IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 22-0341

ELLIOTT GRISELL and LORRI GRISELL
Plaintiffs Below, Petitioners,

vs.

SHELLY & SANDS, INC.,
Defendant Below, Respondent.

Appeal from a Final Order of the Circuit Court of Marshall County (Docket No. 19-C-187)

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

Petitioners, Elliott Grisell and Lorri Grisell, appeal from the April 5, 2022 Order of the Honorable Judge David W. Hummel, Jr. of the Circuit Court of Marshall County granting the Motion for Summary Judgment of the Respondent, Shelly & Sands, Inc. Petitioners identify two (2) purported errors in Judge Hummel's reasoning and decision. First, they assert that Judge Hummel erred in declining to apply Syllabus Pt. 3 of *Sewell v. Gregory,* 179 W. Va. 585, 371 S.E.2d 82 (1988) for purposes of finding that Respondent owed a duty to Petitioners, the subsequent purchasers of property upon which Respondent had previously placed certain fill material at the request of the prior owner. Second, to the extent that Judge Hummel was amenable to recognizing the existence of a duty, he nevertheless erred in concluding that the record evidence did not establish a breach of said duty by Respondent.

By way of background, Petitioners own property located at 215 Julie Court, Glen Dale, Marshall County, West Virginia 26038. Petitioners acquired the property, which consists of several parcels totaling approximately 6.7 acres, from Alfred Renzella and Susan Renzella by deed dated September 27, 2016. Beginning in June of 2017, Petitioners detected "pencil-wide cracks" extending across an area of the property where fill material had been placed several years earlier. Then, on July 28, 2017, during an unusually heavy rain event, the area of the property where the fill material was present became saturated and slipped downhill, with some of the fill material encroaching upon neighboring property. Petitioners allege that the slide was due to improper placement of fill material, such that it covered a freshwater spring and also blocked existing drains and/or culverts designed to capture water runoff, directly resulting in saturation and slippage.

The fill material in question had been sourced from "The Narrows" in Marshall County, where the West Virginia Department of Transportation, Division of Highways[1] had commissioned a highway improvement project some years earlier. Respondent was the contractor retained to perform some or all of the work on the project. Learning of the project and desirous of fill material, Mr. Renzella went to Respondent's office in Glen Dale in April of 2012, at which time he met with Respondent's foreman, Terry LePage, and discussed an arrangement whereby Respondent would deposit fill material on his property. (App'x Pgs. 354-55). Respondent agreed to do so at no cost to Mr. Renzella. (App'x Pg. 377). The details of the arrangement were memorialized in a "Waste Agreement" executed on April 16, 2012.

The Waste Agreement stated that Respondent "conducts certain excavating and demolition operations, and as a result thereof, creates certain surplus excavation and demolition materials ('Materials') which [it] desires to dispose of." (App'x Pg. 15). The Waste Agreement further stated that "[Mr. Renzella] owns certain real estate upon which [he] desires Materials to be deposited, in order to improve the aesthetic value and terrain thereof." (Id.). Pursuant to the Waste Agreement, Respondent was expressly authorized to deposit upon Mr. Renzella's property "all materials of whatever form, content or nature encountered by [it], in the performance of its project excavation and demolition operations." (Id.). Respondent also agreed to "level up waste site + grade slope." (Id.). The Waste Agreement did not require Respondent to design or engineer an expansion of Mr. Renzella's property; nor did it require Respondent to construct any toe keys or benches, or to undertake any other measures to stabilize the property. Lastly, the Waste Agreement contained an exculpatory clause stating: "[Respondent] shall have no responsibility for damages

[1] The West Virginia Department of Transportation, Division of Highways was brought into this action as a party when Petitioners filed an Amended Complaint. However, it was ultimately dismissed from this action when its unopposed Renewed Motion to Dismiss was granted on January 5, 2022.

or diminution in value resulting to the Premises by reason of (a) [its] normal operations upon the Premises, or (b) the consequences of the placement of the Materials upon the Premises." (Id.).

