IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

ELLIOTT GRISELL and LORRI GRISELL,

Plaintiffs,

vs.

Civil Action No.: 19-C-187
Hon. David W. Hummel, Jr.

SHELLY & SANDS, INC.; and WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS,

Defendants.

ORDER GRANTING DEFENDANT SHELLY AND SANDS, INC.'S MOTION FOR SUMMARY JUDGMENT

On a prior day came the parties, by their respective counsel, for a hearing relative to Defendant Shelly and Sands' Motion for Summary Judgment.

Having considered the parties' respective briefs, as well as oral argument of counsel, the Court hereby **ORDERS** that Defendant Shelley and Sands' Motion for Summary Judgment is hereby **GRANTED**. In doing so, the Court makes the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

A. Procedural Background

1. On July 22, 2019, Elliott Grisell and Lorri Grisell ("the Grisells") filed their Complaint against Shelly and Sands, Inc. ("Shelly").

2. On August 26, 2019, the Grisells filed their Amended Complaint, which added West Virginia Department of Transportation, Division of Highways ("DOH") as a defendant[1].

3. The Grisells own real property located at 215 Julie Court, Glen Dale, Marshall County, West Virginia. *See Amended Complaint, ¶1*. The Grisells acquired this property by deed dated September 27, 2016 from Alfred Renzella and Susan Renzella. *Id.*

4. At some time prior to 2016, DOH commissioned a highway improvement project in "The Narrows" in Marshall County. *Id., ¶4*. Shelly was commissioned to perform some or all of this project. *Id.*

5. Shelly entered into an agreement with the then-owners of 615 Julie Court, Alfred and Susan Renzella, to remove material from the work site and place the material on the Renzellas' property. *Id., ¶5*. Shelly delivered the material to the property and spread the material upon the property adjacent to the access road to the property. *Amended Complaint, ¶6.*

6. Several years later, on July 28, 2017, during a rain event, the area where the fill material had been placed slipped. *Id., ¶8.*

7. The Grisells allege Shelly spread the material in a negligent and improper manner, not up to the reasonable and customary standards of a contractor, and in a manner not fit for the purpose for which it was placed on the property, by spreading the material over a natural fresh water spring and not redirecting the same, and by blocking previously installed drains and/or culverts that previously captured water runoff, allowing the area encompassing the material to become saturated. *Id., ¶9*. The Grisells allege Shelly owed a duty when placing the material on the property to do so as a reasonable and proper contractor and in a manner fit for the particular

[1] On January 5, 2022, the court entered the Order Granting the Defendant, West Virginia Department of Transportation, Division of Highways', Renewed Motion to Dismiss the Plaintiffs' Amended Complaint or, in the Alternative, Motion for Summary Judgment, which resulted in the dismissal with prejudice of the Amended Complaint as to the DOH. Following the entry of January 5, 2022 Order, Shelly became the sole remaining Defendant.

purpose for which it was placed upon the property. *Id.*, ¶*10*. The Grisells further allege Shelly owed a duty in placing the material on the property to do so in a manner that would not cause damage to the property or adjacent properties. *Id.*, ¶*10*.

8. The Grisells seek to recover compensatory damages for the damage to their property, diminished value of the property, loss of use of a portion of the property and annoyance and inconvenience, and costs and expenses to reclaim the property and a neighboring property. *Id.*, ¶*11*. The Grisells also seek reimbursement of attorney fees incurred in this matter. *Id., ad damnum clause*.

9. Shelly denied any liability for the incident and alleged damages. *Answer to the Amended Complaint and Affirmative Defenses*.

B. Evidence Developed in Discovery

10. In 2012, Fred Renzella went to Shelly's office in Glen Dale and met with Terry LePage (Shelly) because Mr. Renzella wanted fill dirt. *Depo. Tr. of Terry LePage, pp. 12:18-24, 13:2-4*. Mr. LePage and Mr. Renzella worked out an arrangement for fill material (e.g., dirt, concrete, and rock) and executed a Waste Agreement on April 16, 2012. *Id., p. 14:1 to p. 19:15; Waste Agreement*.

11. The Waste Agreement states that Shelly "conducts certain excavating and demolition operations, and as a result thereof, creates certain surplus excavation and demolition materials ("Materials") which [Shelly] desires to dispose of". *Waste Agreement, p. 1*.

