No. 21-0387

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOEY J. BUTNER,

Petitioner,

v.

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

Respondents.

FROM THE CIRCUIT COURT OF
FAYETTE COUNTY, WEST VIRGINIA
Civil Action No. 19-C-48

BRIEF OF RESPONDENTS HIGH LAWN MEMORIAL PARK COMPANY AND HIGH LAWN FUNERAL CHAPEL, INC.

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STATEMENT OF THE CASE

In the present action, the Petitioner, Joey Butner is appealing the Circuit Court of Fayette County's award of summary judgment in favor of the Respondents, High Lawn Memorial Park Company ("HLMPC") and High Lawn Funeral Chapel, Inc. (HLFC"). In particular, the Petitioner asserts that the Circuit Court erred when it found that that he had failed to present sufficient evidence to support a prima facie case for premises liability against the Respondents in connection with his claims arising from a fall which allegedly occurred while he was visiting a grave site. As will be shown, the Circuit Court's award of summary judgment to the Respondents was correct.

In his *Complaint*, Mr. Butner, a resident of North Carolina, alleges that, on July 23, 2017, he fell into a "hidden hole" while visiting a grave at the High Lawn Memorial Park Cemetery in Oak Hill, Fayette County, West Virginia. (A.R. 002) He further alleges that the area where he fell was "a reasonable path of ingress and egress for pedestrian traffic for visitors" and that the Respondents "owned, operated and were in exclusive control of said premises." (A.R. 002) The Petitioner asserts causes of action against the Respondents for negligence and willful wanton and reckless conduct in connection with their alleged failure to keep the premises in a reasonably safe condition and their failure to warn of or fix the "hidden trap and trip hazard" which purportedly caused the Petitioner to fall. (A.R. 003-006) Mr. Butner asserts that, as a result of the fall, he sustained serious and permanent bodily injury, incurred medical expenses, lost wages and lost his ability to enjoy life. (A.R. 004) He seeks an award of both compensatory and punitive damages. (A.R. 006-007)

In his January 7, 2020 deposition, Mr. Butner testified that the alleged fall occurred during daylight hours and that there was no rain or other weather conditions that affected the condition of the cemetery or obscured his ability to see the ground. He was asked:

Q. Okay. You described the weather, you said it was nice. It was sunny out?

A. It was sunny or just partly cloudy, but it wasn't, you know, it wasn't overcast or anything like that.

Q. Okay. No rain?

A. No rain.

(A.R. 027, *Deposition of Joey Butner*, Page 28, Lines 9-13.) He further testified that it was a "nice day" and that there were no witnesses nearby who saw him fall. (A.R. 196, *Deposition of Joey Butner*, Page 27, Lines 4-24.) Likewise, Mr. Butner testified that on the day of his alleged fall, he did not report the incident to anyone at either HLMPC or HLFC and instead left the cemetery to return to North Carolina. (A.R. 031, *Deposition of Joey Butner*, Page 93, Lines 3-8.) Therefore, the only source of evidence in this case regarding conditions at the cemetery at the exact time of the alleged fall is the testimony of Mr. Butner himself.

Mr. Butner has testified that while he was on his way home, he called his niece, Molly Brown, and requested that she take pictures of the grave site for his intended lawsuit against the Respondents. He was asked:

Q. When did you -- well, did you communicate with Molly Brown and ask her to take photos?

A. Well, yes, I did. I was on my way back to North Carolina and my shoulder was just getting worse and worse, and where I could only drive with one arm, it was getting so bad. And I'm not, I'm not a person that gets angry very quickly or easily, but the more the thing started hurting, the more angry I got. And I called Molly, because I couldn't get ahold of my wife at the time, and I asked, I asked Molly -- I told her what happened, and, you know, she got a laugh out of it. But it was hurting, you know. I said, can you go up and take some pictures in case I need those. And she said yeah, if you can wait until morning, she still had her kids. So that's when she went up

and took them, the next -- I don't know if it was the next morning or afternoon.

(A.R. 029-030, *Deposition of Joey Butner*, Pages 47-48, Lines 10-24 and 1-3.) During her deposition, Molly Brown confirmed that she had taken the photos as Mr. Butner requested the day after he fell, and testified as follows:

Q. Well, what did your uncle say?

A. Just that he got hurt and he was going to have to file a lawsuit and if I could go up there and take pictures.

* * *

Q. - - the day he contacted you?

A. The day he contacted me is the day he fell. But I didn't go and take the pictures till the next morning.

(A.R. 199, *Deposition of Molly Brown*, Page 16, Lines 18-21, and Page 17, Lines 6-9.) Importantly, the conditions shown in the Molly Brown photos differ significantly from Mr. Butner's description of the site at the time of his fall.

The photos taken by Molly Brown show a grave covered by topsoil and sod and with approximately three open holes along the grave's perimeter. (A.R. 069-081, the Brown photos) During her deposition, Ms. Brown testified that the photos were not edited or modified in any way. (A.R. 45, *Deposition of Molly Brown*, Page 13, Lines 15-19.) When shown the Brown photographs during his deposition, Mr. Butner confirmed that they appeared to show the scene of his alleged fall and, while he admitted to making one of the holes shown in the photographs when he fell, he indicated that the other holes were not present at the time of his fall. He was asked:

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?

A. Nothing that I could see.

Q. Okay. Besides the holes that we've kind of focused on, is there any other change to the grave site between the day you fell and the day the photographs were taken?

