IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA

DENISE ORSO,

Plaintiff,

v.

Civil Action No.: CC-23-2020-22
Honorable Miki Thompson

THE CITY OF LOGAN, WEST VIRGINIA, a municipal corporation, the FIRST BAPTIST CHURCH OF LOGAN, W.Va., a religious organization, and NEAL SCAGGS and WYATT SCAGGS, Trustees of the First Baptist Church of Logan, West Virginia,

Defendants.

ORDER GRANTING CITY OF LOGAN'S MOTION FOR SUMMARY JUDGMENT

On January 6, 2022 and on June 7, 2022, the parties appeared by counsel for a hearing on Defendant City of Logan's *Motion for Summary Judgment*. Upon consideration of the *Motion*, Plaintiff's *Response*, Defendant's *Reply*, argument presented on the same, and the applicable law, the Court finds and concludes as follows.

FINDINGS OF FACT

1. The Court finds that Plaintiff filed her *Complaint* on February 25, 2020, alleging that she tripped and fell while walking on a sidewalk along Stratton Street, Logan, West Virginia, on October 1, 2018.[1] Specifically, Plaintiff states she tripped on a "loop of cable wire which was loosely wrapped around a nearby post."[2]

[1] Compl. ¶ 4.
[2] *Id.* at ¶ 3.

2. Plaintiff alleges that the City negligently and carelessly maintained the sidewalk, allowing the loop, "a virtual snare," to lay on the sidewalk where persons walked.[3] Plaintiff alleges that the City was negligent for allowing the "defective condition of a sidewalk" to exist in violation of W. Va. Code § 17-10-17.[4] Plaintiff asserts a negligence claim against the City.

3. The Court finds that Plaintiff alleges she has undergone orthopedic surgery, physical therapy, and has lost wages. Plaintiff seeks damages for past and future medical costs and pain and suffering.[5]

4. It is undisputed that Plaintiff has worked in the Logan County Circuit Clerk's Office for ten years,[6] and since 2017 she takes walks around the block where the Courthouse is located, which includes walking past Defendant First Baptist Church.[7] She walks the same route two to three times every day, four to five times per week.[8]

5. The Court finds it undisputed that, on October 1, 2018, she walked this same route, past the First Baptist Church. She smoked a Marlboro Light as she walked.[9] She walked past the First Baptist Church once or twice without falling. On her second or third time walking past the Church during her lunchbreak,[10] three women approached, causing Plaintiff to walk to the right, toward the church.[11] As she spoke to the women and raised her hand, her right foot got caught in a wire loop and she fell.[12] Plaintiff testified that, before she fell, the wire was stretched out onto the sidewalk.[13]

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[3] *Id.* at ¶¶ 2–3.
[4] *Id.* at ¶ 2.
[5] *Id.* at ¶ 5.
[6] Pl's Test., Dep. Tr. 20, June 1, 2021, attached to Def's Mot. for Summ. J. as Ex. 1.
[7] *Id.* at 38–39, 46.
[8] *Id.* at 36, 38, 41.
[9] *Id.* at 43.
[10] *Id.* at 42, 44,
[11] *Id.* at 47–48.
[12] *Id.* at 48–49.
[13] *Id.* at 57.

6. It is undisputed that the wire loop was attached to a post at the entrance of the First Baptist Church parking lot on Stratton Street in Logan.[14] The First Baptist Church owned and controlled the post and the wire and would use it to block entry to its parking lot.[15] Plaintiff does not dispute the Church's ownership of the wire.[16] After October 1, 2018, the Church has removed the wire and replaced it with a yellow chain.[17]

7. According to the Defendant Church, the wire had been around the pole for at least ten years.[18] The Court finds it is undisputed that Plaintiff had passed by the wire numerous times since 2017. Plaintiff testified she did see the looped wire immediately before her fall.[19] Nothing obstructed Plaintiff's view of the wire, and her testimony shows that, had she looked earlier, she could have seen it.[20] The Court finds that, prior to Plaintiff's fall, the City had received no complaints and no notice of any hazard or danger posed by the wire.[21]

DISCUSSION & CONCLUSIONS OF LAW

Summary Judgment Standard

8. A party is entitled to summary judgment if the evidence, or lack of evidence, "show[s] that there is no genuine issue of material fact."[22] If the moving party shows no genuine

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[14] See picture attached to Def's Mot. for Summ. J. as Ex. 2 [Ex. 3 to Pl's Dep.] ; Plaintiff testified that the subject loop depicted in the picture, taken October 4, 2019, is not positioned the same way as when she fell. Pl's Test., Dep. Tr. 61–62, June 1, 2021, attached to Def's Mot. for Summ. J. as Ex. 1

[15] *See* Defendant First Baptist Church Answers to Pl's Ints. 2, 3, 5, and Answer to Request for Admission No. 1, attached to Def's Mot. for Summ. J. as Ex. ; Pl's Test., Dep. Tr. 70, attached to Def's Mot. for Summ. J. as Ex. 3;

[16] Pl's Test., Dep. Tr. 66, attached to Def's Mot. for Summ. J. as Ex. 1

[17] *See* picture attached to Def's Mot. for Summ. J. as Ex. 4 [Ex. 4 to Pl's Dep]; Defendant First Baptist Church Answers to Pl's Int. 6, attached to Def's Mot. for Summ. J. as Ex. 3; Pl's Test., Dep. Tr. 70, attached to Def's Mot. for Summ. J. as Ex. 1

[18] Defendant First Baptist Church Answers to Pl's Ints. 2, attached to Def's Mot. for Summ. J. as Ex. 3

[19] *Id.* at 137–138.