Contemporaneous with entering into the Waste Agreement, Mr. LePage visited the property. Mr. LePage observed firsthand that fill material had already been placed on the property covering an area spanning 100 feet wide by 100 feet long and with a depth of approximately 15 feet. (App'x Pg. 363). Mr. Renzella advised that the fill material, which consisted of trees, shrubs, grass, concrete blocks, and concrete slabs, had been placed by the City of Glen Dale and the Marshall County School District. (App'x Pgs. 363, 368). It seems these entities may have continued to place some fill material on the property during the timeframe in which Respondent began placing fill material. (Id.). However, this was separate and apart from Respondent's activities and Respondent had no responsibility under the Waste Agreement for the fill material placed by these entities.

According to Mr. LePage, Mr. Renzella was anything but particular when it came to the form, content, or nature of the fill material placed on his property. However, he was particular about where it was placed. (App'x Pgs. 367, 377). Respondent, therefore, placed the fill material exactly where Mr. Renzella directed and then leveled and graded the fill material. (Id.). Mr. Renzella raised no objections and approved of the fill material, its placement, and the leveling and grading of the same. (App'x Pgs. 377-79). Importantly, Respondent was not directed to and did not cover, block, or in any manner or to any degree obstruct or interfere with existing drains and/or culverts located on the property. (App'x Pg. 378).

Petitioners make an issue of Mr. LePage's acknowledgement that he, at some point, observed water flowing from the toe of the area where the fill material was placed, and, moreover, that he recognized that this could potentially "be an issue over time." (App'x Pgs. 368-69).

However, Mr. Renzella was himself aware of this, and, at Mr. Renzella's specific request and direction, Respondent placed rocks in the area to filter and channel the water to a nearby ditch. Mr. Renzella approved of this work after it was completed, as it was done in conformity with Mr. Renzella's wishes. (App'x Pgs. 368-69, 378). Indeed, at the conclusion of all of Respondent's activities, Mr. Renzella expressed his satisfaction. (App'x Pg. 379).

As noted above, Petitioners purchased the property in 2016. Prior to the purchase, Mr. Renzella informed Petitioners that fill material had been placed on the property. (App'x Pgs. 228-29). Mr. Renzella represented to Petitioners that he had personally overseen and directed the work and that it was done properly. (Id.). Petitioners then retained John Hart of J&R Excavating, arranging for him to inspect the area and to offer an opinion as to the suitability of the area for eventual construction of either a garage or a swimming pool. (App'x Pgs. 230-31). The results of Mr. Hart's inspection did not impart any concerns to Petitioners, and so Petitioners proceeded with purchasing the property. (App'x Pg. 232). Not long after purchasing the property, Petitioners noticed pencil-wide cracks forming in the surface of the area where fill material had been placed. Then, on July 28, 2017, after several inches of rain fell overnight, the area became saturated and slipped.

Petitioners filed a Complaint on July 22, 2019, followed by the filing of an Amended Complaint on August 26, 2019, wherein they alleged that Respondent placed the fill material in a negligent manner in placing the same over a freshwater spring, while also blocking existing drains and/or culverts designed to capture water runoff. Petitioners' theory of liability was and is predicated on Petitioners' insistence that Respondent owed and breached a duty to them to place the fill material on the property consonant with the reasonable and customary standards of a contractor and in a manner fit for the particular purpose for which it was placed on the property.

Following the close of pleadings, discovery ensued, during which written discovery requests and responses were exchanged and documents were produced, including the Waste Agreement. Petitioners, who were obviously not party to the Waste Agreement, have denied prior knowledge of it.[2] Discovery also included depositions of both Petitioners and Mr. LePage, as well as Petitioners' designated expert witness, Stephen Rodgers. Petitioners, for their part, conceded during their depositions that they had not personally witnessed any of Respondent's work and, therefore, could not testify with personal, firsthand knowledge that Respondent actually covered a freshwater spring and blocked existing drains and/or culverts with fill material. (App'x Pgs. 263-64, 326-27). As for Mr. Rogers, notwithstanding certain representations to the contrary in Petitioners' expert witness designation and a later affidavit, he testified at his deposition that he would not be offering any opinions respecting the cause of the slip, including whether any alleged acts or omissions on the part of Respondent caused and/or contributed to causing the slip. (App'x Pgs. 399-400).

