A.R. 167). Respondents minimize their duty to maintain the premises in a safe condition, and assert that

---

a lot of backfills, and if you hear "backfills" and "digging graves", we are filling in sinkholes. Because I don't think they had the right equipment and the power at that time to do it…).(Q: How many instances where…the hole opened up was around the edge…? A: …When it settles any kind of moisture in the air or anything will cause it to settle and if it ain't tamped tight it's gonna give…).

[5] Statement of Andrew Lambert, (A.R. at 108). (Q: Did Mike or anybody have any kind of inspection procedure where you guys would go back every day after you initially filled in a grave and check it for holes or was there nothing set up? A: …A lot of times, we didn't have the workers, like when I was there we had like 5 employees and two of us working, so it's kind of got hard for us to keep everything up, so I'm sure there was stuff missed.").

"imposing such a standard of care with respect to hidden defects...would unleash a flood of premises liability litigation upon West Virginia property owners." (Respondents' Brief, p. 20).

Here, the Circuit Court failed to construe the evidence in the light most favorable to the Petitioner. One does not expect to fall into a gravesite while visiting the grave of a loved one during perfectly clear conditions. Genuine issues of material fact exist regarding whether Respondents had actual or constructive knowledge that their tamping procedures created an unsafe condition for visitors and whether Respondents had actual or constructive knowledge of these unsafe conditions. While Respondents are not expected to meticulously walk upon and inspect every inch of their property every few hours to determine if an invisible hole or depression has developed, Respondents do have a duty to ensure that the tamping procedures used at their gravesite due not create an unsafe, unknown hazard to visitors.

Whether the measures taken by a defendant meet the reasonable care standard are questions for the jury and cannot be determined at the summary judgment stage. *See McNeilly v. Greenbrier Hotel Corp.,* 16 F.Supp. 3d 733, 740 (S.D. W.Va. 2014) (citing *Bradley v. Sugarwood, Inc.,* 164 W.Va. 151, 260 S.E. 2d 839, 840, (W.Va. 1979) (explaining that questions of negligence are for the jury...if different conclusions could be drawn from the facts). Thus, the Circuit Court here improperly weighed the evidence in Respondents' favor.

Respondents' reliance on *Hawkins v. U.S. Sports Ass'n Inc.* 219 W.Va. 275, 633 S.E.2d 31 (W.Va. 2006), is misplaced. In *Hawkins*, a softball player injured his knee on a plastic PVC pipe while sliding toward first base in a softball tournament, and brought an action against the Respondents alleging that they were negligent in failing to discover the pipe and confirm the field was safe before allowing Plaintiff to play on the field. *Id.*at 277, 33. The Circuit Court granted summary judgment in favor of the Defendants. This Court found that the Plaintiff lacked evidence

that the Defendants knew or should have known of the existence of the pipe precluded their liability. *Id.*

Unlike in *Hawkins,* where Defendants had no knowledge of the PVC pipe and took reasonable steps to ensure that the playing field was safe prior to the game, here, there are disputed facts with regard to whether 1) Respondents had actual or constructive knowledge that the unsafe tamping procedures created a dangerous condition beneath the ground for visitors at the cemetery. In *Hawkins,* Defendants did not have knowledge of the dangerous instrumentality. Here, Respondents' conduct caused and contributed to the dangerous condition. The improper tamping procedures, which created holes on numerous occasions, provided the Respondents with actual, and at the very least, constructive knowledge, of the unsafe condition at the gravesite.

*McDonald v. University of West Virginia Board of Trustees*, 191 W.Va. 179, 44 S.E.2d 57 (1994) is also distinguishable. In *McDonald,* a theater major at West Virginia University filed a negligence action against the university trustees after suffering a broken leg during a stage movement class conducted on the lawn of the Creative Arts Center at the University. *Id.* at 180, 58. Plaintiff filed suit, claiming that the university was negligent in maintaining its premises and that the negligence, in conjunction with the negligence of her professor in preparing for and conducting her stage movement class, had caused her injury. *Id.* The jury returned a verdict for the Plaintiff but assigned 34% of the total fault to her. *Id.* Following consideration of Defendants' motion for judgment notwithstanding the verdict, the trial judge set aside the jury's verdict and entered judgment in factor of the trustees. *Id.* at 181, 59. On appeal, this Court found that: "the overall evidence adduced in this case, even when construed in the light most favorable to the appellant, suggests that she fell as the result of some irregularity of such *slight* proportions as

would ordinary be recognized to be a normal characteristic of a lawn by any person going upon the lawn. *Id.* at 182-183, 61-62.