[20] Pl's Test., Dep. Tr. 56–57, 135 136, attached to Def's Mot. for Summ. J. as Ex. 1

[21] *See* Pl's Test., Dep. Tr. 56, attached to Def's Mot. for Summ. J. as Ex. 1; Marcum Test., Dep. Tr. 47–49, 52, Oct. 6, 2021, attached to Def's Mot. for Summ. J. as Ex. 7.; *see also* Defendant First Baptist Church Answers to Pl's Ints. 4, 5, 9, attached to Def's Mot. for Summ. J. as Ex. 3

[22] W. Va. R. Civ. P. 56.

issue of material fact, then the moving party is entitled to judgment as a matter of law.[23] "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."[24]

9. "Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove."[25] Summary judgment is a device designed to effect a prompt disposition of controversies on their merits without resorting to a lengthy trial if, in essence, there is no real dispute as to salient facts or if only a question of law is involved.[26]

10. It is not the Defendant's burden "to negate the elements of claims on which [plaintiff] would bear the burden at trial."[27] Rather, it is the Defendant's burden "only [to] point to the absence of evidence supporting [plaintiffs'] case."[28] When a motion for summary judgment is properly supported, the burden shifts to the opposing party to demonstrate that summary judgment is not appropriate.[29] To show that summary judgment is not appropriate, the opposing party, "must satisfy the burden of proof by offering more than a mere 'scintilla of evidence,' and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor."[30]

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[23] *Id.*
[24] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
[25] Syl. pt. 4, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).
[26] *Williams v. Precision Coil*, 194 W. Va. 52, 58, 459 S.E.2d 329 (1995).
[27] *Powderidge Unit Owners Ass'n v. Highland Props.*, Ltd, 196 W. Va. 692, 698-99, 474 S.E.2d 872, 879 (1996) (citation omitted).
[28] *Id.* at 699 (internal quotations and citations omitted).
[29] *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 60, 459 S.E.2d 329, 337 (1995).
[30] *Id.*

11. To meet their burden, plaintiffs "must identify specific facts in the record and articulate the precise manner in which that evidence supports [their] claims."[31] The *Precision Coil* Court further observed that, although a trial court considering a motion for summary judgment must view inferences from the underlying facts in the light most favorable to the party opposing summary judgment, it should consider only "reasonable inferences."[32] "The evidence illustrating the factual controversy cannot be conjectural or problematic."[33]

Immunity Overview

12. The Court finds and concludes that summary judgment is especially ripe for consideration because, as explained below, governmental immunity is involved, and the legal question of immunity must be decided at the earliest possible stage in litigation. The West Virginia Supreme Court has mandated "claims of immunities, where ripe for disposition, should be summarily decided before trial."[34]

13. The City of Logan is entitled to immunity under the West Virginia Tort Claims and Insurance Reform Act (Tort Claims Act) because the Plaintiff has failed to support a negligence claim under West Virginia law.

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[31] *Powderidge*, 196 W. Va. at 699, 474 S.E.2d at 879; *see also Precision Coil*, 194 W. Va. at 59, n. 9, 459 S.E.2d at 336, n. 9 (1995) (where the party opposing a motion for summary judgment fails to make a showing sufficient to establish the existence of an essential element of his or her case on which he or she will bear the burden of proof at trial, "Rule 56(e) mandates the entry of a summary judgment[.]").

[32] *Id.* at n. 10. ("We need not credit purely conclusory allegations, indulge in speculation, or draw improbable inferences. Whether the inference is reasonable cannot be decided in a vacuum; it must be considered 'in light of the competing inferences' to the contrary.").

[33] *Id.* at 60, 337.

[34] *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996) (quoting *see Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985)).

14. The City of Logan is a political subdivision as defined by the Tort Claims Act.[35]

Statutory immunity of a political subdivision is "governed exclusively by the West Virginia Tort Claims and Insurance Reform Act."[36] The Tort Claims Act exists

> to limit liability of political subdivisions and provide immunity to political subdivisions in certain instances and to regulate the costs and coverage of insurance available to political subdivisions for such liability. W. Va. Code § 29-12A-1 (1986). Considering these purposes, there is no basis for a finding that W. Va. Code § 29-12A-4(c) reduces a plaintiff's evidentiary burden in proving the negligence of a political subdivision under the statute.[37]

15. Specifically, under W. Va. Code § 29-12A-4 of the Tort Claims Act,

> Except as provided in subsection (c) of this section, a political subdivision **is not liable in damages in a civil action for injury**, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function[.][38]

Therefore, the City is immune from suit unless an exception provided in subsection (c) applies. Under subsection (c),

> (1) Except as otherwise provided in this article, political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent operation of any vehicle by their employees when the employees are engaged within the scope of their employment and authority.
>
> (2) Political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent performance of acts by their employees while acting within the scope of employment.
>
> (3) Political subdivisions are liable for injury, death, or loss to persons or property caused by their negligent failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political

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[35] W. Va. Code § 29-12A-3.