After discovery concluded, Respondent filed a Motion for Summary Judgment and Memorandum of Law in Support of Motion for Summary Judgment. Respondent argued that it owed no duty, common law or contractual, to Petitioners, as subsequent purchasers of the property. In the alternative, and assuming strictly for the sake of argument that a duty was owed, Respondent

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[2] Petitioners, in the "Statement of the Case" section of their Brief, allude to the Waste Agreement not having been recorded with the Office of the Clerk of Marshall County Commission. In a footnote, Petitioners state their belief that the exculpatory clause set forth in the Waste Agreement is "unenforceable" given the lack of recording. In the same footnote, Petitioners identify statutes that purportedly support their position, although Petitioners do not elaborate. Nor do Petitioners revisit this issue in the "Argument" section of their Brief. This Court has on many occasions reminded both petitioners and respondents that failing to adequately brief an issue results in waiver of the same. *See State v. LaRock,* 196 W.Va. 294, 302, 470 S.E.2d 613, 621 (1996) ("Although we liberally construe briefs in determining issues presented for review, issues . . . mentioned only in passing . . . are not considered on appeal."); *see also Carr v. Veach*, 244 W. Va. 73, 78, 851 S.E.2d 519, 524 (2020) ("A skeletal 'argument,' really nothing more than an assertion, does not preserve a claim. . . . Judges are not like pigs, hunting for truffles buried in briefs."). As such, Respondent submits that any issue regarding the validity and/or enforceability of the exculpatory clause that Petitioners might be attempting to raise in this appeal is not properly before this Court.

argued that discovery had failed to produce any evidence creating a genuine issue of material fact that Respondent placed fill material that covered a freshwater spring or blocked existing drains and/or culverts.

Petitioners filed a Response opposing Petitioners' Motion for Summary Judgment, citing Syllabus Pt. 3 of *Sewell v. Gregory,* 179 W. Va. 585, 371 S.E.2d 82 (1988) as establishing a duty flowing from a contractor to a subsequent purchaser to exercise reasonable care to protect the latter from latent defects. Respondent filed a Reply Brief illustrating the inapplicability of the rule announced in *Sewell* to this case.

The Motion for Summary Judgment was heard on December 13, 2021, after which Judge Hummel requested supplemental briefing on an issue not before this Court on appeal. Thereafter, on April 5, 2022, Judge Hummel handed down an Order granting Respondent's Motion for Summary Judgment. This appeal followed.

II. SUMMARY OF ARGUMENT

Respondent cannot be liable to Petitioners for negligence because Respondent did not owe a duty to Petitioners in the first instance. The decision rendered in *Sewell v. Gregory,* 179 W. Va. 585, 371 S.E.2d 82 (1988) articulates a duty owed by residential contractors to subsequent purchasers of a residence. The cases that cite to the *Sewell* decision, and in particular to Syllabus Pt. 3, do not expand its application to encompass the factual or legal scenario now before this Court. Simply put, the *Sewell* standard does not apply because it was not foreseeable to Respondent that its limited activities, which were performed pursuant to contract, at Mr. Renzella's request, and under Mr. Renzella's close guidance and personal oversight, would result in harm to subsequent purchasers such as Petitioners. Respondent did not agree to assume the risk of such harm and, in fact, the Waste Agreement relieved Respondent of all liability for such harm. Because

no legally cognizable duty flowed from Respondent to Petitioners, Petitioners' negligence claim fails and awarding summary judgment in Respondent's favor was appropriate and not done in error.

In the alternative, Respondent cannot be liable to Petitioners because it did not breach any duties owed to Petitioners and, consistent therewith, Petitioners have failed to meet their burden of proof of breach. Respondent agreed to place fill material of varied form, content, or nature upon Mr. Renzella's property, followed by leveling and grading the same. Respondent did not cover a freshwater spring or block any existing drains and/or culverts in the process. Petitioners cannot testify based on personal knowledge that Respondent covered a freshwater spring or blocked drains and/or culverts with fill material. Also, despite certain conclusions drawn by Petitioners' expert, Respondent was not asked to and did not agree to install toe keys or benches, or to design, engineer, and implement an expansion of the property. Respondent did what it was contracted to do. Nothing Respondent did, or did not do, effectuated a breach of any duty owed to Mr. Renzella or, more importantly, to Petitioners as subsequent purchasers. In the end, Petitioners offer not proof, but mere conjecture, which is insufficient to defeat summary judgment and advance to trial. Because there is no record evidence of a breach, and because a breach in fact did not occur, summary judgment was properly granted in favor of Respondent and should be affirmed on appeal.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent does not object to Petitioners' request for oral argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure. However, Respondent strenuously objects to Petitioners' position that oral argument is necessary because of an "error in settled law" committed by the Honorable Judge David W. Hummel, Jr. of the Circuit Court of Marshall County. On the

contrary, Judge Hummel correctly applied the law in concluding that Respondent neither owed nor breached any duty to Petitioners.