12. The Waste Agreement states "[Renzella] owns certain real estate upon which [Renzella] desires Materials to be deposited, in order to improve the aesthetic value and terrain thereof". *Id.*

13. The Waste Agreement authorized Shelly to deposit Materials on the real property. The Waste Agreement expressly states the "Material shall include all materials of whatever form, content or nature encountered by [Shelly], in the performance of its project excavation and demolition operations". *Id.* Shelly also agreed to "level up waste site + grade slope". *Id.*

14. Per the Waste Agreement, Mr. Renzella agreed that "[Shelly] shall have no responsibility for damages or diminution in value resulting to the Premises by reason of (a) [Shelly's] normal operations upon the Premises, or (b) the consequences of the placement of the Materials upon the Premises". *Id.*

15. Upon visiting the Renzella property, Mr. LePage observed previously dumped fill material in the area in question that consisted of trees, shrubs, grass, concrete blocks, and concrete slabs, and spanned an area in excess of 100 feet wide, 100 feet long, and 15 feet deep. *Id., p. 21:20-25, p. 30:13 to p. 31:1, p. 32:2-4*; *Shelly's Answers and Responses to Plaintiffs' First Set of Interrogatories and Request for Documents, Interrogatory Nos. 1 and 4*. Mr. LePage was advised that the entities that previously dumped fill material on the property included the City of Glen Dale and the Marshall County School District. *Depo. Tr. of Terry LePage, p. 25:25 to 26:11.*

16. Mr. Renzella was not picky about the composition of the Materials delivered by Shelly and accepted the Materials as is. *Id., p. 35:15-20.*

17. Mr. Renzella directed where the Materials were dumped on the property. *Id., p. 25:10-24, p. 35:21-23*. Shelly leveled and graded the Materials after they was dumped on site. *Id., p. 29:11-13*. The Materials did not cover up the culvert on the property. *Id., p. 36:22-25*. Mr. Renzella approved of the manner in which the dumped Materials were leveled up and sloped. *Id., p. 36:3-18, p. 37:1-5*.

18. During this work, Mr. LePage observed water coming out at the toe of the slope. Renzella was aware of this condition and in response simply requested of Mr. LePage to place rocks to direct the water away from the slope down to the ditch line. Mr. LePage did so and Mr. Renzella approved of the manner in which Mr. LePage performed the same. Mr. LePage thought that the water coming out of the toe of the slope was potentially going to be an issue over time. *Id., 26:25 to 28:15, 36:9-18. Id.*

19. Mr. Renzella never contacted Shelly to complain about movement or any other issues with the dumped Materials. *Id., p. 37:6-13.*

20. Prior to the purchase of the property, Mr. Renzella told the Grisells that fill had been placed on the property to create additional usable space and numerous times stated that the work was done correctly, he watched the work being performed, and he had not had any issues with the work. *Depo. Tr. of Lorri Grisell, p. 11:2-18, p. 16:6-11*; *Depo. Tr. of Elliott Grisell, p. 17:24 to p. 20, line 3*; *Affidavit of Elliott Grisell, ¶¶1, 5.*

21. Prior to purchasing the property from the Renzellas, the Grisells had the fill area inspected by John Hart from J&R Excavating to determine if this area of the property was suitable for building a garage or pool on top of it. *Depo. Tr. of Elliott Grisell, p. 20:4-23.* Mr. Hart performed a visual inspection of the fill area and based upon his comments the Grisells had no concern about the stability of the area and proceeded to purchase the property. *Depo. Tr. of Elliott Grisell, p. 20:24 to p. 22:12.*

22. The Grisells acquired the property located at 215 Juliet Court by deed dated September 27, 2016. *Deed Book 903, at page 357, Office of the Clerk of the Marshall County Commission.*

23. The Grisells did not become aware of the existence of the Waste Agreement until after suit was filed. *Affidavit of Elliott Grisell, ¶3.*

24. In June 2017, the Grisells observed multiple cracks in the yard that were as wide as a pencil, some of which were 5-30 feet long, and the Grisells though they needed to consult with an excavator. *Depo. Tr. of Elliott Grisell, p. 26:24 to 27:24*; *Depo. Tr. of Lorri Grisell, p. 18:5 to 19:13*. Prior to the July 28, 2017 slip, the cracks got wider and almost started to drop. *Depo. Tr. of Elliott Grisell, p. 30:2-6.*