A. I don't know.

Q. Well, you don't recognize any changes other than the holes you described?

A. No, I don't -- I mean, I doubt that there has, but I don't know. Because, you know, my mind, I can't really remember. I mean, I was in so much pain afterwards, I didn't even look back to see what it looked like.

Q. Okay. All right. Let me ask the same question kind of in another way.

A. Yeah.

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?

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.

(A.R. 028 and 197, *Deposition of Joey Butner*, Pages 37-38, Lines 2-24, and 1-6.) Thus, according to Mr. Butner, there were no visible holes at the site prior to his fall. In fact Mr. Butner expressly confirmed that fact when he testified in his deposition that no holes or other hazards were visible to him at the grave site prior to his alleged fall. He was asked:

Q. . . . . Mr. Butner, on the day of the fall, did the area on the grave site appear to be firm ground?

A. Yes.

Q. Okay. You've testified here today, Mr. Butner, that you did not notice any holes around the grave site prior to the fall; is that correct?

A. I did not notice any holes or anything.

Q. Did you notice any deficiencies of any kind which would lead you to believe that the ground on the grave site or around the grave site was not firm?

A. I did not.

Q. Okay. Was there anything open or obvious around the grave site which would lead you to believe that the ground was not firm?

A. No.

(A.R. 082, *Deposition of Joey Butner*, Page 113, Lines 6-20.) In fact, Mr. Butner did not identify any other witness or provide any other evidence to establish that the existence of the hole into which he allegedly fell was actually known to or visible to anyone(including HLMPC and HLFC) prior to his fall. As will be shown, the absence of such evidence is fatal to his claims.

Because it did not appear that there was a genuine issue of fact to be decided by a jury with respect to the Petitioner's claims against them, HLMPC, the operator of the cemetery, and HLFC, the operator of the funeral home, filed two separate requests for summary judgment. The first of these was filed by HLFC alone, and sought summary judgment because the Petitioner had offered no evidence to suggest that it was at fault for the condition of the cemetery and could not articulate anything that it had done wrong. (See A.R. 048-058, *Defendant High Lawn Funeral Chapel, Inc. 's Motion For Summary Judgment* and *Memorandum In Support* with attachments.) In that regard,

HLFC pointed out that when asked what the funeral chapel, as opposed to the cemetery operator, had done wrong, Mr. Butner could not identify any improper or negligent act. He was asked:

> Q. . . . You sued High Lawn, you sued two different companies, one is High Lawn Memorial Park Company, who I understand owns or operates the cemetery; and then the second defendant was High Lawn Funeral Chapel, who conducts the services, etcetera. And, again, I'm not trying to ask you any kind of tricky questions: But did the funeral home, the funeral home or the chapel who operates the service, do you have any gripes with them, or is it just with the company who operates the cemetery?
>
> A. I don't have any gripes with everything all the way around, I mean, it's -- I'm not, you know, I'm not a lawyer, so I don't know who should be responsible here, no.
>
> Q. Well, let me ask: Do you think the chapel who operates the funeral services, do you think the chapel did anything wrong?
>
> A. I don't know.

(A.R. 055, *Deposition of Joey Butner*, Page 94, Lines 2-19.)

The second request for summary judgment was filed by both Respondents and sought summary judgment because the Petitioner could not meet the two part test for establishing a prima facia case of premises liability against them under *W.Va. Code §55-7-28* because there was no evidence the Respondents had actual or constructive knowledge of any potential defective condition of the property or, in the alternative, because the holes shown in the Brown photographs would have been open and obvious to Mr. Butner at the time of the alleged fall. (See A.R. 018-046, *Defendant's Notice of Hearing, Motion For Summary Judgment* and *Memorandum In Support* with attachments.) On January 8, 2021, the Petitioner served his *Response in Opposition* (A.R. 059-095), followed on February 23, 2021 with a *Supplemental Response In Opposition* (A.R. 96-111). In response to the Respondents' request for summary judgment, the Petitioner argued that the Respondents should have

had constructive knowledge of the "possibility" of a hidden hole at the grave site based upon the anticipated testimony of a retained cemetery expert, William Stovall, a former employee of HLMPC, Andrew Lambert, and Brian Brooks, a supervisor at a national chain of cemeteries. (A.R. 059-095 and 96-111.)

On February 8, 2021, the Circuit Court held a remote hearing on the Respondents' request for summary judgment. Unfortunately, due to technical difficulties, neither the Circuit Court nor the reporter could hear portions of the argument (A.R. 114) and a second hearing was then held on February 23, 2021. (See A.R. 112-150, the transcript of that second hearing.) After hearing the complete arguments of counsel at that second hearing, the Circuit Court invited each side to submit proposed Orders with findings of fact and conclusions of law reflecting their arguments. (A.R. 148.) The parties did so and, on April 14, 2021, the Circuit Court below entered its *Order Granting Defendants' Motion For Summary Judgment*. (A.R. 151-172) The Petitioner filed his *Notice of Appeal* on May 13, 2021, and his *Brief* on August 16, 2021. His *Brief* sets forth three assignments of error. First, Mr. Butner asserts that the Circuit Court erred by granting summary judgment to the Respondents by making factual determinations regarding the Respondents' duty of care and liability which should have been considered by a jury. Second, the Petitioner asserts that the Circuit Court had erred by finding that the open and obvious doctrine barred the Petitioner's claims because the question of whether the hazard was open and obvious required resolution of disputed facts by a jury. Finally, the Petitioner asserted that the Circuit Court below improperly found that the Respondents lacked actual or constructive knowledge of the hidden, hazardous condition at the grave site. The Respondents now submit their *Response Brief* and ask that the Circuit Court's Order be affirmed.