[36] *Bowden v. Monroe Cnty. Comm'n*, 232 W. Va. 47, 51, 750 S.E.2d 263, 267 (2013); *See also* W.Va. Code § 29-12A-1 *et seq.*

[37] *Dattoli*, 237 W. Va. at 282, 787 S.E.2d at 553 (internal quotations omitted).

[38] W. Va. Code § 29-12A-4(b)(1)(emphasis added).

> subdivisions open, in repair, or free from nuisance, except that it is a full defense to such liability, when a bridge within a municipality is involved, that the municipality does not have the responsibility for maintaining or inspecting the bridge.
>
> (4) Political subdivisions are liable for injury, death, or loss to persons or property that is caused by the negligence of their employees and that occurs within or on the grounds of buildings that are used by such political subdivisions, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility.
>
> (5) In addition to the circumstances described in subdivisions (1) to (4), subsection (c) of this section, a political subdivision is liable for injury, death, or loss to persons or property when liability is expressly imposed upon the political subdivision by a provision of this code. Liability shall not be construed to exist under another section of this code merely because a responsibility is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue and be sued.[39]

The Court concludes, under the Tort Claims Act, and because a political subdivision can only act through its employees, Plaintiff must prove that a City employee acted negligently.

16. To prove negligence, Plaintiff must establish that (1) Defendant owed the Plaintiff a duty of care; (2) Defendant breached said duty by failing to exercise ordinary care; (3) Defendant's breach caused the Plaintiff to be injured; and (4) that Plaintiff suffered damages as a result of Defendant's breach.[40] Under West Virginia law, traditional negligence and premises liability principles apply to political subdivisions under the Tort Claims Act. [41]Accordingly, the Court finds and concludes that the City is entitled to immunities under the Act unless Plaintiff shows by specific evidence that the immunities do not apply.[42]

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[39] W. Va. Code § 29-12A-4(c).
[40] *See Webb v. Brown & Williamson Tobacco Co.*, 121 W. Va. 115, 2 S.E.2d 898, 898 (1939) (emphasis added).
[41] *Wheeling Park Comm'n v. Dattoli*, 237 W. Va. 275, 282, 787 S.E.2d 546, 553 (2016) (the Tort Claims Act *does* "expressly provide that the traditional elements of negligence apply in actions brought for injuries incurred on the property of political subdivisions.").
[42] *See Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649, 657–658 (1996).

Ownership of the Subject Wire Loop

17. Under West Virginia law, "[t]he bare fact of an injury standing alone, without supporting evidence, is not sufficient to justify an inference of negligence. The burden is on the plaintiff to prove by a preponderance of the evidence that the defendant was negligent and that such negligence was the proximate cause of the injury."[43] "No action for negligence will lie without a duty broken," and a duty cannot be broken if it's not owed.[44] The West Virginia Supreme Court has held that "[T]*he 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."[45] In the premises liability context, if a defendant does not own or control the subject property causing injury, there can be no liability:

> "[I]n cases dealing with premises liability we have generally adhered to the principle that liability results either from control of the subject area or from a specific wrongful act." *Durm v. Heck's Inc.*, 184 W. Va. 562, 565, 401 S.E.2d 908, 910 (1991). In other words, "liability should be assessed against the party having control of the premises." *Id.* at 565, 401 S.E.2d at 910. "**[A] defendant [generally] cannot be held liable for a defective or dangerous condition of property which it does not own, possess or control[.]**" *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 710, 421 S.E.2d 247, 251 (1992), quoting *Southland Corp. v. Superior Court*, 203 Cal.App.3d 656, 664, 250 Cal.Rptr. 57, 61 (1988). *Accord Gover v. Mastic Beach Property Owners Association*, 57 A.D.3d 729, 869 N.Y.S.2d 593 (2008); *Contreras v. Anderson*, 59 Cal.App.4th 188, 69 Cal.Rptr.2d 69 (1997); 62 Am. Jur. 2d. Premises Liability § 4 (2005).[46]

Thus the Court finds and concludes that, under West Virginia law, a party owes no duty for any injury caused by a property condition he or she does not own or control.

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[43] *Walton v. Given*, 158 W. Va. 897, 902, 215 S.E.2d 647, 651 (1975); *See also Mrotek v. Coal River Canoe Livery, Ltd.*, 214 W. Va. 490, 492, 590 S.E.2d 683, 685 (2003).
[44] *Parsley v. Gen. Motors Acceptance Corp.*, 280 S.E.2d 703, 706 (W. Va. 1981)
[45] Syl. pt. 5, in part, *Aikens v. Debow*, 208 W. Va. 486, 541 S.E.2d 576 (2000); syl. pt. 4, in part, *Conley v. Stollings*, 223 W. Va. 762, 764, 679 S.E.2d 594, 596 (2009)
[46] *Conley v. Stollings*, 223 W. Va. 762, 766–67, 679 S.E.2d 594, 598–99 (2009) (emphasis added).