25. The slip occurred on July 28, 2017, when there was a heavy rain storm that caused 4 inches of rain to accumulate on the property. *Depo. Tr. of Lorri Grisell, p. 21:9 to 26:12.*

26. The Grisells designated Steve Rogers as their expert witness in this matter. Mr. Rogers was, in relevant part, "expected to render an opinion as to causes of slips in general and in particular the slip that occurred on [the Grisells'] property. It is expected his opinion regarding the cause of the slip in [the Grisells'] case is that no drainage or insufficient drainage was put in place to carry water from the area where the fill was installed on the property. Furthermore, the culverts installed appeared to have been blocked by the fill placed on the property resulting in the ground eventually becoming saturated with the weight of the material causing the ground to become unstable thereby resulting in its moving. The blocking of the culverts and installation of no or insufficient drainage in the fill area being improper in his opinion." *Plaintiffs Designation of Expert Witness, p. 2.*

27. On April 14, 2021, Mr. Rogers admitted during his discovery deposition that he is not going to testify at trial as to (1) what caused the slip to happen or (2) why Shelly might be responsible for the slip occurring. *See Depo. Tr. of Steve Rogers, p. 13:14-24.* Mr. Rogers testified

he was only going to offer expert witness testimony about an estimate of repair provided by Litman Excavating. *Id., p. 14:1-5.*

28. On November 4, 2021, Mr. Rogers executed an Affidavit stating he had reviewed the deposition testimony of Mr. LePage and believed that testimony confirmed his "opinion [Shelly's] failure to properly drain water emerging from the toe of where material was deposited was the primary cause of the slip in this matter. In addition, upon reviewing Mr. LePage's deposition I do not believe a proper toe key or benching was put in place to make a stable foundation to finish a proper slope. It appears according to [Mr. LePage's] deposition they merely leveled, graded and 'pushed' off the fill material. This in my opinion was also improper and was a contributing factor to the slip occurring. *Affidavit of Stephen Rogers, ¶6.*

II. CONCLUSIONS OF LAW

1. Based upon the briefs submitted by Shelly and the Grisells, the oral argument conducted by the court on December 13, 2021, and the supplemental briefing of the parties submitted at the court's request following oral argument, the court finds the Grisells have failed to create a genuine issue of material fact that the Grisells are entitled to any relief against Shelly and, therefore, the court hereby grants Shelly's Motion for Summary Judgment and dismisses the Amended Complaint with prejudice.

2. Motions for summary judgment are governed by Rule 56 of the West Virginia Rules of Civil Procedure, which states in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law.

See W.Va.R.C.P. 56(c).

3. A motion for summary judgment should be granted only when it is clear that there is no genuine issue of material fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. Syl. pt. 2, *Vankirk v. Green Constr. Co.*, 195 W.Va. 714, 466 S.E.2d 782 (1995), *cert. denied* 518 U.S. 1028, 135 L.Ed.2d 1087, 116 S.Ct. 2571 (1996).

4. A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment. Syl. pt. 6, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of N.Y.*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

5. If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure. Syl. pt. 3, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329, 337 (1995).

6. To defeat summary judgment, the nonmoving party must satisfy its burden of proof by offering more than a mere scintilla of evidence and must produce evidence sufficient for a reasonable jury to find in the nonmoving party's favor. *Browning v. Halle*, 219 W.Va. 89, 94-95, 632 S.E.2d 29, 34-35 (2005). "Unsupported speculation is not sufficient to defeat a motion for summary judgment." *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 61, 459 S.E.2d 329, 338 (1995).

7. While it is true that "the nonmoving party is entitled to the most favorable inferences that may reasonably be drawn from the evidence, [such evidence] '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) (quoting *Beale v. Hardy,* 769 F.2d 213, 214 (4th Cir.1985)).

8. "[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." Syl. pt. 3, *Dawson v. Norfolk & Western Ry. Co.*, 197 W.Va. 10, 475 S.E.2d 10 (1996); Syllabus pt. 5, *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 the litigation under the applicable law". *Id.*

9. Summary judgment must be granted if the pleadings, depositions, 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. *See Aetna Cas. & Sur. Co. v. Federal Ins. Co. of N.Y.*, 148 W.Va. 160, 171, 133 S.E.2d 770, 777 (1963).

