

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

SANDY K. HAYES,

Plaintiff,

v.

KANAWHA VALLEY REGIONAL
TRANSPORTATION AUTHORITY,
a political subdivision, and
JOHN DOE bus driver, an employee of
KANAWHA VALLEY REGIONAL
TRANSPORTATION AUTHORITY,

Defendants.

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CATHY S. CATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

Civil Action No. 20-C-1013
Judge Joanna I. Tabit

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On January 31, 2022, came the Plaintiff, Sandy K. Hayes, by counsel, Andrew D. Byrd and Woody Hill, and the Defendants, by counsel Duane J. Ruggier and Evan S. Olds, for hearing on the Plaintiff's *Motion for Partial Summary Judgment* and the Defendants' *Motion for Summary Judgment*. During the hearing, the Court instructed the parties to submit supplemental briefing on whether Defendants owed Plaintiff a duty in this case. Upon review and consideration of the dispositive motions, responses, replies, supplemental briefing, and oral argument of counsel, the Court makes the following "Findings of Fact" and "Conclusions of Law."

FINDINGS OF FACT

1. Plaintiff was a regular passenger on the Kanawha Valley Regional Transportation Authority (KRT) bus and took the Route 23 bus home once or twice a week. Plaintiff lives at the Elk Crossings Apartment Complex, outside city limits.

2. Generally, KRT stops in city limits are limited to designated stops, usually at street corners.¹ Outside city limits, passengers notify bus drivers when they want to stop; these are referred to as “flag stops.”² During a flag stop, the passenger notifies the bus driver when to stop by pulling a string or cord.³

3. As evidence by an undisputed KRT video, at around 8 p.m. on October 14, 2019, Plaintiff pulled the string to stop and alight from the bus.⁴ Daniel Taylor was the bus driver on October 14, 2019. He was not Plaintiff’s regular driver but was trained on and familiar with the subject route.⁵ Mr. Taylor stopped the bus at the direction of Plaintiff after Plaintiff pulled the cord.⁶ Plaintiff agrees she has exited the bus from this area many times before.⁷

4. Plaintiff has made no allegation that, prior to her injury, she ever complained to anyone at the KRT about where the bus normally stopped. On October 14, 2019, Plaintiff did not tell the bus driver, Daniel Taylor, where she was going, and Plaintiff did not ask for any assistance crossing the road.⁸ The Court finds that Plaintiff told the driver “Home Sweet Home” and then exited the bus, following her friend, Abraham Stover, with whom she lives.⁹

5. Plaintiff testified she looked both ways before crossing the road diagonally, following Mr. Stover.¹⁰ Mr. Stover told Plaintiff to hurry across the road.¹¹ Mr. Stover was about three steps in front of Plaintiff and had made it to the other side of the road without incident when Plaintiff was hit by a

¹ Smith Test., Dep. Tr. 35–36, attached to Def’s Mot. as Ex. A. Mr. Smith trains KRT drivers.

² Mullins Test., Dep. Tr. 15, 29, attached to Def’s Mot. as Ex. B. Mr. Mullins is the usual bus driver on Plaintiff’s route.

³ Mullins Test., Dep. Tr. 32, attached to Def’s Mot. as Ex. B; Pl Test., Dep. Tr. 36:2–15, attached to Def’s Mot. as Ex. C.

⁴ Video, attached to Def’s Mot. as Ex. I.

⁵ Taylor Test., Dep. Tr. 37, attached to Def’s Mot. as Ex. D; *see id.* at 61 (noting familiarity with area where Plaintiff lives). All drivers are trained on all routes. Smith Test., Dep. Tr. 62–63, attached to Def’s Mot. as Ex. A.

⁶ Video, attached to Def’s Mot. as Ex. I.

⁷ *Id.* at 45.

⁸ *Id.* at 39, 59–60, 101.

⁹ *Id.* at 45.

¹⁰ *Id.* at 32–33, 65.

¹¹ *Id.* at 71.

car operated by Taylor Jenkins.¹² By the time Plaintiff crossed the road and was hit by Jenkins, the bus had pulled away.

6. Plaintiff has not alleged or produced any evidence showing that the bus in anyway affected Ms. Jenkins' driving. The bus had already pulled away when Plaintiff was struck by Ms. Jenkins' automobile.¹³ Ms. Jenkins did not stop after striking Plaintiff but kept driving.

7. Plaintiff alleges she fractured her right knee, injured her hip and left leg, and was in the hospital for nine days.¹⁴ Plaintiff alleges she may need a knee replacement.