IV. ARGUMENT

A. Respondent Did Not Owe A Duty To Petitioners

Petitioners' claim against Respondent sounds in negligence. In order to succeed on their claim, Petitioners must prove the following by a preponderance of the evidence: (1) the existence of a duty owed; (2) a negligent breach of the duty owed; and, (3) that the negligent breach proximately caused damages. *See Wheeling Park Comm'n v. Dattoli*, 237 W. Va. 275, 280, 787 S.E.2d 546, 551 (2016). Regarding the first element, the question of whether or not a duty exists is a legal question that must be answered by the court rather than a jury. *See Aikens v. Debow,* 208 W.Va. 486, 490, 541 S.E.2d 576, 580 (2000) ("[T]he 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.").

In its Motion for Summary Judgment, Respondent argued (and Judge Hummel agreed) that no duty was owed to Petitioners as a matter of law. In opposing summary judgment, Petitioners cited to Syllabus Pt. 3 of *Sewell v. Gregory,* 179 W. Va. 585, 371 S.E.2d 82 (1988) as support for the existence of a duty, and they again invoke this as authority on appeal.

In *Sewell*, Paul Gregory constructed a single-family home and then almost immediately sold it to William and Beverly Toup. After only a few years, the Toups—with the assistance of Mr. Gregory, who served as the real estate agent in the transaction—sold the home to Arthur and Irma Sewell. Within a few months of moving in, a heavy rain event caused flooding in the home, resulting in extensive damage. The Sewells brought suit against Mr. Gregory, alleging negligence

in the design and construction of the home; strict liability for selling the house in a defective condition; and, breaches of warranties of habitability and fitness for a particular purpose. The Circuit Court dismissed the Sewells' claims based on want of privity of contract. *Id.* at 586-87, 83-84.

On appeal, this Court looked to decisions handed down by courts from a number of jurisdictions in which "the existence of a negligence cause of action against a contractor/builder by a subsequent purchaser" was recognized. Noting that "foreseeability" was the touchstone, this Court quoted with approval a decision of the Connecticut Supreme Court:

> The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised . . . . The test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?

Id. at 588, 85 (*quoting Coburn v. Lenox Homes*, 173 Conn. 567, 378 A.2d 599 (1977)). This Court then held:

> We hold that implied warranties of habitability and fitness for use as a family home may be extended to second and subsequent purchasers for a reasonable length of time after construction, but such warranties are limited to latent defects which are not discoverable by the subsequent purchasers through reasonable inspection and which become manifest only after purchase.

Id. at 589, 86. Viewing the facts of the case before it through the prism of this holding, this Court concluded that the Sewells' claims were colorable because Mr. Gregory "foresaw that there would be subsequent purchasers when he constructed the house . . . [and] [i]ndeed, he took economic advantage of that eventuality by acting as the real estate agent in the sale to the [Sewells]." *Id.*

Sewell involved a particular set of facts and circumstances that are easily distinguishable from the facts and circumstances of the present case. First, Mr. Gregory clearly had a duty to construct a home in compliance with designs, plans, specifications, and building codes.

Respondent did not construct a home for Petitioners. Rather, Respondent was requested to dump fill material at Mr. Renzella's request and direction. Respondent's work in this regard was dictated by the Waste Agreement, which limited the scope of that work to placing, leveling up, and grading the fill material.