10. The Amended Complaint avers a single cause of action against Shelly for negligence. "In every action for damages resulting from injuries to the plaintiff, alleged to have been inflicted by the negligence of the defendant, it is incumbent upon the plaintiff to establish, by a preponderance of the testimony, three propositions: (1) A duty which the defendant owes to him; (2) A negligent breach of that duty; (3) Injuries received thereby, resulting proximately from the breach of that duty." *See C.C. v. Harrison County Board of Education*, 245 W.Va. 594, 859 S.E.2d 762, 771 (2021)(*quoting Webb v. Brown & Williamson Tobacco Co.*, 121 W. Va. 115, 118, 2 S.E.2d 898, 899 (1939)).

11. "Negligence is the violation of the duty of taking care under the given circumstances. It is not absolute, but is always relative to some circumstance of time, place, manner, or person." *See* Syl. pt. 3, *Wal-Mart Stores East, L.P. v. Ankrom*, 244 W.Va. 437, 854 S.E.2d 257 (2020)(*quoting* Syl. pt. 1, *Dicken v. Liverpool Salt & Coal Co.*, 41 W. Va. 511, 23 S.E. 582 (1895)).

12. "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." Syl. pt. 4, *Wal-Mart Stores East, L.P. v. Ankrom*, 244 W.Va. 437, 854 S.E.2d 257 (2020) *quoting* Syl. pt. 1, *Parsley v. General Motors Acceptance Corp.*, 167 W. Va. 866, 280 S.E.2d 703 (1981).

13. In deciding the motion for summary judgment, the court must first determine what, if any, duty did Shelly owe to the Grisells under the circumstances presented. *See* Syl. pt. 5, *Aikens v. Debow*, 208 W.Va. 486, 541 S.E.2d 576 (2000)("The determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law.")

14. Based upon the evidentiary record, the court finds that Shelly did not owe any duty of care to the Grisells and, therefore, the Grisells' negligence claim fails to state a claim against Shelly upon which relief may be granted as a matter of law.

15. The court finds there is no genuine issue of material fact that Shelly's delivery of and dumping of Materials on the property and all attendant activities under the Waste Agreement were performed in 2012, when the property was owned by the Renzellas and years prior to the Grisells' purchase of the property. Under these facts, Shelly owed no duty of care to the Grisells as a matter of law.

16. The Grisells assert that a duty of care, based in negligence, was owed by Shelly under the analysis conducted by the Supreme Court of Appeals in *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988). The court disagrees.

17. The *Sewell* case involved litigation between the contractor that constructed a residence and a subsequent purchaser of that residence. Two months after the Sewells moved into the home after purchasing the home from the original owner, heavy rains caused flooding throughout much of the house, resulting in significant damage. *Id.*, 179 W.Va. at 586, 371 S.E.2d at 83. The Sewells filed suit and alleged Gregory negligently designed and constructed the home and breached the warranty of habitability and fitness for use as a family residence. *Id.*, 179 W.Va. at 587, 371 S.E.2d at 84. In reversing the trial court's dismissal of the case, the Supreme Court of Appeals held:

> "A builder is under a common law duty to exercise reasonable care and skill in the construction of a building and a subsequent homeowner can maintain an action against a builder for negligence resulting in latent defects which the subsequent purchaser was unable to discover prior to purchase."

Id., Syl. pt. 4.

18. The court finds the *Sewell* case is not applicable to the present case. It is clear from the *Sewell* opinion that the holding in that case is confined to and limited to a specific claim scenario: the negligent construction of a residential building and the right of a subsequent owner, who lacks privity to the construction contract, to nevertheless sue the construction contractor for

negligence and breach of implied warranties such as habitability and fitness for the intended purpose as a family residence.

The present case, however, does not involve a claim of defective construction of the Grisells' home and, therefore, the Grisells are not subsequent purchasers of a residential building seeking to recover compensatory damages from the original construction contractor.

In fact, the court finds the Waste Agreement is not a construction contract at all. To the contrary, the evidentiary record clearly demonstrates that Mr. Renzella and Shelly entered into an agreement for the delivery and dumping of Materials, leveling up the site, and grading the slope, at no cost to Mr. Renzella, and without any promises or warranties[2]. The Waste Agreement was not a contract to construct an expansion of the yard. Shelly was not hired to design an expansion plan, engineer surface water and subsurface water mitigation, and construct a yard expansion according to established plans and specifications. Mr. Renzella did not contract for Shelly to install a toe key or a bench to provide a stable foundation for the fill. The evidentiary record demonstrates that Mr. Renzella was only interested in having copious amount of construction waste delivered and dumped onto the property and then leveled with slope grading, all for free and that is what Shelly provided.