18. The Court finds it is beyond genuine dispute that the City does not own or control, and did not exert any ownership or control, over the subject wire loop. Mr. Kevin Marcum, the City's Steet Commissioner, testified:

> Q. Does the City own that wire, to your knowledge?
> A. No, sir.
> Q. Okay. Is that wire a part of the - of any City-owned property?
> A. No, sir.[47]

Again, it is undisputed that the Church owned and controlled the subject wire loop. The Church admits ownership,[48] and the Plaintiff posits the same:

> Q. All right. So you don't have any information that the City of Logan placed that wire there?
> A. I don't know who put that wire there. I would think that the church is the one that put the wire there.[49]

That the Church owned and controlled the wire is not only admitted by and undisputed by the parties, but also, the Court finds that the Church's actions in removing the wire and replacing the same with a chain demonstrates the Church's ownership and control. The Court finds and concludes that the City does not own or control the wire loop, and the City has never exerted any control over the wire loop.[50] Only the Church has. Therefore, the Court finds and concludes that the City cannot be liable to Plaintiff for the Plaintiff tripping over the Church's wire. The Court concludes that Plaintiff's negligence claim fails, and the City is entitled to immunity under the Tort Claims Act.

Whether Sidewalk was "Out of Repair"

19. The Court notes that, in Plaintiff's *Response* at § 1, Plaintiff argues that the sidewalk was "out of repair" under W. Va. Code § 17-10-17; in Plaintiff's *Response* at § II.B,

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[47] Marcum Test., Dep. Tr. 46, Oct. 6, 2021, attached to Def's Mot. for Summ. J. as Ex. 7.
[48] *See* Def. Church discovery responses, attached to Def's Mot. for Summ. J. as Ex. 3
[49] Pl's Test., Dep. Tr. 66, attached to Def's Mot. for Summ. J. as Ex. 1; *see id.* at 56.
[50] See Marcum Test., Dep. Tr. 49–50, 52:19–21, Oct. 6, 2021, attached to Def's Mot. for Summ. J. as Ex. 7.

however, Plaintiff states that the "instant case does not involve a construction or repair issue."[51] The Court finds that Plaintiff has pointed to no evidence that sidewalk was "out of repair." Rather, the undisputed evidence shows that Plaintiff was injured when she tripped on a wire loop owned and controlled by the Defendant Church. As the Court has found, the City cannot be liable as it did not own or control the wire loop.

20. The Court further finds and concludes that the case law cited by Plaintiff does not support her claim. The cases Plaintiff cites in her *Response* § I—*Smith*, *Burdick*, *Jones*, *Johnson*, *Waddell*, *Watkins*, *Bowen*, and *Lewis*—were decided in 1948, 1950, 1964, 1918, 1925, 1972, 1891, and 1969, respectively. The Court finds that the cases are distinguishable for the reasons stated in Defendant's *Reply*.[52]

21. The Court concludes that the Tort Claims Act took effect in 1986 and *Dattoli* was decided in 2016, which is in contrast with Plaintiff's outdated case law. W. Va. Code § 17-10-17 was enacted in 1933. The Court notes that Plaintiff's argument depends on an assumption that § 17-10-17 takes precedence over the Tort Claims Act. However, applying traditional tools of statutory construction, the "absolute liability" imposed by W. Va. Code § 17-10-17 and relied on by Plaintiff yields to the Tort Claims Act's immunity.[53] "Even if we believed there was conflict between the statutes, we would resolve such tension in favor of the more recent and specific statute."[54] "If . . . two statutes cannot be reconciled, the language of the more specific promulgation prevails. The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be

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[51] Pl's Resp. at page 5.
[52] Def's Reply at page 4.
[53] *See Fuller*, discussed *infra*.
[54] *State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 124 n.4, 464 S.E.2d 763, 766 (1995) See State ex rel. Simpkins v. Harvey, 172 W. Va. 312, 305 S.E.2d 268 (1983); RMLL Enters. v. Matkovich, No. 13-1275, 2014 W. Va. LEXIS 1087, at *5 (Oct. 17, 2014)

reconciled."[55] The Court finds and concludes that the Tort Claims Act is more recent and specific. The Act only allows liability for political subdivision in specific situations and otherwise provides immunity to political subdivisions.[56] The Court in *Dattoli* reiterated that the Tort Claims Act exists

> to limit liability of political subdivisions and provide immunity to political subdivisions in certain instances and to regulate the costs and coverage of insurance available to political subdivisions for such liability. W. Va. Code § 29-12A-1 (1986). Considering these purposes, there is no basis for a finding that W. Va. Code § 29-12A-4(c) reduces a plaintiff's evidentiary burden in proving the negligence of a political subdivision under the statute.[57]

As stated, statutory immunity and liability of a political subdivision are now specifically "governed exclusively by the West Virginia Tort Claims and Insurance Reform Act."[58] Thus, the Court finds and concludes that Plaintiff's reliance on outdated case law and reliance on a reading of W. Va. Code § 17-10-17 that conflicts with the Tort Claims Act does not support her claim or defeat Defendant's *Motion for Summary Judgment.*

City Ordinances

22. The Court finds and concludes that, under the City of Logan ordinances, the City is not responsible for and cannot be liable for sidewalk maintenance:

> Sec. 23-7.1. Duty of property owner.
> It shall be the duty of the owner of any real property abutting on or next adjacent to any sidewalk, footway or gutter, to lay and construct proper sidewalks, and to curb, recurb, pave, repave or repair, and