SUMMARY OF ARGUMENT

The Circuit Court properly granted summary judgment to the Respondent with respect to the Petitioner's claims. In particular, the Circuit Court properly found that the Petitioner could not meet the two part test for imposing liability upon the owners of property in premises liability/slip and fall cases because he had no evidence that the Respondents had actual or constructive knowledge of the "hidden" hole which purportedly caused his fall. In that regard, the only evidence submitted regarding the actual condition of the grave site at the time of the alleged fall was the Petitioner's own testimony and he testified that no holes were visible before his fall. Likewise, no testimony or other evidence was submitted to establish that any employee or representative of either Respondent knew before the accident that the hole into which Mr. Butner purportedly fell actually existed. Instead, the Petitioner speculates that the Respondents should have known about the existence of the subject hole based upon nothing more than the purported formation of other holes in the past at other locations.

The Circuit Court also properly disregarded the unsworn and unverified recorded statement of a former employee and a discovery response describing the anticipated testimony of that former employee's new supervisor at a different cemetery. Neither represented evidence which the Circuit Court could properly consider under *Rule 56* of the *West Virginia Rules of Civil Procedure*. Moreover, such anticipated testimony regarding the proper methods for tamping and compressing the soil above graves was not material to the issue of whether the Respondents had actual or constructive knowledge of the "hidden" hole into which the Petitioner purportedly fell. Instead, the testimony went to the cause of the purported hole and did not make it more or less likely that the Respondents knew that the subject hole existed prior to Mr. Butner's fall.

The anticipated testimony of the Petitioner's retained cemetery expert, William Stovall, also fails to support his claims. While such testimony would go to the issue of what caused the "hidden" hole, as opposed to whether the Respondents had actual or constructive knowledge of a hidden defect, it is undisputed that Mr. Stovall did not complete any inspection of the property and merely speculated as to the cause of the "hidden" hole. Moreover, his anticipated testimony actually weakens the Petitioner's claims because he specifically noted, "*It would be difficult or impossible to visually determine that the dirt under that sod was not solid.*" If taken as true, this testimony indicates that the Respondents could not have had "actual or constructive knowledge" of the existence of the hole. Likewise, because Mr. Stovall testified that only a visual inspection of grave sites was necessary, evidence that the hole was "hidden' or invisible supports the Respondents' position.

Finally, the Petitioner's reliance upon a Texas decision reversing an award of summary judgment to the owner of a cemetery is misplaced because the case involved a hole which was clearly visible before the cemetery owner's employees covered it when preparing for a funeral service. The Petitioner's evidence here establishes that the purported hole was not visible to anyone before his fall.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner Joey Butner requests oral argument under *Rule 19* of the *West Virginia Rules of Appellate Procedure* because he asserts that the disposition of the issues would be aided by oral argument. The petitioner does not, however, appear to dispute that the issues raised in his appeal address only the application of settled law to the subject claims. Accordingly, the Respondents

oppose the Petitioner's oral argument request because the *Petitioner's Brief* presents no new issues of law and further argument is not necessary.

ARGUMENT

I. Standard of Review.

Joey Butner appeals the Order issued by the Circuit Court granting summary judgment in favor of the Respondents High Lawn Memorial Park Company ("HLMPC") and High Lawn Funeral Chapel, Inc. (HLFC"). Under settled West Virginia law, the Order is subject to *de novo* review. *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994) ("A circuit court's entry of summary judgment is reviewed *de novo*."); *see also*, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002) ("This Court reviews *de novo* the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court.").

While the standard of review is *de novo*, when this Court reviews a decision of the Circuit Court to grant summary judgment, it does so under the same standards that the Circuit Court applied to determine whether summary judgment was appropriate. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59, 459 S.E.2d 329, 335 (1995). *Rule 56* of the *West Virginia Rules of Civil Procedure* governs requests for partial summary judgement and provides: "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."

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. *W. Va. R. Civ. P. 56(c)*; *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). 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 *W. Va. R. Civ. P. 56(f)*". Syl. Pt. 3, *Williams*, 194 W. Va. 52, 459 S.E.2d 329. Immaterial facts are irrelevant, and summary judgment is required if the non-movant cannot establish an essential element of her case. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 59, 459 S.E.2d 329 (1995); Syl. Pt. 5, *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995).

A "genuine issue" for summary judgment purposes 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. *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995).

A "material fact" is one that has the capacity to sway the outcome of litigation under the applicable law. *Jividen*, 194 W. Va. 705. For purposes of determining whether there is a genuine issue of material fact sufficient to preclude summary judgment, factual disputes that are irrelevant or unnecessary will not be counted. *Id.* The nonmoving party must, at a minimum, offer more than a "scintilla of evidence" to support his claim. *Id.* The mere contention that issues are disputable is not sufficient to deter the trial from the award of summary judgment. *DeRocchis v. Matlack, Inc.*, 194 W. Va. 417, 460 S.E.2d 663 (1995). Summary judgment "*shall* be entered against" an adverse

party, *W. Va. R. Civ. P. 56(e)* (emphasis supplied), who cannot point to "specific facts demonstrating that, indeed, there is a 'trialworthy' issue." *Williams*, 194 W. Va. at 60.