Second, the home Mr. Gregory constructed, sold to the Toups, and then facilitated the sale of to the Sewells, was obviously subject to recognized warranties, including warranties of habitability and fitness for a particular purpose. No such warranties, express or implied, were created by the Waste Agreement. In fact, the Waste Agreement essentially disclaimed warranties through its inclusion of exculpatory language releasing Respondent of responsibility and liability for damages. Exculpatory clauses of this nature are presumed to be valid and enforceable as long as they are not unconscionable or in conflict with clearly established public policy. *See Murphy v. N. Am. River Runners, Inc.*, 186 W. Va. 310, 314-15, 412 S.E.2d 504, 509 (1991). The record is devoid of evidence that the exculpatory clause in the Waste Agreement was either unconscionable or offended public policy. Moreover, inasmuch as no warranties were afforded to Mr. Renzella by operation of the exculpatory clause, there existed no warranties capable of assignment to Petitioners. *See TD Auto Fin. LLC v. Reynolds*, 243 W. Va. 230, 239, 842 S.E.2d 783, 792 (2020) ("[A]n assignee gains nothing more, and acquires no greater interest than had his assignor.").

Third, whereas the Sewells were apparently unable to discover latent defects in the construction of the home, Petitioners were made aware of the fill material prior to purchase and enlisted a construction professional of their choice to inspect the property to Petitioners' satisfaction.

Fourth, Mr. Gregory had a vested pecuniary interest given his direct role in the sale of the home to the Sewells. Here, Respondent did not have such a vested pecuniary interest. Respondent did not solicit Mr. Renzella; instead, Mr. Renzella came to Respondent's office actively seeking out fill material. What is more, no money was exchanged between Mr. Renzella and Respondent.

All of these distinctions are vitally important, because they demonstrate that it was not foreseeable to Respondent that any harm would come to subsequent purchasers—namely, Petitioners—in doing exactly what it was asked to do by Mr. Renzella and agreed to do per the terms of the Waste Agreement.

Despite the numerous factual and legal distinctions, Petitioners request that this Court subscribe to an elastic reading of its holding in *Sewell* and apply it to this case. They insist that this Court has been willing to do so in other cases, such as *Eastern Steel Constructors, Inc. v. City of Salem*, 209 W. Va. 392, 549 S.E.2d 266 (2001). In *Eastern Steel*, Kanakanui Associates, a design professional, entered into a contract with the City of Salem to render engineering and architectural services and to create plans and specifications to be used in the construction of improvements to an existing sewer system. *Id.* at 395, 269. Eastern Steel, a contractor, prepared a bid based on the plans and specifications, which was accepted by the City. After it began its work, Eastern Steel experienced significant delays due to encountering subsurface rock conditions and underground utilities that had not be disclosed in the plans and specifications. The delays resulted in Eastern Steel suffering substantial economic losses, but no other damages. Although not party to the contract between Kanakanui and the City, Eastern Steel filed suit against Kanakanui, asserting claims sounding in negligence and—claiming third-party beneficiary status—breach of contract. Finding no duty owed to Eastern Steel, the Circuit Court granted summary judgment in favor of Kanakanui.

On appeal, this Court framed the issue with reference to the specific facts before it, tasking itself with answering a rather narrow question:

> [W]hether there exists [] a cause of action sounding in negligence whereby a construction contractor may recover damages for purely economic losses from a design professional (*e.g.*, architect or engineer) in the absence of a contract between the contractor and the design professional.

Id. at 396, 270. While this Court did cite to Syllabus Pt. 3 of *Sewell*, it devoted considerable discussion to its other precedents, while also surveying ample case law from other jurisdictions. *Id.* at 397-401, 271-275. This Court then stated:

> [W]e expressly hold that a design professional (*e.g.*, an architect or engineer) owes a duty of care to a contractor, who has been employed by the same project owner as the design professional and who has relied upon the design professional's work product in carrying out his or her obligations to the owner, notwithstanding the absence of privity of contract between the contractor and the design professional, due to the special relationship that exists between the two.

Id. at 401, 275. Critical to the holding was this Court's finding that a "special relationship exists between a design professional and a contractor," because,

> [T]he contractor must rely on design documents to calculate his or her bid and, if successful in bidding, to construct the project, and may be further subject to oversight by the design professional during actual construction of the project, [which] fulfills the requirement of the foreseeability of harm that would result from negligence on the part of the design professional.

Id.