The Supreme Court of Appeals has not expanded the *Sewell* holding to any other type of claim scenario and the court declines the Grisells' invitation to do so in this matter under the evidence presented.

[2] The Waste Agreement specifically states Shelly "shall have no responsibility for damages or diminution of value resulting to the Premises by reason of (a) [Shelly's] normal operations upon the Premises, or (b) the consequences of the placement of the Materials upon the Premises".

19. Even if the Grisells had met its burden to establish that Shelly owed a duty of care so as to pursue a negligence claim, the court nevertheless finds the evidentiary record fails to create a genuine issue of material fact that Shelly engaged in any conduct that breached said duty of care.

20. The Grisells contend that Shelly breached a duty of care owed to the Grisells by failing to install sufficient drainage to carry water from the area where the fill was installed on the property, blocking drains and culverts with fill, and/or failing to install a toe key or benching, which resulted in the ground becoming saturated and resultant instability of the slope until the slope failed. The court disagrees.

21. The court finds the evidentiary records fails to create a genuine issue of material fact that Shelly caused Materials to cover a natural fresh water spring and/or block drains and culverts so as to create a condition that proximately caused the July 28, 2017 slip. The record is devoid of testimony from a competent witness who can testify that Shelly's activities on the property covered the spring, blocked drains, or blocked culverts. The Grisells can only offer speculation, which is legally insufficient to defeat summary judgment.

As for Mr. Rogers, he testified at his discovery deposition that he will not offer opinion testimony at trial that Shelly is responsible for the slip occurring. Even if the court sets that testimony aside and focuses upon the Designation of Expert Witness and Mr. Rogers' post-deposition Affidavit, the court finds Mr. Rogers' disclosures fail to create a genuine issue of material fact to defeat summary judgment. The evidentiary record clearly demonstrates that Shelly never undertook a duty to construct a toe key or a bench. Similarly, the evidentiary record clearly demonstrates that Shelly never undertook a duty to construct drainage for the slope; at most, Mr. Renzella directed Mr. LePage to place rocks to direct the water away from the slope down to the ditch line, which Mr. LePage did to Mr. Renzella's approval and satisfaction.

22. The court finds the uncontroverted evidence and testimony demonstrates Mr. Renzella was only interested in having Shelly deliver and dump Materials on the property, level up the waste site, and grade the slope, to be performed at no cost to Mr. Renzella. There was no agreement between Mr. Renzella and Shelly that Shelly would install drainage, construct a toe key or, construct a bench, or otherwise conform its activities to any engineering or construction standard. The activity performed by Shelly on the property was performed in accordance with the Waste Agreement and to Mr. Renzella's satisfaction. The evidentiary record simply does not create a genuine issue of material fact that Shelly breached a duty of care under the circumstances.

23. Finally, the court turns to Grisells' argument that summary judgment should be denied based upon the application of the evidentiary rule of *res ipsa loquitur*. The court finds the requirements of *res ipsa loquitur* have not been met by the evidentiary record.

24. "Pursuant to the evidentiary rule of *res ipsa loquitur,* it may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when (a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff." Syl. pt. 4, *Foster v. City of Keyser*, 202 W.Va. 1, 501 S.E.2d 165 (1997).

25. "It is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn. It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached." *Id.*, 202 W.Va. at 21, 501 S.E.2d at 185 (citation omitted). "In other words, the test set forth in *Foster* allows a trial court to make a preliminary determination that the evidence that a plaintiff intends to present is indeed circumstantial evidence that will lead to reasonable

inferences by the jury, and is not simply evidence which would force the jury to speculate in order to reach its conclusion." *Beatty v. Ford Motor Co*, 212 W.Va. 471, 476, 574 S.E.2d 803, 808 (2002); Syl. pt. 4, *Kyle v. Dana Transport, Inc.*, 220 W.Va. 714, 649 S.E.2d 287 (2007).