Although the non-movant for summary judgment is entitled to the most favorable inferences that may reasonably be drawn from the evidence, it cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another. *Marcus v. Holley*, 217 W.Va. 508, 516, 618 S.E.2d 517, 525 (2005). Unsupported speculation is not sufficient to defeat summary judgment. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 59, 459 S.E.2d 329 (1995).

II. The Circuit Court below properly found that in light of the evidence presented, the Petitioner could not meet the two part test for establishing a prima facia case of premises liability against the Respondents.

In order to address the propriety of the Circuit Court's below's ruling, it is first necessary to examine the nature of the claims being asserted in this case. Here, the Petitioner is asserting that the Respondents were negligent in inspecting and monitoring their property and in failing to find and fix an alleged "hidden defect" which purportedly caused him to fall. (A.R. 003-004, the *Complaint,* Pages 3-4, at Paragraph 14). He further asserts that the Respondents "acted in a malicious, willful, wanton, reckless and/or grossly negligent manner by failing to keep their premises in a reasonably safe condition." (A.R. 005, the *Complaint,* Page 5, Paragraph 22.) Such premises liability claims are governed by *W. Va. Code, §55-7-28(a),* which provides:

> 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) (2015). Therefore, if the purported hazard was as equally visible or apparent to the Petitioner as it was to the Respondents, no premises liability claim could exist against

them under *W.Va. Code, §55-7-28(a)*. Because the Brown photos in this case show a number of clearly visible holes near the grave site, the Petitioner has taken the position that, at the time he fell, those holes were "hidden" and not visible. (See the *Complaint* (A.R. 001-007) and Mr. Butner's deposition (A.R. 082, *Deposition of Joey Butner*, Page 113, Lines 6-20)). Moreover, he has asserted that the Respondents "knew or should have known" of the danger said holes represented and "failed to provide an adequate warning of its existence." (A.R. 004) Mr. Butner did not, however, provide evidence to adequately support such a premises liability claim under applicable law.

This Court has set forth a two part test for imposing liability upon the owners of property in premises liability/slip and fall cases and explained:

> . . . an owner of business premises is not legally responsible for every fall which occurs on his premises. He is only liable if he allows some hidden, unnatural condition to exist which precipitates the fall. He is not responsible if some small characteristic, commonly known to be a part of the nature of the premises, precipitates the fall. This has been otherwise stated as follows:
>
> **In order to make out a prima facie case of negligence in a slip and fall case, the invitee must show (1) that the owner had actual or constructive knowledge of the foreign substance or defective condition and (2) that the invitee had no knowledge of the substance or condition or was prevented by the owner from discovering it** ... With respect to slip-and-fall cases, the mere occurrence of a fall on the business premises is insufficient to prove negligence on the part of the proprietor.
>
> 3 S. Speiser, et al., The American Law of Torts § 14.14 (1986); see Hughes v. Hospital Authority of Floyd County, 165 Ga.App. 530, 301 S.E.2d 695 (1983), and Preuss v. Sambo's of Arizona, Inc., 130 Ariz. 288, 635 P.2d 1210 (1981).
>
> This broad principle has been applied when the place of injury is a lawn. As summarized in 62A Am.Jur.2d Premises Liability § 653 (1990):

The owner of premises has a duty to maintain a lawn or front yard open to invitees in reasonably good condition, but he is not liable to one who steps in a small hole in the lawn where he had neither actual nor constructive notice of such defect.

McDonald v. Univ. of W. Virginia Bd. of Trustees, 191 W. Va. 179, 182, 444 S.E.2d 57, 60 (1994) (Emphasis added.) Thus, a necessary element of the Petitioner's premises liability claims is proof that the Respondents had actual or constructive knowledge of the defective condition which caused the Petitioner's injury. Based upon the evidence submitted by the Petitioner, it is clear that he could not meet this necessary element of his claim.

When addressing a claim for negligence in the maintenance of real property this Court has noted:

> Our laws governing negligence claims are well-settled. This Court has explained that to prevail in a negligence suit "it is incumbent upon the plaintiff to establish, by a preponderance of the testimony, three propositions: (1) A duty which the defendant owes him; (2) A negligent breach of that duty; (3) injuries received thereby, resulting proximately from the breach of that duty." . . . . "In order to establish a prima facie case of negligence in West Virginia, it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. No action for negligence will lie without a duty broken." In other words, "[l]iability of a person for injury to another cannot be predicated on negligence unless there has been on the part of the person sought to be charged some omission or act of commission in breach of duty to the person injured."

Wheeling Park Comm'n v. Dattoli, 237 W. Va. 275, 280, 787 S.E.2d 546, 551 (2016) Importantly, the Court went on to state:

> This Court previously has indicated that before an owner of land may be held liable for negligence, "he must have had actual or constructive knowledge of the defective condition which caused the injury." Hawkins v. U.S. Sports Ass'n., 219 W.Va. 275, 279, 633 S.E.2d 31, 35 (2006); accord Neely v. Belk Inc., 222 W.Va. 560, 571, 668 S.E.2d 189, 199 (2008).

Wheeling Park Comm'n v. Dattoli, at 280, 551. In that regard, the Court in *Neely v. Belk Inc.*, 222 W. Va. 560, 668 S.E.2d 189 (2008) explained:

In syllabus point 6 of Mallet v. Pickens, 206 W.Va. 145, 522 S.E.2d 436 (1999), we set forth guidelines for the trier of fact to ascertain whether a premises liability defendant has breached its legal duty of care by holding that:

> [i]n 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 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."