Eastern Steel is as distinguishable as *Sewell* itself. The case centered on this Court's appreciation of the "special relationship" between a design professional and construction contractor, where the latter was entirely dependent upon the plans and specifications of the former, including for purposes of satisfying a project owner that both were beholden to. Certainly it was or should have been foreseeable to Kanakanui that its omissions would harm Eastern Steel and result in Eastern Steel incurring economic losses. In the present matter, no relationship, special or

ordinary, existed between Respondent and Petitioners. Respondent's relationship was with Mr. Renzella and any duties attendant thereto, which were narrowly defined by the Waste Agreement, were fulfilled by Respondent. Indeed, if any duty existed as to Petitioners, that duty ran from Mr. Renzella to Petitioners.

Petitioners also cite to *Wal-Mart Stores East, L.P. v. Ankrom*, 244 W. Va. 437, 854 S.E.2d 257 (2020), in which a shoplifter in a Wal-Mart who was fleeing store personnel collided with and seriously injured Johna Ankrom. Ms. Ankrom filed suit against Wal-Mart and, following a jury trial, obtained a sizeable verdict. Wal-Mart's motion for a new trial was denied, whereupon it filed an appeal, specifically arguing that it did not owe a duty to Ms. Ankrom. This Court cited to Syllabus Pt. 3 of *Sewell* for the principal that "foreseeability is key when determining whether a particular actor operates under a duty of care." *Id.* at 448, 268. This Court then rejected Wal-Mart's arguments that it did not owe a duty to Ms. Ankrom based on (1) the so-called shopkeeper's privilege found in West Virginia Code § 61-3A-4 (1981), and (2) its employees' compliance with the store's policies on investigating and detaining shoplifters. *Id.* at 448-49, 268-69. The latter argument found no purchase with this Court because, at trial, the jury was presented with conflicting testimony as well as surveillance footage that this Court believed permitted the jury to conclude that Wal-Mart exposed Ms. Ankrom to a "foreseeable high risk of harm in the course of apprehending [the shoplifter], and, therefore, Wal-Mart owed a duty to Ms. Ankrom to protect her from his criminal conduct." *Id.* at 450, 270.

The scenario in *Wal-Mart Stores East, L.P.*, a premises liability case, is radically different from that in the present case. Naturally it was or should have been foreseeable to Wal-Mart that one of its paying customers could get caught in the fray if its personnel were not properly trained in pursuing and detaining a shoplifter. Meanwhile, no parallels can be drawn between the

straightforward transactional relationship of a retail store to its business invitee and a contractor and subsequent purchaser of property where fill material was placed, leveled, and graded at the request of the former property owner and as contemplated by a written agreement.

Finally, Petitioners cite to *Gable v. Gable*, 245 W. Va. 213, 858 S.E.2d 838 (2021), wherein Ronald Gable filed suit against his daughter, Deborah Gable, after he stepped on a small ball on her front steps, fell, and was injured. The Circuit Court dismissed Mr. Gable's Complaint on the grounds that he had not pled that he was not a trespasser and that the condition was not open and obvious. On appeal, this Court reversed, stating emphatically that a plaintiff need not anticipate and plead around potential defenses. *Id.* at 850. This Court, as it did in *Wal-Mart Stores East, L.P.*, then quoted Syllabus Pt. 3 from *Sewell* for the proposition that "foreseeability of an injury is dispositive of the duty owed." *Id.* at 851. This Court devoted much of the remainder of its opinion to the issue before it, which was the duty owed to a "typical visitor" in a premises liability action, including in its discussion notions of implied license and permissible visitation. *Id.* at 850-52. *Gable* is distinguishable for the same reasons as *Wal-Mart Stores East, L.P.* That is, it is a classic premises liability case where a duty between a homeowner and visitor has long-been recognized. There simply is no merit to a claim that Respondent owed the same or even a similar duty to Petitioners.

Summary judgment was properly granted in favor of Respondent because there was and is no genuine issue of material fact that no duty was owed by Respondent to Petitioners. Respondent contracted with Mr. Renzella, thereby agreeing at no charge to transport and deposit fill material of whatever form, content, or nature upon his property, followed by leveling and grading the same, and no more. Respondent did precisely this, at Mr. Renzella's request and under his direction. It was not foreseeable to Respondent that the limited activities it performed on Mr. Renzella's

property might later result in harm to subsequent purchasers of the property—a risk Respondent never assumed and for which it was actually released. Accordingly, Respondent respectfully requests that this Court affirm Judge Hummel's ruling that Respondent did not owe a duty to Petitioners, thus entitling it to summary judgment.