Unlike in *McDonald,* which involved a *slight* irregularity in the ground, the improper tamping methods around the parameters of the grave, which had caused at least one similar fall in the past, placed the Respondents on, at the very least, constructive notice that sink holes on the edges of the graves on the premises created an unsafe condition for visitors. This Court has stated that "there is no liability for injuries from dangers that are obvious, reasonably apparent, or as well known to the person injured as they are to the owner or occupant." *McDonald v. University Board of Trustees,* 191 W.Va. at 181, 444 S.E.2d at 63. The Petitioner recognizes, as set forth in *McDonald,* that the owner of a premises is not liable to one who steps in a small hole in the lawn where he had neither actual or constructive notice of such defect. Here, the size of the sink hole and the degree to which Petitioner was injured, coupled with the fact that Respondents caused or contributed to the dangerous condition, raise genuine issues of material fact that Respondents had constructive knowledge that the sink hole on the premises created this hazard.

### A. Although the Circuit Court Erred in Improperly Weighing the Evidence, the Evidence Presented with Respect to Lambert and Brooks was Appropriate for the Court to Review under Rule 56(c) of the Rules of Civil Procedure

Respondents assert that "inasmuch as the evidence [of Andrew Lambert] was un-sworn, un-verified, and recorded outside the presence of the Respondents' counsel, it clearly did not represent a pleading, deposition, answer to interrogatories, admission on file or affidavit which the Circuit Court could properly consider under Rule 56 of the West Virginia Rules of Civil Procedure." (Respondents' Brief, p. 16-17). Contrary to Respondents' assertions, the evidence of Brooks and Lambert was presented in Plaintiff's Third Supplemental Response to Defendants' First Set of Interrogatories and Request for Production of Documents. (A.R. 86-92). Respondents,

however, concede that "it is clear that the Circuit Court, did, in fact, consider Mr. Lambert's proposed testimony..." (Respondents' Brief at p. 17). Respondents assert that the Circuit Court's consideration of the evidence presented by Mr. Lambert and Mr. Brooks is outside the parameters of Rule 56. Further, Respondents assert that the testimony of Brian Brooks, Mr. Lambert's new supervisor at Blue Ridge, was not appropriate for the Court's consideration under Rule 56 of the Rules of Civil Procedure because "once again, no actual affidavit or sworn testimony from Mr. Brooks were presented to the Circuit Court and no affidavit explaining why such materials were not available was provided as required under Rule 56". (Respondents' Brief at p. 19).

This Court considered the type of evidence that a Court may consider in deciding a motion for summary judgment in *Aluise v. Nationwide Mutual Fire Insurance Co.,* 218 W.Va. 498, 625 S.E.2d 260 (W.Va. 2005). The Court held, in syllabus point 6, that, "Rule 56(c) of the West Virginia Rules of Civil Procedure does not contain an exhaustive list of materials that may be submitted in support of summary judgment. In addition to the material listed by that rule, a trial court may consider any material that would be admissible or usable at trial." As set forth *in Williams v. Precision Coil, Inc.,* 194 W.Va. 52, 60-61, 459 S.E.2d 329, 337-338, "A nonmoving party need not come forward with evidence in a form that would be admissible at trial in order to avoid summary judgment. (citations omitted). However, to withstand the motion, the nonmoving party must show that there will be enough competent evidence available at trial to enable a finding favorable to the nonmoving party."

Further, Respondents forfeited this argument below by failing to object to the circuit court's consideration of the evidence of Mr. Lambert or Mr. Brooks. The record on appeal contains no objection by Respondents to either the circuit court's review and consideration of this evidence. This Court has held that nonjurisdictional questions...raised for the first time on appeal, will not

be considered." *Noble v. W.Va. Dep't of Motor Vehicles,* 223 W.Va. 818, 821, 679 S.E.2d 650, 653 (W.Va. 2009). Further, "the raise or waive rule is designed 'to prevent a party from obtaining an unfair advantage by failing to give the trial court an opportunity to rule on the objection and thereby correct potential error.'" *PNGI Charles Town Gaming, LLC v. Reynolds*, 229 W.Va. 123, 134, 727 S.E.2d 799, 810 (W.Va. 2011).