The element of foreseeability is particularly crucial in premise liability cases because 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." Hawkins v. United States Sports Assoc., Inc., 219 W.Va. 275, 279, 633 S.E.2d 31, 35 (2006) (per curiam).

Neely v. Belk Inc., at 570, 199 (Emphasis added.)

As noted above, the only evidence submitted by the Petitioner regarding the actual condition of the grave site at the time of the alleged fall was the testimony of Mr. Butner himself and he testified that no holes were visible before his fall. (A.R. 082, *Deposition of Joey Butner*, Page 113, Lines 6-20.) No testimony or other evidence was submitted by Petitioner to establish that any employee or representative of either Respondent knew before the accident that the hole into which Mr. Butner purportedly fell was, in fact, present at the grave site. Likewise, no evidence was submitted to by Petitioner establish that the purported hole was actually visible, such that it could have been discovered if someone had only looked. Instead, the Petitioner asks the Court to speculate that the Respondents "could have" known about or discovered the existence of this particular hole based upon nothing more than the suggestion that other holes had formed in the past at other locations. Such speculation is insufficient to meet the standard for imposing premises liability upon

the Respondents. For example, in *Hawkins v. U.S. Sports Ass'n, Inc.*, 219 W. Va. 275, 633 S.E.2d 31 (2006), this Court rejected a similar claim involving a purportedly "hidden" pipe and stated:

> It is apparent to this Court that Mr. Merendino's testimony consists primarily of speculation regarding the degree to which the pipe might have protruded from the ground at the time Mr. Hawkin's knee encountered it. The testimony does not establish that the pipe was above ground or visible prior to the accident when representatives of the Appellees inspected and prepared the field. Nor does the testimony establish that the Appellees had any prior knowledge of the existence of the pipe or the ability to locate the pipe prior to the injury.
>
> Mr. Merendino's testimony establishes only that, in hindsight, it becomes obvious that the pipe was in existence, either completely or partially covered, at the time the competition began. **To that extent, Mr. Merendino stated that it could have been located. However, that is not the issue. The issue is whether the Appellees had knowledge of the pipe or should have, through reasonable inspection, discovered the existence of the pipe. There is no evidence that any Appellee, prior to the injury, had seen the pipe or had actual or constructive knowledge of the pipe's existence.**

Hawkins v. U.S. Sports Ass'n, Inc., at 281, 37 (Emphasis added.) The Court then went on to note:

> Mr. Hawkins' injury was an extremely unfortunate incident. However, "[t]he bare fact of an injury standing alone, without supporting evidence, is not sufficient to justify an inference of negligence."

Id., at 282, 38. Because there was no evidence in this case the Respondents had "actual or constructive knowledge" of the existence of the hole into which Mr. Butner purportedly fell, similar considerations would apply here and the Circuit Court properly awarded summary judgment in favor of the Respondents.

III. The Circuit Court properly found that the evidence offered by the Petitioner concerning the anticipated testimony of a former employee did not raise a genuine question of material fact with respect to his claims.

In his *Brief*, the Petitioner directs the Court to the anticipated testimony of a former employee of HLMPC, Andrew Lambert, and argues that the Circuit Court improperly disregarded the fact that his testimony would have raised a genuine question of material fact with respect to whether the

Respondents had constructive knowledge of the "hidden" hole. (See the Petitioner's *Brief*, at Pgs. 13-14.) In that regard, the Petitioner is referring to the purported transcript of a recorded statement which Mr. Lambert provided to Petitioner's counsel, Nathan Chill. (See A.R. 099-111.) Inasmuch as this "evidence" was un-sworn, un-verified and recorded outside of 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*. Nor did the Petitioner submit an affidavit explaining why additional time was needed to obtain properly sworn testimony or a verified affidavit from Mr. Lambert, as required under *Rule 56*. Nevertheless, it is clear that the Circuit Court did, in fact, consider Mr. Lambert's proposed testimony and simply recognized that it was not sufficient to establish that the Respondents had "actual or constructive knowledge" of the existence of the subject hole. (See A.R. 167-168, the Circuit Court's *Order*, at Pgs. 17-18.)

Initially, it should be noted that Mr. Lambert freely acknowledged that "[t]here's a little bit of bad blood" between himself and his former employer. (A.R. 107, *Recorded Statement Of Andrew Lambert*.) However, the real issue here is not whether Mr. Lambert had some bias against his former employer. Instead, the critical issue under *Rule 56* is whether his anticipated testimony would raise a genuine question of "material" fact. Mr. Lambert indicated in his recorded statement that, when he took a subsequent job with Blue Ridge Memorial Park Company, he was instructed to use grave filling procedures which were different from those employed at HLMPC. (A.R. 105) Specifically, Mr. Lambert indicated that Blue Ridge uses a compressed air tamper to tamp down the grave sites and sometimes fills in the holes with sand. (A.R. 103) For example, he indicated:

> A. Yeah, it's a hand held version of that and I can walk along the sides of the grave and it tamps it down real

nice, but at Blue Ridge, I'm not even lying, we we bury someone you can't even tell they was there, like families will have trouble finding graves the next day.

Q. So the compressed air tamper is much better than beating it with a grave board?

A. Yeah because you gotta think about the worker the guys like when I did the tamps I myself and I would get wore out. Versus there and it does all the work for you.