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[55] *Zimmerer v. Romano*, 223 W. Va. 769, 784, 679 S.E.2d 601, 616 (2009) (internal quotation omitted); Syl. pt. 1, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984). *Accord Tillis v. Wright*, 217 W. Va. 722, 728, 619 S.E.2d 235, 241 (2005) ("[S]pecific statutory language generally takes precedence over more general statutory provisions."); Bowers v. Wurzburg, 205 W. Va. 450, 462, 519 S.E.2d 148, 160 (1999) ("Typically, when two statutes govern a particular scenario, one being specific and one being general, the specific provision prevails." (citations omitted)); *Daily Gazette Co., Inc. v. Caryl*, 181 W. Va. 42, 45, 380 S.E.2d 209, 212 (1989) ("The rules of statutory construction require that a specific statute will control over a general statute when an unreconcilable conflict arises between the terms of the statutes." (citations omitted)).

[56] W. Va. Code § 29-12A-4.

[57] *Dattoli*, 237 W. Va. at 282, 787 S.E.2d at 553 (internal quotations omitted).

[58] *Bowden v. Monroe Cnty. Comm'n*, 232 W. Va. 47, 51, 750 S.E.2d 263, 267 (2013); *See also* W.Va. Code § 29-12A-1 *et seq.*

> constantly keep the same in good repair, clean condition and free from snow, ice, dirt or refuse. (6-11-68.)
>
> . . .
>
> Sec. 29. Duty of owner of abutting property with reference to sidewalks
>
> It shall be the duty of the owner of any real property abutting on or next adjacent to or on any sidewalk, footway, or gutter, to lay and construct proper sidewalks, and to curb, recurb, pave, repave, or repair, and keep the same in constant good and clean condition in the manner and within the time required by the council. And if any owner of any such real estate shall fail or refuse to lay and construct such sidewalks, and to do such curbing, recurbing, paving, repaving, or repairing, or to keep the same constantly in good condition and clean, in the manner and within the time required by the said council, it shall be the duty of the said county to cause the same to be done at the expense of the city, and to assess the amount of such expense against said property, and upon the owner thereof, and the amount so assessed against said property shall constitute a lien thereon and shall be collected by the city treasurer in the same manner and at the same time that city taxes on property assessed within the city are collected.[59]

23. Plaintiff argues that the City cannot enact such an ordinance as the City is a "home rule city." The Court finds that Plaintiff has provided no legal basis or evidence showing that the City of Logan is actually and legally a "home rule city." The Court concludes that, for this reason alone, Plaintiff's argument fails.

24. The Court in *Toler* recognized that when a city is not authorized to enact ordinances by the State legislature, the city is a "home rule city" and therefore cannot enact ordinances addressing, for instance, sidewalk maintenance.[60] However, the Court finds that Plaintiff ignores that the City is expressly authorized to enact ordinances under W. Va. Code § 17-10-17. The Court

[59] Ordinances, attached to Def's Mot. for Summ. J. as Ex. 5. The City is authorized to enact these ordinances under W. Va. Code § 17-10-17, which is pled in Plaintiff's *Amended Complaint*.
[60] *Toler v. Huntington*, 153 W. Va. 313, 316, 168 S.E.2d 551, 553 (1969)

concludes that the City is authorized to enact ordinances commensurate with its authority to control public walkways and construct sidewalks.[61] Under W. Va. Code § 8-11-1,

> To carry into effect the powers and authority conferred upon any municipality or its governing body by the provisions of this chapter, or any past or future act of the Legislature of this State, the governing body has plenary power and authority to:
> (1) Make and pass all needful ordinances, orders, bylaws, acts, resolutions, rules and regulations not contrary to the constitution and laws of this State;

Under West Virginia law, municipalities are permitted to enact ordinances governing use and maintenance of sidewalks.[62] Further, under W. Va. Code § 17-10-17,

> *Any person who sustains an injury to his person or property by* reason of any . . . sidewalk . . . being out of repair due to negligence of the . . . incorporated city . . . may recover all damages sustained by him by reason of such injury in an action against the . . . city . . . in which the . . . sidewalk may be, **except that such city . . . shall not be subject to such action unless it is required by charter, general law, or ordinance to keep the . . . sidewalk therein, at the place where such injury is sustained, in repair.**[63]

Accordingly, the City was authorized under West Virginia law to enact the above-quoted ordinance. Under the duly enacted ordinance, it is the duty of property owners to maintain sidewalks that abut their properties—not the City.

25. To the extent Plaintiff claims that the ordinances evince a "purposeful" neglect of duty,[64] the City, "[a] political subdivision[,] is immune from liability is a loss or claim results from . . . [a]doption . . . [of an] ordinance."[65] The West Virginia Supreme Court has described the immunities in W. Va. Code § 29-12A-5(a) as providing political subdivisions with "absolute

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[61] *See* W. Va. Code § 8-18-1.
[62] *See* W. Va. Code § 8-12-5;
[63] W. Va. Code § 17-10-17 (emphasis added).
[64] *See Resp.* at 11.
[65] W. Va. Code § 29-12A-5(a)(4).

immunity."[66] The West Virginia Supreme Court has explained, "[t]o read into these words [as stated W. Va. Code § 29-12A-5(a)] anything but a grant of absolute immunity would take us beyond the plain meaning of the statute."[67] Importantly, "[i]n absolute statutory immunity cases, the lower court has little discretion, and the case must be dismissed if one or more of the provisions imposing absolute immunity applies."[68]