8. Plaintiff asserts negligence against KRT; recklessness against the bus driver, Mr. Taylor; and vicarious liability against KRT.

DISCUSSION & CONCLUSIONS OF LAW

Standard of Review

9. 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."¹⁵ If the moving party shows no genuine issue of material fact, then the moving party is entitled to judgment as a matter of law.¹⁶ "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."¹⁷

10. "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."¹⁸ Summary

¹² See Incident Report, attached to Def's Mot. as Ex. H.

¹³ See Video, attached to Def's Mot. as Ex I.

¹⁴ Pl Test., Dep. Tr. at 80.

¹⁵ W. Va. R. Civ. P. 56.

¹⁶ *Id.*

¹⁷ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

¹⁸ Syl. pt. 4, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

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.¹⁹

11. It is not the Defendant's burden "to negate the elements of claims on which [plaintiff] would bear the burden at trial."²⁰ Rather, it is the Defendant's burden "only [to] point to the absence of evidence supporting [plaintiffs'] case."²¹ When a motion for summary judgment is properly supported, the burden shifts to the opposing party to demonstrate that summary judgment is not appropriate.²² 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."²³

12. To meet their burden, plaintiffs "must identify specific facts in the record and articulate the precise manner in which that evidence supports [their] claims."²⁴ 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."²⁵ "The evidence illustrating the factual controversy cannot be conjectural or problematic."²⁶

¹⁹ *Williams v. Precision Coil*, 194 W.Va. 52, 58, 459 S.E.2d 329 (1995).

²⁰ *Powderidge Unit Owners Ass'n v. Highland Props., Ltd.*, 196 W.Va. 692, 698-99, 474 S.E.2d 872, 879 (1996) (citation omitted).

²¹ *Id.* at 699 (internal quotations and citations omitted).

²² *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 60, 459 S.E.2d 329, 337 (1995).

²³ *Id.*

²⁴ *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[.]").

²⁵ *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.").

²⁶ *Id.* at 60, 337.

13. Summary judgment is especially ripe for consideration because, as discussed below, governmental immunity is involved, and the legal question of immunity must be decided at the earliest possible stage in litigation. Under West Virginia law, “claims of immunities, where ripe for disposition, should be summarily decided before trial.”²⁷ “The mere contention that issues are disputable is not sufficient to preclude summary judgment.”²⁸

Immunity Overview

14. KRT is a political subdivision as defined by the Tort Claims Act.²⁹ Statutory immunity of a political subdivision is “governed exclusively by the West Virginia Tort Claims and Insurance Reform Act.”³⁰

15. Under W. Va. Code § 29-12A-4 of the Tort Claims Act, the KRT cannot be liable unless it is shown that a KRT employee was negligent. Indeed, a political subdivision can only act through its employees. Under West Virginia law, traditional negligence principles apply under the Tort Claims Act.³¹

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) Plaintiff suffered damages as a result of Defendant’s breach.³²

²⁷ *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)).

²⁸ *Conley v. Stollings*, 223 W.Va. 762, 768, 679 S.E.2d 594, 600 (2009).

²⁹ W. Va. Code § 29-12A-3.

³⁰ *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.*

³¹ *Wheeling Park Comm’n v. Dattoli*, 237 W.Va. 275, 282, 787 S.E.2d 546, 553 (2016).

³² *See Webb v. Brown & Williamson Tobacco Co.*, 121 W.Va. 115, 2 S.E.2d 898, 898 (1939) (emphasis added).

Duty

17. “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.”³³ Proof of breach of the duty of care is necessary because “[t]he bare fact of an injury standing alone, without supporting evidence as to the cause thereof, is not sufficient to justify an inference of negligence.”³⁴ As a preliminary matter, whether or not a defendant owes a plaintiff a duty of care in a particular case is a question of law that must be determined by the presiding judge.³⁵

18. Under West Virginia law,

whether there is a duty is a question of law and not a question of fact for the jury. Likewise, legal commentators agree that “the determination of any question of duty . . . has been held to be an issue of law for the court rather than for the jury, to be determined by reference to the body of statutes, rules, principles, and precedents which make up the law.”³⁶

19. The State Supreme Court has warned against imposing duties where none exist:

A line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit. It is always tempting to impose new duties and, concomitantly, liabilities, regardless of the economic and social burden. Thus, the courts have generally recognized that public policy and social considerations, as well as foreseeability, are important factors in determining whether a duty will be held to exist in a particular situation.³⁷

³³ Syl. Pt. 1, *Parsley v. Gen. Motors Acceptance Corp.*, 167 W.Va. 866, 280 S.E.2d 703 (1981); see also *Robertson v. LeMaster*, 171 W.Va. 607, 610, 301 S.E.2d 563, 566 (1983) (“[i]n order to establish . . . negligence in West Virginia, it must be shown that the defendant has . . . violat[ed] . . . a duty owed to the plaintiff” (citation omitted)); *McNair v. Johnson & Johnson*, 241 W.Va. 26, 35, 818 S.E.2d 852, 861 (2018).