Q. It does a better job?

A. I think it does, yeah.

(A.R. 104) Mr. Lambert then went on to purportedly indicate that hidden voids around HLMPC grave sites were not uncommon and that he had allegedly fallen into an open grave because of such a "hidden" hole. He testified:

A. That's what I was figuring cause it settled and 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. And once it gives it all floats to the bottom and it 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.

Q. Did you fall through on the side?

A. Yeah, I fell through on the edge side. It was a dug grave actually. I fell in the open grave because they undercut the sod and I stepped where I thought was grass and I went through, on to the hospital and everything.

(A.R. 107) Based upon this "testimony," the Petitioner suggests that the Respondents were not properly filling in grave sites and, thus, caused the hidden hole in which he fell to form. He then seeks to bolster this argument by directing the Court to the anticipated testimony of Mr. Lambert's new supervisor at Blue Ridge, Brian Brooks, who will also purportedly testify regarding the proper practice for backfilling graves to prevent sinkage and voids. (See the Petitioner's *Brief,* at Pg. 4 referencing the Petitioner's discovery responses describing this anticipated testimony at A.R. 090-91) Once again, no actual affidavits 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*. More importantly, while the Petitioner argues that this proposed testimony raises questions of fact, it is clear that both Mr. Lambert's statements and the predicted testimony of Brian Brooks go to the issue of what might have caused the "hidden" hole in question and not to the issue of whether any hole was visible on the day in question or to whether the Respondents knew or should have known that this particular "hidden" hole existed prior to Mr. Butner's purported fall. In effect, the Petitioner is proposing that mere knowledge that hidden holes are possible or have happened before is sufficient to place every cemetery owner on constructive notice of every small hole that might ever develop, regardless of whether such a hole is actually visible. Such a conclusion would render meaningless the requirement that the owner of a premises have "actual or constructive knowledge" of a hidden defect before liability will attach, as addressed in *Hawkins* and *McDonald v. Univ. of W. Virginia Bd. of Trustees* supra. Instead, under the Petitioner's proposed standard of care, mere knowledge that small unseen holes "might" come to exist at some time in the future would be enough to impose liability upon the owners of property unless they meticulously walked upon and inspected every inch of their property every few hours to determine if an invisible hole or

depression had developed. In fact, under the Petitioner's standard, even a visual inspection alone would not be sufficient since the covering sod could conceivably render a hole or void invisible to the naked eye. The Circuit Court below correctly recognized the undue burden and expense which the Petitioner's proposed standard of care would impose upon West Virginia cemetery owners and noted:

> 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 which Plaintiff's own expert states would be difficult or impossible to see. Plaintiff's proposed duty of care exceeds any reasonable magnitude of burden which should be placed upon a cemetery owner.

(A.R. 169.) Imposing such a standard of care with respect to hidden defects would be contrary to the principles set forth in *Hawkins* and *McDonald v. Univ. of W. Virginia Bd. of Trustees* supra. and would unleash a flood of premises liability litigation upon West Virginia property owners.

IV. The Circuit Court properly found that the Petitioner's proposed expert testimony did not raise a genuine question of material fact with respect to his claims.

In his *Brief*, the Petitioner also suggests that the Circuit Court improperly disregarded the opinions of his retained cemetery expert, William Stovall. (See Petitioner's *Brief*, at Pgs. 14-15.) In that regard, Mr. Stovall offered three opinions in his July 10, 2019 written report:

(1) "In viewing the photos of the ground where the grave is located, it was clear that there was a large hole that Mr. Butner made when he stepped up to the gravespace ... 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."

(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...."

(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."

(A.R. 093-094) Thus, it is apparent that Mr. Stovall's anticipated testimony, like the anticipated testimony of Mr. Lambert and Mr. Brooks, related to the issue of what caused the "hidden" hole as opposed to whether the Respondents had actual or constructive knowledge of it. Moreover, it is undisputed that Mr. Stovall did not complete any actual physical inspection of the property and his report does not reference any scientific or technical requirements which he believes would govern or control how the dirt and sod should be placed upon a closed grave site or how frequent inspections of the grave sites should be. For example, Mr. Stovall was asked during his deposition:

Q. Are you aware of any West Virginia law or regulation that requires a cemetery owner to revisit a gravesite to check to see if there still remain any problems with the soil around a gravesite or the burial vault?

A. No.

Q. Are you aware of any federal laws or regulations that requires a cemetery owner to revisit a gravesite to check to see if there still remain any problems with soil around a gravesite or vault?

A. No, sir.

Q. How many times and over what period of time, do you believe a cemetery owner should go back and check on a recently closed gravesite?

A. They should periodically do that.

Q. Okay. Well, how many times?

A. I can't say for sure how many. It's going to largely depend on the weather conditions, to see what else is maybe going on.

(A.R. 205-206, *Deposition of William Stovall*, at Pg. 54, Lines 4-22.) Therefore, Mr. Stovall's anticipated expert testimony represents nothing more than his speculation as to the cause of the purported hidden hole based upon his review of the Molly Brown photos and his unsupported conclusion that the Respondents did not inspect the site "often enough." In that regard, this Court has noted:

> An expert witness' affidavit that is wholly conclusory and devoid of reasoning does not comply with West Virginia Rule of Civil Procedure 56(e).