### B. The Testimony of Mr. Lambert and Mr. Brooks is Relevant Because it Addresses the Issue of the Foreseeability of the Harm

Respondents misconstrue Mr. Lambert's testimony regarding the holes in the photographs taken by Mrs. Brown. (Respondents' Brief, p. 24). While the after-the-fact photos made it "clear" that it was a large hole, a genuine issue of material fact exists regarding the visibility of the hole at the time of the incident. Petitioner testifies that the ground "gave way" beneath him, and he did not see the hole before he fell because it was not an open an obvious hazard, but was created as he stepped on the periphery of the grave. (A.R. at 82, 154). The Circuit Court improperly determined that "any hidden hole was as equally well known to both the Plaintiff and Defendant"). (A.R. at 170), disregarding evidence that Respondents were placed on constructive notice that holes frequently formed around the parameter of the graves at High Lawn.[6]

Respondents inaccurately indicate that "both Mr. Lambert's statements and the predicted testimony of Mr. Brooks goes to the issue of what might have *caused* the 'hidden' hole in question and not the issue of whether any hole was visible on the day in question or to whether the Respondents knew or should have known that his particular hidden hole existed prior to Mr. Butner's purported fall." (Respondents' Brief, p. 19).

The testimony of Mr. Lambert and Mr. Brooks establishes that genuine issues of material fact exist with regard to whether Defendants breached their duty to exercise ordinary care to keep

[6] *See supra* notes 1-5.

their premises in a reasonably safe condition given that they had at the very least, constructive knowledge that sink holes frequently occurred around the edges of graves on the gravesite premises. (A.R. 82, 154).

Here, Mr. Lambert's testimony raises a question of material fact as to whether Respondents had actual or constructive knowledge that such tamping procedures created an unsafe condition at their gravesites. Respondents failed to reasonably train and supervise their employees. (A.R. at 108). Respondents also failed to establish tamping policies and procedures. (A.R. 93.). Mr. Brooks' testimony further raises a genuine issue of material fact that the standard of care for tamping graves to prevent sinkage and voids was not followed. (A.R. 90-91). While Petitioner's expert, William Stovall, testified that "it would be difficult or impossible to visually determine that the dirt under that sod was not solid,"(A.R. 093), such statement does not preclude Petitioner's claims because genuine issues of material fact exist regarding whether Respondents had actual or constructive knowledge of the hazardous condition below the ground, not on its surface.

### C. The Circuit Court Improperly Drew Inferences in Favor of the Respondents with Regard to the Testimony of Petitioner's Expert, William Stovall

The Circuit Court erred in drawing inferences in the light most favorable to the Defendants, rather than the Plaintiff with regard to the testimony of Petitioner's expert William Stovall. *See Painter v. Peavy,* 192 W.Va. 189, 192, 451 S.E.2d 755, 758 (1994) (It is equally as well-settled that this Court must draw any favorable inference from the underlying facts in the light most favorable to the party opposing the motion). *Painter v. Peavy,* 192 W.Va. 189, 192, 451 S.E.2d 755, 758 (1994); *see also Williams v. Precision Coil, Inc.,* 194 W. Va. 52, 61, 459 S.E.2d 329, 338 (1995) (internal citations omitted).

The testimony of Mr. Stovall is material to the issue of whether the Respondent had actual or constructive knowledge of the hole on the gravesite into which the Petitioner fell. While Mr. Stovall testified that "it would be difficult or impossible to visually determine that the dirt under that sod was not solid," Mr. Stovall concluded that his impression is that "workers did not properly and adequately pack the dirt back into the grave before they replaced the sod." (A.R. 93-94). The Court found that, "At best..., 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." (A.R. at 165).

The Circuit Court improperly determined that whether Respondents have a written set of practices or procedures fails to address the relevant statutory question. (A.R. at 165). 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. While industry standards are not dispositive of the issue of reasonable care, the jury, as a factfinder is responsible for assessing the factors related to the burden of reasonable care. *McNeilly v. Greenbrier Hotel Corp.,* 16 F.Supp. 3d 733, 740 (S.D. W.Va. 2014).