³⁴ Syl. Pt. 1, *Walton v. Given*, 158 W.Va. 897 (1975); *Mrotek v. Coal River Canoe Livery, Ltd.*, 214 W.Va. 490, 492 (2003).

³⁵ Syl. pt. 5, *Aikens v. Debow*, 208 W.Va. 486, 488, 541 S.E.2d 576, 578 (2000).

³⁶ *Aikens v. Debow*, 208 W.Va. 486, 491, 541 S.E.2d 576, 581 (2000) (internal quotations omitted); see *id.* at syl. pt. 5; *Jackson v. Putnam Cty. Bd. of Educ.*, 221 W.Va. 170, 175, 653 S.E.2d 632, 637 (2007).

³⁷ *Aikens v. Debow*, 208 W.Va. 486, 493, 541 S.E.2d 576, 583 (2000).

Regarding political subdivisions, the West Virginia Supreme Court has recognized that the Tort Claims Act's purpose is:

“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.³⁸

20. Under West Virginia law, “[t]he 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?”³⁹

21. Under West Virginia law,

Beyond the question of foreseeability, the existence of duty also involves policy considerations underlying the core issue of the scope of the legal system's protection Such considerations include the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant.⁴⁰

22. As with any negligence claim, Plaintiff must establish a duty owed. Because immunity is involved, Plaintiff in the instant case must do so with specificity.⁴¹ It is Plaintiff's burden to overcome KRT's immunity.

23. The Court finds no West Virginia law that imposes a duty on common carriers to passengers after they have alighted from the bus. After extensive briefing by the parties, and consistent with

³⁸ *Wheeling Park Comm'n v. Dattoli*, 237 W.Va. 275, 282, 787 S.E.2d 546, 553 (2016).

³⁹ Syl. Pt. 3, *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988); Syl. pt. 8, *Aikens v. Debow*, 208 W.Va. 486, 489, 541 S.E.2d 576, 579 (2000).

⁴⁰ *Robertson v. LeMaster*, 171 W.Va. 607, 612, 301 S.E.2d 563, 568 (1983) (internal citations omitted).

⁴¹ See *Hutchison v. City of Huntington*, 198 W.Va. 139, 148, 479 S.E.2d 649, 658 (1996).

persuasive authority cited by Defendants, the Court concludes that the KRT did not have a duty to Plaintiff after she flagged the stop, exited the bus, the bus pulled away, and she crossed the road diagonally and was struck by a vehicle in a hit-and-run. This is not a case where Plaintiff had complained about the stop. This is not a case where Plaintiff was immediately injured as she alighted. Plaintiff had almost crossed the road before falling victim to a hit-and-run. Plaintiff was not in danger at the stop; she was not in danger until she crossed the road without yielding. She had ample opportunity to reach a point of safety; her companion made it across the road without incident. Defendants did not know where she was going and did not control where she went or the path she took to get there.

24. Based upon the foregoing, Plaintiff has failed to establish that KRT owed her a duty after she exited the bus, crossed the road, was nearly to the other side of the road, and was struck by an oncoming vehicle.

25. Having concluded that the Defendants owe the Plaintiff no legal duty, all Plaintiff's remaining claims of negligence against the Defendants fail.

DECISION

Accordingly, it is hereby **ORDERED** that the Defendants' *Motion for Summary Judgment* is **GRANTED**. It is **FURTHER ORDERED** 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 as follows:

- (1) Evan S. Olds, Esq. and Duane J. Ruggier, II, Esq., 901 Quarrier Street, Charleston, WV 25301;
- (2) Robert B. Warner and Andrew D. Byrd, Esq., 227 Capitol Street, Charleston, WV 25333;

(3) Woody Hill, Esq. and Anna Butcher, Esq., 707 Virginia Street East, Suite 1450,
Charleston, WV 25301.


ENTERED this 18th day of February 2022.


HONORABLE JOANNA I. TABIT

Prepared By: **(Entered as Modified by the Court)*

/s/ Evan Olds

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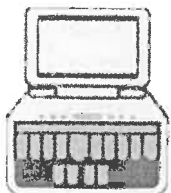
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