Jividen v. Law, 194 W. Va. 705, 708, 461 S.E.2d 451, 454 (1995). Moreover, the issues addressed by the anticipated testimony must "material" to the dispute. For example, this Court noted in *Jividen:*

> The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed "material" facts. Williams, 194 W.Va. at 60-61, 459 S.E.2d at 337-38. A material fact is one "that has the capacity to sway the outcome of the litigation under the applicable law." Id. at 60, 459 S.E.2d at 337 n. 13.

Id., at 714, 460. Thus, the real question is whether Mr. Stovall's anticipated testimony would be material to the issue of whether the Respondents had actual or constructive knowledge of the hole into which Mr. Butner purportedly fell. As the Circuit Court correctly found, it would not be.

Setting aside the fact that Mr. Stovall never actually inspected the subject property and did no soil testing, it is clear from his report and his deposition that his anticipated testimony would actually weaken the Petitioner's claims. For example, he expressly states in his opinion, *"It would be difficult or impossible to visually determine that the dirt under that sod was not solid."* (A.R. 093) If taken as true, such testimony would hardly render it more likely that the Respondents had "actual or constructive knowledge" of the existence of a hidden hole into which Mr. Butner purportedly fell. Instead, such testimony would suggest that the hole was equally as visible or, in this case, invisible

to the Respondents as it was to the Petitioner. In fact, when asked during his deposition about what sort of inspection should have been performed, Mr. Stovall testified as follows:

> Q. Well, what -- what's involved in going back and checking to see if there still remain problems at the gravesite?
>
> A. See if you notice settling.
>
> Q. Okay. It's a -- it's a personal visit, or going back physically to go look at the gravesite. Correct?
>
> A. By maintenance staff, yes.
>
> Q. Okay. When they're there at the gravesite revisiting, what are they supposed to do?
>
> A. Observe whether they see additional settling, or if they see where ruts have been created or something has disturbed the ground that they need to fix.
>
> Q. So it's a visual inspection?
>
> A. It would be.
>
> Q. You're not suggesting that a cemetery owner should go back and do any soil compaction testing, are you?
>
> A. Only if they have seen a significant amount of settling that would tend to make you think they didn't compact it well enough.

(A.R. 206-207, *Deposition of William Stovall*, at Pgs. 55-56, Lines 20-24, and 1-15.) Thus, if taken as true, the proposed expert testimony of Mr. Stovall would establish that, if the Respondents had done the only sort of inspection he believed they were required to do (a visual inspection), they would not have seen the hole into which Mr. Butner purportedly fell and, therefore, would not have had "actual or constructive knowledge" of what even the Petitioner described as a "hidden" hole.

Much like his opinion that the "hidden" hole would not have been visible prior to the Petitioner's fall, Mr. Stovall's discussion of his review of the Brown photos also supports the Respondents' position in this case. In that regard, Mr. Stovall's report notes that when viewing the photos "it was clear" that there was a large hole. (A.R. 093) While Mr. Stovall was referring to the hole purportedly made by Mr. Butner when he fell, his ability to clearly see the holes depicted in the photos makes it obvious that anyone who looked at those photos would clearly see the holes in the ground they show. (A.R. 069-081, the Brown photos) Thus, Mr. Stovall's anticipated testimony would also actually support the Circuit Court's conclusion that, if the holes in Molly Brown's pictures were present when the Petitioner visited the grave site and purportedly fell, they would have been an open and obvious hazard under *W. Va. Code §55-7-28(a)*. (A.R. 162) As the Circuit Court properly recognized, either the holes in the photos were visible when Mr. Butner fell and, therefore, would have represented an open, obvious, and easily apparent hazard, or they were not visible at the time of his fall, which would mean that the Respondents could not have had actual or constructive knowledge of them, even if they had performed the visual inspection Mr. Stovall suggested was necessary. In either event, the Petitioner could not meet the two part test set forth in *McDonald* supra. to support a prima facie case for premises liability against the Respondents.

V. The Petitioner's reliance upon the Texas decision in *Rivas v. MPII, Inc.* is misplaced.

After acknowledging that West Virginia Courts have not directly addressed a case involving potential liability for hidden hazards at a grave site, the Petitioner invites the Court to consider an unreported Texas Appeals Court Memorandum Decision in which an award of summary judgment in favor of a cemetery owner was overturned. (See Petitioner's *Brief* at pgs. 16-17) In *Rivas v. MPII, Inc.*, No. 13-09-00177-CV, 2011 WL 1106692 (Tex. App. Mar. 24, 2011), the Court examined the

claims of Mr. Rivas, who stepped into a carpet covered hole while acting as a pallbearer during a funeral service. The Court explained the underlying issue and the applicable Texas law regarding hidden defects as follows:

> Rivas does not dispute that there is no evidence that Mission Park had actual knowledge, i.e., that Mission Park created or knew of the condition on the premises. Instead, Rivas relies on constructive knowledge, which requires proof that Mission Park had a reasonable opportunity to discover the defect. Reece, 81 S.W.3d at 813; CMH Homes, Inc., 15 S.W.3d at 101-02 ("Daenen would be entitled to recover if he presented evidence that CMH actually knew that the platform and step unit had become unstable or if a reasonable inspection would have revealed that the unit was no longer safe."); Corbin v. Safeway Stores, Inc., 648 S.W.2d 292, 295 (Tex.1983) ("The occupier is considered to have constructive knowledge of any premises defects or other dangerous conditions that a reasonably careful inspection would reveal.").