26. The doctrine of *res ipsa loquitur* does not "dispense with the requirement that negligence must be proved by him who alleges it." *Beatty*, 212 W.Va. at 476, 574 S.E.2d at 808 (quoting *Peneschi v. Nat'l Steel Corp.*, 170 W.Va. 511, 520, 295 S.E.2d 1, 10 (1982)). "'The doctrine of *res ipsa loquitur* cannot be invoked where the existence of negligence is wholly a matter of conjecture and the circumstances are not proved, but must themselves be presumed, or when it may be inferred that there was no negligence on the part of the defendant. The doctrine applies only in cases where defendant's negligence is the only inference that can reasonably and legitimately be drawn from the circumstances.' Syl. pt. 5, *Davidson's, Inc. v. Scott,* 149 W.Va. 470, 140 S.E.2d 807 (1965)." Syl. pt. 2, *Farley v. Meadows,* 185 W.Va. 48, 404 S.E.2d 537 (1991); Syl. Pt. 5, *Kyle v. Dana Transport, Inc.*, 220 W.Va. 714, 649 S.E.2d 287 (2007).

27. "In order to avoid summary judgment or judgment as a matter of law, a plaintiff who seeks to proceed on a theory of *res ipsa loquitur* must demonstrate each of the three prongs of the test this Court adopted in syllabus point four of *Foster v. City of Keyser,* 202 W.Va. 1, 501 S.E.2d 165 (1997), as a predicate to application of the evidentiary rule of *res ipsa loquitur.*" Syl. pt. 6, *Kyle v. Dana Transport, Inc.*, 220 W.Va. 714, 649 S.E.2d 287 (2007).

28. The court finds the evidentiary record fails to create a genuine issue of material fact that the July 28, 2017 slip, which occurred in the context of a rainstorm that dropped approximately 4 inches of rain on property that had multiple cracks that were as wide as a pencil and in some instances 5-30 feet long is of a kind which ordinarily does not occur in the absence of negligence and, as such, the Grisells have failed to satisfy the first prong of *res ipsa loquitur*. The Grisells

have not produced a competent witness who is prepared to testify at trial that the slip involves an incident that ordinarily does not occur in the absence of negligence. Without such testimony, the jury would be left to speculate that the incident is of a kind which ordinarily does not occur in the absence of negligence, which is impermissible as a matter of law.

29. The court further finds the evidentiary record fails to create a genuine issue of material fact that other responsible causes for the slip, including the conduct of third persons, are sufficiently eliminated by the evidence and, as such, the Grisells have failed to satisfy the second prong of *res ipsa loquitur*. The uncontroverted evidence is that voluminous amounts of fill material had been delivered and dumped at the property by other entities prior to Shelly delivering Materials under the Waste Agreement. Prior to Shelly performing any activities under the Waste Agreement, the area of the property in question already had fill material in place that spanned an area of 100 feet wide, 100 feet long, and 15 feet deep that consisted of trees, shrubs, grass, concrete blocks, and concrete slabs. The Grisells failed to develop an evidentiary record that sufficiently eliminates the conduct of other entities as being the cause of the July 28, 2017 slip.

30. At the December 13, 2021 hearing, the court raised the issue of whether the Grisells had a viable cause of action for breach of the Waste Agreement such that the Grisells could be granted leave to file an amended complaint to assert a breach of contract claim. The court directed the parties to brief the issue of whether the gist of the action against Shelly lies in tort or in contract.

31. The court finds, based upon the evidentiary record and as a matter of law, the Grisells do not have a cause of action against Shelly based in contract. The court observes that the Grisells took the position in their supplemental brief that they do not have a cause of action against Shelly based in contract.

32. The court observes that in *Dan Ryan Builders, Inc. v. Crystal Ridge Development, Inc.*, 783 F.3d 976 (4th Cir. 2015), the United States Court of Appeals for the Fourth Circuit addressed the issue of whether the alleged legal duty of a defendant sounds in tort or in contract:

> "To prevail in a negligence suit, the plaintiff must prove by a preponderance of the evidence that the defendant owed a *legal duty* to the plaintiff." *Strahin v. Cleavenger*, 216 W.Va. 175, 603 S.E.2d 197, 205 (2004) (emphasis added). Under the "gist of the action" doctrine, a party to a contract can prevail on a negligence claim only if he can demonstrate "the breach of some positive legal duty imposed by law because of the relationship of the parties, rather than from a mere omission to perform a contract obligation." *Lockhart*, 567 S.E.2d at 624 (internal quotation marks and citation omitted).[6] In other words, the negligence "action in tort [must] arise independent of the existence of the contract." *Id.* (internal quotation marks and citation omitted). "If the action is not maintainable without pleading and proving the contract, where the gist of the action is the breach of the contract, either by malfeasance or non-feasance, it is, in substance, an action on the contract, whatever may be the form of the pleading." *Cochran v. Appalachian Power Co.*, 162 W.Va. 86, 246 S.E.2d 624, 628 (1978) (internal quotation marks and citation omitted).