## III. As in *Rivas v. MPII, Inc.*, the Facts Establish that Reasonable Minds Could Differ Regarding Whether Respondents had Constructive Knowledge of the Unreasonably Dangerous Condition on the Premises

*Rivas v. MPII, Inc.,* 13-09-00177-CV, 2011 WL 1106692 (Tex. App. Mar. 24, 2011) provides guidance on the factors that the Court considered in overturning an award of summary judgment in favor of a cemetery owner based on the constructive knowledge requirement for a hidden hazard that caused the plaintiff injury at a grave site. The Court in *Rivas* found that reasonable and fair-minded individuals could differ in their conclusions regarding whether the hole

had existed long enough for the cemetery owners to have discovered it or whether it existed long enough to give the cemetery owners reasonable opportunity to discover the hazard. *Id.* at *5. *Rivas* further illustrates that when genuine issues of material fact exist with regard to whether Respondents had constructive knowledge of the hole based on its size, location, the work done by employees to remedy the condition, and the severity of the Petitioner's injuries, summary judgment should not be granted. *Id.* at *5.

Here, the Circuit Court 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." (A.R. at 166). Respondents assert that the instant case is factually distinguishable because Mr. Stovall indicated that "It would be difficult or impossible to visually determine that the dirt under that sod was not solid." (A.R. 093). While Mr. Stovall's statement would provide evidence with respect to whether the Respondents had *actual* notice of the unsafe condition under the ground, it would not preclude liability on the basis of whether the Respondents had constructive knowledge of the hazard. While two weeks had passed between the funeral service and Petitioner's fall, this evidence raises a genuine issue of material fact regarding whether Respondents had sufficient time to remedy the dangerous condition. Further, Mr. Lambert's testimony raises a genuine issue of material fact that Respondents had constructive knowledge that sink holes commonly occurred on the parameter of gravesites and he had also fallen into a hole due to a grave on the premises not properly being tamped. (A.R. at 106). As in *Rivas,* the size of the sink hole, the serious nature of Petitioner's injuries, and the fact that Defendants' conduct caused or contributed to the dangerous condition, raise genuine issues of material fact that Respondents had constructive knowledge of this dangerous condition under the ground.

## CONCLUSION

As set forth above, the Circuit Court erred in improperly weighing the evidence at the summary judgment stage. The evidence presented by the Petitioner, viewed in the light of the reasonable inferences that can be drawn in Petitioner's favor, present genuine issues of material fact that should be decided by a jury. Thus, this case was inappropriate for disposition at the summary judgment stage and Petitioner respectfully requests that the Circuit Court's decision be reversed.

Dated: October 19, 2021

Respectfully submitted,

**JOEY J. BUTNER,**
**By Counsel**

Anthony J. Majestro (WVSB No. 5165)
POWELL & MAJESTRO, PLLC
405 Capitol Street, Suite P-1200
Charleston, WV 25301
304-346-2889 / 304-346-2895 (f)
amajestro@powellmajestro.com

S. Brooks West, II (WVSB 10493)
David A. Dobson (WVSB 12092)
WEST LAW FIRM, L.C.
1514 Kanawha Boulevard East, Suite 2
Charleston, WV 25311
Phone: 304-343-9378
brooks@wvpersonalinjurylawyer.com
david@wvpersonalinjurylawyer.com

Nathan J. Chill (WVSB 8793)
PO Box 687
Poca, WV 25199
Phone: 304-549-8695
nathanjchill@gmail.com

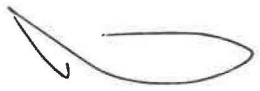
*Counsel for Petitioner*

## CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2021, the "Petitioner's Reply Brief" was deposited in the regular U.S. mail, addressed as follows:

Brent K. Kesner, Esq.
Ernest G. Hentschel II
Mark L. Garren, Esq.
Kesner & Kesner PLLC
112 Capitol Street
PO Box 2587
Charleston, WV 25329
Phone: 304-345-5200
Fax: 304-345-5265
bkesner@kesnerlaw.com
egh@kesnerlaw.com
mgarren@kesnerlaw.com
*Counsel for Respondents*

**JOEY J. BUTNER**
**By Counsel**



Anthony J. Majestro (WVSB No. 5165)
*Counsel for Petitioner*