B. Respondent Did Not Breach A Duty Owed To Petitioners

As an alternative basis for summary judgment, Respondent argued below that it had not committed a breach of a duty owed to Petitioners. Breach, of course, is an element as essential as duty when it comes to making out a claim for negligence.

> 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.

Parsley v. General Motors Acceptance Corp., 167 W.Va. 866, 870, 280 S.E.2d 703, 706 (1981). Respondent contended that it was not culpable of any act or omission in violation of a duty owed to Petitioner. This contention was bolstered by Petitioners' failure to adduce competent evidence of a breach attributable to Respondent. Respondent's position, which Judge Hummel adopted, was that Petitioners' failure in this regard rendered them incapable of identifying a genuine issue of material fact sufficient to overcome summary judgment and to have their claim heard by a jury.

As recounted above, Mr. Renzella came to Respondent's offices, requesting that construction debris from the highway improvement project underway in "The Narrows" be delivered to his property to serve as fill material. (App'x Pgs. 354-55). Respondent agreed and entered into a Waste Agreement with Mr. Renzella. (App'x Pg. 15). Neither Respondent nor Mr. Renzella paid or received any valuable consideration upon entering into the Waste Agreement. Further, and as confirmed by the Waste Agreement's reference to fill material of "whatever form, content or nature," Mr. Renzella was less concerned with quality and more concerned with

quantity, as he was interested in utilizing copious amounts of construction debris to fill a natural hollow on his property. (App'x Pg. 377). Beyond providing the fill material, Respondent agreed to level and grade it in order to create a slope. (App'x Pg. 15). Respondent agreed to nothing more.

Respondent's foreman, Mr. LePage, testified that when he first visited Mr. Renzella's property, he discovered that a substantial amount of fill material had already been placed on the property by the City of Glen Dale and the Marshall County School District. (App'x Pgs. 363, 368). He observed that the area was expansive and that the fill material placed by these entities was heterogeneous in composition, consisting as it did of trees, shrubs, grass, concrete blocks, concrete slabs, and more. (Id.). While it seems these entities may have continued to place some fill material, it was never Respondent's responsibility to oversee their activities or exercise quality control over the fill material they placed. Also, these entities' activities occurred under an altogether separate agreement that Mr. Renzella presumably entered into with them—not the Waste Agreement that Mr. Renzella had entered into with Respondent. Lastly, Petitioners have never been able to refute that, objectively speaking, the fill material placed by these other entities may have covered up a freshwater spring or blocked existing drains and/or culverts *before* Respondent placed any fill material at all on the property.

After Respondent did begin transporting fill material to the property, Mr. Renzella assumed an active role, instructing Respondent where to place the fill material. (App'x Pgs. 367, 377). As Mr. LePage testified, at no point did Respondent place fill material in an area or in a manner such as to block any existing drains and/or culverts. (App'x Pg. 378). This makes sense insofar as Respondent was adhering to Mr. Renzella's directives and certainly Mr. Renzella would not have requested that fill material be placed in a way that would interfere with or obstruct existing drains

and/or culverts. By that same token, it defies reason that Mr. Renzella would request (or acquiesce in) the placing of fill material over a freshwater spring.

In the course of his deposition, Mr. LePage testified that he noticed some water flowing from the toe of the area where the fill material was being placed. Because he understood that this could present an issue in the future, Mr. LePage brought the situation to Mr. Renzella's attention. (App'x Pgs. 368-69). To address the issue, Mr. Renzella requested and directed Respondent to place rocks in the area to filter the water and manage its flow to a nearby ditch. Mr. Renzella was satisfied with Respondent's specific efforts in this regard and, moreover, with Respondent's overall efforts in placing, leveling, and grading fill material. (App'x Pgs. 368-69, 378-79).