Dan Ryan Builders, 783 F.3d at 981. Footnote 6 to the above passage states:

> This requirement - - that a tort claim must rest on a non-contractual duty - - is hornbook law in most jurisdictions, even if they do not employ the "gist of the action" nomenclature. *See Black's Law Dictionary* (10th ed.2014)(defining "tort" as "[a] civil wrong, other than breach of contract, for which a remedy may be obtained, ... a breach of a duty that the law imposes"); Restatement (Third) of Torts: Liab. for Econ. Harm § 3 (Tentative Draft No. 1, 2012) (explaining the general rule that "there is no liability in tort for economic loss caused by negligence in the performance or negotiation of a contract between the parties").

Id.

33. Under West Virginia law, a recovery in tort will be barred by the "gist of the action" doctrine "when any of the following factors is demonstrated:

> 1) where liability arises solely from the contractual relationship between the parties; (2) when the alleged duties breached were grounded in the contract itself; (3) where any liability stems from the contract; and (4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim."

Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP, 231 W.Va. 577, 586, 746 S.E.2d 568, 577 (2013) (internal citations omitted).

34. The court agrees with the Grisells and finds there is no privity of contract between the Grisells and Shelly. Shelly's activities on the property were performed under a contract entered into between Shelly and the Renzellas; there was never a contract entered into between Shelly and the Grisells.

35. The court finds the Grisells cannot sue under the Waste Agreement as third party beneficiaries because the Waste Agreement contains no language, specific or general, identifying the Grisells as third party beneficiaries. *See Robinson v. Cabell Huntington Hosp., Inc.*, 201 W.Va. 455, 456, 498 S.E.2d 27, 32 (1997)(In order for a contract to "give rise to an independent cause of action in [a] third party, [the contract] must have been made for the third party's sole benefit."); *see also Woodford v. Glenville State College Hous. Corp.*, 159 W.Va. 442, 448, 225 S.E.2d 671, 674 (1976); *Ison v. Daniel Crisp Corp.*, 146 W.Va. 786, 122 S.E.2d 553, 556-557 (1961).

36. The court further finds the Grisells cannot sue under the Waste Agreement as assignees. The Grisells do not claim to be assignees to the Waste Agreement and, in fact, the Grisells assert they did not become aware of the Waste Agreement until after suit was filed.

37. Even if the court was inclined to find the Grisells have standing to sue Shelly in contract based upon the Waste Agreement, the Grisells would "stand in the shoes" of Mr. Renzella and would not have any greater rights under the Waste Agreement than the rights possessed by Mr. Renzella. *See e.g.*, Syl. pt. 4, *TD Auto Fin. LLC v. Reynolds*, 243 W.Va. 230, 842 S.E.2d 783 (2020)(assignment); Syl. pt. 10, *Lightner v. Lightner*, 146 W.Va. 1024, 124 S.E.2d 355 (1962)(assignment).

Under such a scenario, the court nevertheless finds the evidentiary record fails to create a genuine issue of material fact that Shelly breached a duty of care imposed by the Waste Agreement and as such Shelly is entitled to summary judgment as a matter of law[3].

38. The Grisells contend that Shelly breached a duty of care owed to the Grisells by failing to install sufficient drainage to carry water from the area where the fill was installed on the property, blocking drains and culverts with fill, and/or failing to install a toe key or benching, which resulted in the ground becoming saturated and resultant instability of the slope until the slope failed. The court disagrees.

39. The court finds the evidentiary records fails to create a genuine issue of material fact that Shelly caused Materials to cover a natural fresh water spring and/or block drains and culverts so as to create a condition that proximately caused the July 28, 2017 slip. The record is devoid of testimony from a competent witness who can testify that Shelly's activities on the property covered the spring, blocked drains, or blocked culverts. The Grisells can only offer speculation, which is legally insufficient to defeat summary judgment.

As for Mr. Rogers, he testified at his discovery deposition that he will not offer opinion testimony at trial that Shelly is responsible for the slip occurring. Even if the court sets that testimony aside and focuses upon the Designation of Expert Witness and Mr. Rogers' post-deposition Affidavit, the court finds Mr. Rogers' disclosures fail to create a genuine issue of material fact to defeat summary judgment. The evidentiary record clearly demonstrates that Shelly never undertook a duty to construct a toe key or a bench. Similarly, the evidentiary record clearly demonstrates that Shelly never undertook a duty to construct drainage for the slope; at most, Mr.