As the Supreme Court explained in Wal-Mart Stores, Inc. v. Spates, the question of constructive knowledge "requires analyzing the combination of proximity, conspicuity, and longevity." 186 S.W.3d 566, 567-68 (Tex.2006) (per curiam) (citing Reese, 81 S.W.3d at 816). "If the dangerous condition is conspicuous as, for example, a large puddle of dark liquid on a light floor would likely be, then an employee's proximity to the condition might shorten the time in which a jury could find that the premises owner should reasonably have discovered it." Id. "Similarly, if an employee was in close proximity to a less conspicuous hazard for a continuous and significant period of time, that too could affect the jury's consideration of whether the premises owner should have become aware of the dangerous condition." Id. In addition, "[w]ithout some temporal evidence, there is no basis upon which the fact[-]finder can reasonably assess the opportunity the premises owner had to discover the dangerous condition." Reese, 81 S.W.3d at 816. Moreover, "when circumstantial evidence is relied upon to prove constructive notice[, as in this case,] the evidence must establish that it is more likely than not that the dangerous condition existed long enough to give the proprietor a reasonable opportunity to discover the condition." Wal-mart Stores, Inc. v. Gonzalez, 968 S.W.2d

936, 936 (Tex.1998). "[M]eager circumstantial evidence from which equally plausible but opposite inferences may be drawn is speculative and thus legally insufficient to support a finding." Id.

Rivas v. MPII, Inc., No. 13-09-00177-CV, 2011 WL 1106692, at 3. The Court then found that the award of summary judgment against Mr. Rivas was inappropriate, stating:

> To conclude Mission Park had constructive knowledge of the hole, jurors would have to conclude that the employees should have noticed the hole, in other words, that Mission Park had a reasonable opportunity to discover the defect. Reviewing the evidence in the light most favorable to Rivas, crediting such evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not, see *Tamez*, 206 S.W.3d at 582; City of Keller, 168 S.W.3d at 825, 827; Ortega, 97 S.W.3d at 772, this summary judgment evidence indicates that Mission Park employees were at the grave site in question, preparing the grave a day or two before the service, and covering the grave site with Astroturf after the grave was opened but prior to the service.
>
> As set out earlier, the question of constructive knowledge "requires analyzing the combination of proximity, conspicuity, and longevity." Spates, 186 S.W.3d at 567-68 (citing Reese, 81 S.W.3d at 816). In this case, a jury could reasonably find that Mission Park's employees' proximity to the condition during the preparation of the grave and set up of the site for the burial service within one day or, at most, two days of the burial service support a conclusion that Mission Park should reasonably have discovered the large hole into which Rivas fell. See id. Moreover, 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.

Rivas v. MPII, Inc., No. 13-09-00177-CV, 2011 WL 1106692, at 4-5.

Leaving aside the fact that it was decided under Texas law, the factual circumstances of this case are quite different from those discussed in *Rivas*. For example, the hole in *Rivas* was quite large and would have obviously been visible to the Mission Park employees before they covered it with Astroturf. Here, the purported "hidden" hole was not covered with anything and the Petitioner's own expert indicated, *"It would be difficult or impossible to visually determine that the dirt under that sod was not solid."* (A.R. 093) Likewise, the fall in *Rivas* occurred during a funeral service where

the cemetery employees had recently been working and was the result of a hazard which those employees had actively concealed as part of their work. Here, the Petitioner is seeking to impose liability for a purported hidden condition at a completed grave site long after the funeral service was over. Moreover, the Petitioner offered no evidence at all regarding how long the purported condition had existed. Therefore, unlike *Rivas*, there was no temporal evidence "upon which the fact[-]finder can reasonably assess the opportunity the premises owner had to discover the dangerous condition." *Rivas* at 3. In fact, because the Petitioner's own expert concluded that the purported defect was not visible, it could not have been discovered through the type of visual inspection Mr. Stovall suggested was appropriate. (A.R. 206-207, *Deposition of William Stovall,* at Pgs. 55-56, Lines 20-24 and 1-15.) Accordingly, the Petitioner's reliance upon the *Rivas* decision is simply misplaced and the Court should affirm the Circuit Court's award of summary judgment to the Respondents.

Conclusion

For all of the foregoing reasons, the Petitioner's appeal should be denied and the Circuit Court's April 14, 2021 *Order* awarding summary judgment to the Respondents should be affirmed.

Respectfully submitted,

HIGH LAWN MEMORIAL PARK COMPANY and HIGH LAWN FUNERAL CHAPEL, INC.

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No. 21-0387
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOEY J. BUTNER,

Petitioner,

v.

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

Respondents.

FROM THE CIRCUIT COURT OF
FAYETTE COUNTY, WEST VIRGINIA
Civil Action No. 19-C-48

I, Brent K. Kesner/Ernest G. Hentschel II/Mark L. Garren, counsel for High Lawn Memorial Park Company and High Lawn Funeral Chapel, Inc., do hereby certify that on the **29TH day of September, 2021,** service of the foregoing **BRIEF OF RESPONDENTS HIGH LAWN MEMORIAL PARK COMPANY AND HIGH LAWN FUNERAL CHAPEL, INC.** has been made upon counsel of record by depositing a true copy thereof in the regular United States mail, first-class postage prepaid, addressed as follows:

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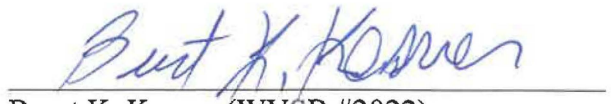

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