26. Consistent with the subject ordinances, Mr. Marcum testified that property owners are responsible for sidewalks that abut their property:

> Q. All right. And what is your understanding, at least, as Street Commissioner, of your duties, if any, as with regard to sidewalks in the City of Logan?
>
> A. None in that area. Property owners are in charge of sidewalks.
>
> Q. Okay. In this case, if the property abutting that is the First Baptist Church, is it your belief that that's their duty?
>
> A. Oh, it's definitely their duty. Even I own real estate in the town, and I own buildings and I have to -- you know, I've replaced my sidewalks whenever they've needed it, you know, so.
>
> Q. And how long has that been the practice or the -- what I'll call the law -in Logan that the –
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> A. As far as I -- as long as I've known, it's always been the code.
>
> Q. Okay. And is that the -- you rely on the City ordinance for that?

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[66] *See State ex rel. City of Bridgeport v. Marks*, 233 W. Va. 449, 456, 759 S.E.2d 192, 199 (2014); *Hutchison v. City of Huntington*, 198 W. Va. 139, 151, 479 S.E.2d 649, 661 (1996) ("To read into these words [W. Va. Code 29-12A-5(a)(1)] anything but a grant of absolute immunity would take us beyond the plain meaning of the statute."); *Albert v. City of Wheeling*, 238 W. Va. 129, 133, 792 S.E.2d 628, 632 (2016) (holding that W. Va. Code 29-12A-5(a) provides immunity "regardless of whether such loss or claim, asserted under West Virginia Code § 29-12A-4(c)(2), is caused by the negligent performance of acts by the political subdivision's employees while acting within the scope of employment."); *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996) ("[t]o read into these words [as stated W. Va. Code § 29-12A-5(a)] anything but a grant of absolute immunity would take us beyond the plain meaning of the statute."); syl. pt. 4, *Hose v. Berkeley County Planning Commission*, 194 W.Va. 515, 460 S.E.2d 761 (1995) (holding that immunity under 29-12A-5(a)(9) renders a political subdivision immune regardless of any negligent act); *Standard Distrib. v. City of Charleston*, 218 W. Va. 543, 549, 625 S.E.2d 305, 311 (2005) (citing *Hose* to conclude that, regardless of any negligence, § 29-12a-5(a)(1) and -(a)(9) provide political subdivisions with immunity).

[67] *Hutchison*, 198 W. Va. at 151, 479 S.E.2d at 661 (1996) (emphasis and brackets added).

[68] *Id.* at 148 n.10, 479 S.E.2d at 658.

A. Yes, sir.[69]

27. The Court finds and concludes that the City cannot be liable for negligence because the City transferred any duty to maintain sidewalks to owners of properties that abut or are adjacent to the sidewalks in Logan. It is not disputed that the portion of the sidewalk where Plaintiff fell abuts the First Baptist Church on Stratton Street in Logan, and it is further beyond genuine dispute that the Church owned and controlled the subject wire loop and the Church has even removed and replaced it since the fall. Thus, the Court finds and concludes that the City had no duty to maintain the sidewalk where Plaintiff fell under the controlling ordinance. The Court concludes that the Plaintiff's negligence claim fails as a matter of law, and the City is immune.

No Actual or Constructive Knowledge

28. As the Court has already found, the City did not own or control the wire, and therefore could not have breached a duty to Plaintiff. Further, the Court finds that the undisputed evidence shows that the City had no knowledge of any hazard posed by the wire.

29. Under West Virginia law, "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."[70] "The mere occurrence of a fall on the business premises is insufficient to prove negligence on the part of the proprietor."[71]

30. Our Supreme Court has stated, "[t]he 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

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[69] Marcum Test., Dep. Tr. 11–12, October 6, 2021, attached to Def's Mot. for Summ. J. as Ex. 7.
[70] *Dattoli*, 237 W. Va. at 280, 787 S.E.2d at 553 (internal quotations omitted) (citing *Hawkins v. U.S. Sports Ass'n.*, 219 W. Va. 275, 279, 633 S.E.2d 31, 35 (2006); *Neely v. Belk Inc.*, 222 W. Va. 560, 571, 668 S.E.2d 189, 199 (2008)).
[71] *Hawkins v. U.S. Sports Ass'n, Inc.*, 219 W. Va. 275, 279, 633 S.E.2d 31, 35 (2006).

caused the injury.'"[72] Likewise, a landowner has no duty to warn about dangers unknown to the owner.[73] In *Dattoli*, the Supreme Court affirmed dismissal when the plaintiffs failed to show that the political subdivision had any notice of the alleged defective condition on its property.[74]

31. Here, Mr. Marcum, the Street Commissioner for the City of Logan, testified that the City had no knowledge or notice of and had received no complaints about any hazard posed by the wire loop:

> Q. Okay. To your knowledge, did the City ever receive a report about a wire cable on that sidewalk prior to Ms. Orso's fall?
> A. No, sir.
> Q. Did the City ever receive a report about any cable on the subject sidewalk prior to her fall?
> A. Not that I'm aware of, no, sir.
> Q. Did you receive a report about that cable prior to her fall?
> A. No, sir.
> Q. Did you have any knowledge that the wire cable was on the subject sidewalk prior to her fall?
> A. No, sir.
> Q. Did the City have any notice of that cable on that subject sidewalk prior to her fall?
> A. No, sir.
> Q. Did you have any notice prior to her fall?
> A. No, sir.
> Q. Did anyone tell the City about a cable on that subject sidewalk prior to Ms. Orso's fall?
> A. No, sir.
> Q. Did anyone tell you about that wire being on the sidewalk prior to Ms. Orso's fall?
> A. No, sir.
> Q. Did anyone ask you to remove the cable shown in that Exhibit 2 prior to her fall?
> A. No, sir.
> Q. Did anyone ask the City to remove the cable depicted in Exhibit 2 [attached to Def's Mot. as Ex. 8] prior to her fall?
> A. No, sir.

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[72] *Neely v. Belk Inc.*, 222 W. Va. 560, 570, 668 S.E.2d 189, 199 (2008) (quoting *Hawkins v. United States Sports Assoc., Inc.*, 219 W. Va. 275, 279, 633 S.E.2d 31, 35 (2006)).
[73] *Burdette v. Burdette*, 147 W. Va. 313, 318, 127 S.E.2d 249, 252 (1962); *Estate of Helmick by Fox v. Martin*, 192 W. Va. 501, 505, 453 S.E.2d 335, 339 (1994); *McDonald v. Univ. of W. Virginia Bd. of Trustees*, 191 W. Va. 179, 182, 444 S.E.2d 57, 60 (1994); *see* syl. pt. 1, *Sesler v. Rolfe Coal & Coke Co.*, 51 W. Va. 318, 41 S.E. 216 (1902).
[74] *Wheeling Park Comm'n v. Dattoli*, 237 W. Va. 275, 280, 787 S.E.2d 546, 551 (2016).

Q. Did the City receive any complaints about the wire prior to her fall?
A. No, sir.
Q. Did you receive any complaints about that wire prior to Ms. Orso's fall?
A. No, sir.
. . .
Q. Okay. You don't know of any other · injuries occurring on the sidewalk abutting the First Baptist Church's parking lot, do you?
A· No.[75]

The Court finds that Plaintiff has produced no evidence of any prior fall caused by, or any knowledge on part of the City about, the wire loop. Plaintiff testified:

Q. Had you ever informed the city that that loop wire was a danger?
A. No.

Q. Did you ever ask the city to remove the loop wire?
A. No.

Q. Did you ever ask the church to remove the loop wire?
A. No.

Q. Are you aware of anyone asking the city to remove the loop wire?
A. No.[76]

Q. Okay. And you don't know of anybody that reported to you that that cable wire was there?
A. No.

Q. And you don't know -- I'm sorry. And nobody reported that to the City of Logan?
A. Not that I am aware of.

Q. All right. And are you aware of anybody that told the City of Logan that that cable wire had a loop on it?
A. I don't think so, you know.[77]

[75] Marcum Test., Dep. Tr. 47–49, 52, Oct. 6, 2021, attached to Def's Mot. for Summ. J. as Ex. 7.
[76] Pl's Test., Dep. Tr. 56, attached to Def's Mot. for Summ. J. as Ex. 1
[77] Pl's Test., Dep. Tr. 66–67, attached to Def's Mot. for Summ. J. as Ex. 1

32. The Court concludes it is undisputed that the City had no notice of the wire or any hazard posed by it. Without knowledge of any hazard, the City cannot be liable.

33. Moreover, the Court notes that Plaintiff produced no evidence showing how long the wire had been stretched out onto the sidewalk.[78] It is undisputed that Plaintiff walked by it moments earlier during her lunchbreak without incident, suggesting that the wire had not been stretched out for any significant amount of time. Nonetheless, the Court finds and concludes that the City breached no duty to Plaintiff as it does not own the wire, is not responsible for maintaining the sidewalk under controlling ordinances, and had no knowledge of any hazard posed by the wire. The Court concludes that Plaintiff's negligence claim fails, and the City is entitled to immunity.

Open and Obvious Doctrine

34. Under the open and obvious doctrine,

> 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.[79]

This accords with the longstanding principles that a landowner "is not legally responsible for every fall which occurs on his premises,"[80] and every person has a duty "to look, and to look effectively, and to exercise ordinary care to avoid a hazard."[81]

35. The open and obvious doctrine clarifies:

> It is the intent and policy of the Legislature that this section reinstates and codifies the open and obvious hazard doctrine in actions seeking to assert liability against an owner, lessee or other lawful occupant of real property to its status prior to the decision of the West Virginia Supreme Court of Appeals in the matter of *Hersh*

[78] Pl's Test., Dep. Tr. 55–56, 141–142, attached to Def's Mot. for Summ. J. as Ex. 1
[79] W. Va. Code § 55-7-28 (effective Feb. 18, 2015) (emphasis added).
[80] *McDonald*, 444 S.E.2d at 60.
[81] *Birdsell v. Monongahela Power Co.*, 181 W. Va. 223, 225, 382 S.E.2d 60, 62 (1989)

v. E-T Enterprises, Limited Partnership, 232 W. Va. 305 (Nov. 12, 2013).[82]