[3] In their supplemental brief, the Grisells stated the evidence to be presented as part of a breach of contract claim is "essentially identical to that which has been presented in the case to date." The Grisells did not identify any additional discovery that would need to be conducted in support of a breach of contract claim as required by Rule W.Va.R.C.P. 56(f).

Renzella directed Mr. LePage to place rocks to direct the water away from the slope down to the ditch line, which Mr. LePage did to Mr. Renzella's approval and satisfaction.

40. The court finds the uncontroverted evidence and testimony demonstrates Mr. Renzella was only interested in having Shelly deliver and dump Materials on the property, level up the waste site, and grade the slope, to be performed at no cost to Mr. Renzella. There was no agreement between Mr. Renzella and Shelly that Shelly would install drainage, construct a toe key, construct a bench, or otherwise conform its activities to any engineering or construction standard. The activity performed by Shelly on the property was performed in accordance with the Waste Agreement and to Mr. Renzella's satisfaction. The evidentiary record simply does not create a genuine issue of material fact that Shelly breached the Waste Agreement.

41. Finally, the court finds that even if the evidentiary record did create a genuine issue of material fact that Shelly breached the terms of the Waste Agreement, nevertheless summary judgment is required on the grounds the Waste Agreement includes exculpatory language - - Shelly has "no responsibility for damages or diminution in value resulting to the Premises by reason of (a) [Shelly's] normal operations upon the Premises, or (b) the consequences of the placement of the Materials upon the Premises" - - that is valid and enforceable and fatal to a breach of contract claim.

42. "A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." Syl. pt. 1, *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W.Va. 484, 128 S.E.2d 626 (1962)

43. "Generally, in the absence of an applicable safety statute, a plaintiff who *expressly* and, under the circumstances, *clearly* agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct may not recover for such harm, unless the agreement is invalid as contrary to public policy". *See Murphy v. N. Am. River Runners, Inc.*, 186 W.Va. 310, 314-315, 412 S.E.2d 504, 508-509 (1991) (citations omitted) (emphasis in the original). "When such an express agreement is freely and fairly made, between parties who are in an equal bargaining position, and there is no public interest with which the agreement interferes, it generally will be upheld." *Id.*, 186 W.Va. at 315, 412 S.E.2d at 509.

44. An agreement exempting a party from tort liability is unenforceable on grounds of public policy if (1) the clause exempts a party charged with a duty of public service from tort liability to a party to whom that duty is owed, or (2) the injured party is similarly a member of a class which is protected against the class to which the party inflicting the harm belongs. *See Murphy*, 186 W.Va. at 315, 412 S.E.2d at 509 (1991) (citation omitted).

45. The court finds the clear and unambiguous language of the Waste Agreement establishes that Mr. Renzella agreed to accept the dumping and placement of Materials as performed by Shelly and agreed to relieve Shelly of any responsibility for damages or diminution in value resulting to the property. To the extent the Grisells have standing under the Waste Agreement, the Grisells stand in the shoes of Mr. Renzella and are bound to the language of the Waste Agreement. The court finds there is no aspect of the evidentiary record that could be offered in support of a claim under the Waste Agreement that falls outside the scope of the exculpatory language. The court further finds the exculpatory language does not violate public policy as Shelly was not charged with a duty of public service to the Grisells nor are the Grisells a member of a statutorily protected class.

III. ORDER OF COURT

For the reasons set forth by the Court, it is hereby **ORDERED** Defendant, Shelly & Sands, Inc.'s Motion for Summary Judgment be and hereby is **GRANTED** and the *Amended Complaint* is **DISMISSED WITH PREJUDICE.**

The exceptions and objections of the parties are noted and preserved.

The Clerk of this Court shall, in accord with W.Va. R.Civ.P. 77(d), transmit a copy of this Order to: **Adam M. Barnes, Esq.,** 2100 Corporate Drive, Suite 300, Wexford, PA 15090; and **Eric M. Gordon, Esq.,** 514 7th Street, Moundsville, WV 26041; and to all counsel of record and any and all unrepresented (pro se) parties who have appeared in this action.

Dated: April 5, 2022

Honorable David W. Hummel, Jr.
Circuit Court Judge