Mr. Renzella eventually placed his property on the market. To his credit, Mr. Renzella fully disclosed to Petitioners that fill material had been placed on the property, assuring them that the work had been done properly. (App'x Pgs. 228-29). To their credit, Petitioners did not simply take Mr. Renzella at his word. Petitioners hired an independent excavator who came to the property and inspected the area where the fill material had been placed, leveled, and graded. (App'x Pgs. 230-31). The excavator's assessment did not give Petitioners' pause, and so they moved ahead with purchasing the property. (App'x Pg. 232). Thereafter, the slip figuring in this litigation occurred.

Petitioners pled in their Complaint and Amended Complaint that the slip occurred due to Respondent allegedly covering up a freshwater spring and blocking existing drains and/or culverts. In his deposition, Mr. LePage adamantly denied doing so. What matters more, though, is that both Petitioners were constrained to admit during their depositions that they lacked personal knowledge that Respondent actually did what they alleged. (App'x Pgs. 263-64, 326-27). Obviously, they were not present for and did not witness the placing, leveling, and grading of the fill material.

Consequently, they are not competent to testify at trial that Respondent engaged in any activities that covered a freshwater spring or blocked existing drains and/or culverts. *See West Virginia Rule of Evidence 602* ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter . . . ."). Petitioners also cannot rely on any other witness's testimony to prove these particular allegations because no such testimony was ever furnished. Quite simply, Petitioners can point to no record evidence to substantiate their allegations.

Undeterred by this, Petitioners insist that their expert, Mr. Rogers, is prepared to opine at trial that slippage in fact occurred because of what Petitioners allege—namely, the covering up of a freshwater spring and blockage of existing drains and/or culverts—as well as because of Respondent's failure to properly address the water flowing from the area's toe by installing toe keys or benches. However, Mr. Rogers stated unequivocally during his deposition that he was not being asked to offer any opinions at trial as to causation; he had only been asked to offer an opinion at trial on certain proposals for remediation of the property procured by Petitioners. (App'x Pgs. 399-400).

More importantly, it is indisputable that Respondent never agreed to and was not obligated to install toe keys or benches on the property. Mr. Renzella never asked Respondent to install these. Nor did Mr. Renzella ask or expect Respondent to design, engineer, create, or oversee the creation of an expansion of his property. Per the terms of the Waste Agreement, Respondent only agreed to place, level, and grade fill material. (App'x Pg. 15). Respondent agreed to no more and was obligated to do no more. Further, Mr. Renzella agreed to accept fill material of "whatever form, content or nature." (Id.). He also agreed that Respondent would bear no responsibility or

liability for any "damages or diminution in value" resulting from Respondent's activities or "the consequences of the placement of the Materials upon" his property. (Id.).

In the final analysis, Petitioners have no proof of what they allege. Neither they, their expert, nor any other witness can testify that Respondent covered up a freshwater spring, blocked existing drains and/or culverts, or failed to install toe keys or benches—the latter being something that did not fall within the parameters of what Respondent agreed to do in the Waste Agreement. Petitioners also have no documentary or tangible evidence, such as photographs or the like, that support and prove their allegations. Indeed, all Petitioners have is speculation and conjecture, which are legally insufficient to make out a genuine issue of material fact that a duty was breached so as to overcome summary judgment and get to trial. *See Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 61, 459 S.E.2d 329, 338 (1995) ("Unsupported speculation is not sufficient to defeat a summary judgment motion . . . .").

Thus, if this Court is of the opinion that a duty existed (which is denied), it should nevertheless affirm the grant of summary judgment on the grounds that that duty was not breached by Respondent, especially in view of Petitioners' failure to meet their burden of proof respecting breach.

V. CONCLUSION

As a matter of law, Respondent did not owe a duty to Petitioners. Alternatively, if Respondent did owe a duty, it did not breach that duty and this is reflected by the absence of evidence of a breach. As such, Petitioners have failed to demonstrate a genuine issue of material fact precluding summary judgment in Respondent's favor.

WHEREFORE, Respondent, Shelly & Sands, Inc., respectfully requests that this Honorable Court affirm the April 5, 2022 Order of the Honorable Judge David W. Hummel, Jr. of the Circuit Court of Marshall County granting Respondent's Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of **Respondent's Brief** has been served upon all counsel of record by U.S. Mail via first class mail, postage pre-paid, this 12th day of September, 2022:

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