36. Pre-*Hersh* and currently, the West Virginia Supreme Court has consistently held that the duty to keep premises safe applies only to conditions that are in the nature of hidden dangers, traps, snares, pitfalls, and the like, in that they are not known the invitee and would not be observed in the exercise of ordinary care.[83] Thus, there is no liability for injuries from dangers that are obvious, reasonably apparent, or as well known to the person injured as they are to the owner or occupant.[84] The Court finds that the West Virginia Supreme Court and federal courts in West Virginia consistently affirm that dismissal is warranted when a plaintiff has as much knowledge, or more knowledge, of the defect as the landowner.[85]

37. Plaintiff testified:

> Q. On that day, prior to your fall, was there anything blocking your view of the loop wire?
> A. No. No.[86]
>
> Q. Had you looked down prior to your fall, would you have been able to see the loop wire?
> A. Well, I guess I would have, yes.[87]

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[82] W. Va. Code § 55-7-28.
[83] *McDonald*, 444 S.E.2d at 61.
[84] *Id.*
[85] *Fuller v. City of Huntington*, 2020 W. Va. LEXIS 541, 2020 WL 4355652 (W. Va. July 30, 2020); *McDonald v. Univ. of W. Va. Bd. of Trs.*, 191 W. Va. 179, 444 S.E.2d 57 (1994); *Estate of Helmick by Fox v. Martin*, 192 W. Va. 501, 453 S.E.2d 335 (1994); *Aitcheson v. Dolgencorp, LLC*, No. 20-1207, 2020 U.S. App. LEXIS 38658, (4th Cir. Dec. 10, 2020); *Mundell v. Consolidation Coal Co.*, No. 95-2739, 1996 U.S. App. LEXIS 14296, (4th Cir. June 13, 1996); *Alexander v. Curtis*, 808 F.2d 337, 340 (4th Cir. 1987); *Horton v. Family Dollar Stores of W. Va. Inc.*, No. 2:16-cv-05361, 2017 U.S. Dist. LEXIS 80962, (S.D. W. Va. May 26, 2017); *Scaggs v. United States*, Civil Action No. 2:14-cv-19304, 2015 U.S. Dist. LEXIS 90911, (S.D. W. Va. July 14, 2015); *Adams v. United States*, No. 5:11-cv-00660, 2013 U.S. Dist. LEXIS 125158, (S.D. W. Va. Sep. 3, 2013); *Bullington v. Lowe's Home Ctrs., Inc.*, No. 5:10-cv-00293, 2011 U.S. Dist. LEXIS 97507 (S.D. W. Va. Aug. 30, 2011); *White v. Home Depot U.S.A., Inc.*, No. 2:10-cv-01016, 2011 U.S. Dist. LEXIS 78672 (S.D. W. Va. July 19, 2011); *Vance v. Wal-Mart Stores E., LP*, Civil Action No. 2:07-CV-101, 2009 U.S. Dist. LEXIS 144573 (N.D.W. Va. June 17, 2009); *Harris v. United States*, Civil Action No. 1:05CV17 (STAMP), 2006 U.S. Dist. LEXIS 63939, (N.D.W. Va. Sep. 6, 2006); *Eichelberger v. United States*, No. 1:04CV45, 2006 U.S. Dist. LEXIS 19250, (N.D.W. Va. Mar. 3, 2006); *Phillips v. Superamerica Grp.*, 852 F. Supp. 504, 506 (N.D.W. Va. 1994). Please see caselaw attached to Def's Mot. for Summ. J. as Ex. 6
[86] Pl's Test., Dep. Tr. 56, attached to Def's Mot. for Summ. J. as Ex. 1.
[87] *Id.* at 57.

Q. Okay. And I believe you testified that if you had looked down, you would have seen the loop wire, correct?
A. Yes. I would have. Yes.[88]

The Court finds it is undisputed that Plaintiff saw the wire loop immediately before she fell but did not see the wire the first time she passed it during her walk.[89]

38. The Court finds that the undisputed evidence shows Plaintiff walked by the wire regularly, numerous times, and walked by it even moments before she fell. Plaintiff admits she saw the wire a second before she fell, and nothing obstructed Plaintiff's view of it. The Court finds it is beyond genuine dispute that, had Plaintiff looked, she could have seen it earlier. The wire was therefore as apparent to the Plaintiff, who had some knowledge of it, than it was to the City, who had no knowledge of it. The Court concludes that, even if Plaintiff had no knowledge of the wire, then the wire was as apparent to the Plaintiff as it was to the City, and the open and obvious doctrine bars her claim. Drawing all inferences favorable to the Plaintiff, the Court concludes the open and obvious doctrine bars her claim. Thus, the Court concludes the City is entitled to immunity as Plaintiff's negligence claim fails.

[88] *Id.* at 135–136.
[89] *Id.* at 137–138, 141.

DECISION

Accordingly, it is hereby **ORDERED** that Defendant's *Motion for Summary Judgment* is **GRANTED**. It is **FURTHER ORDERED** that all Plaintiff's claims are **DISMISSED WITH PREJUDICE**, and this matter is **STRICKEN** from the docket of the Court. The Clerk is **DIRECTED** to send a copy of this *Order* to all counsel of record.

ENTERED this 27th day of June 2022.

HONORABLE MIKI THOMPSON

PREPARED BY:

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