No. 22-0207

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SANDY K. HAYES

Petitioner/Plaintiff Below,

v.

(ON APPEAL FROM THE
CIRCUIT COURT OF KANAWHA
COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 20-C-1013)

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

Respondents/Defendants Below.

BRIEF OF PETITIONER

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES 3

II. ASSIGNMENTS OF ERROR 4

III. STATEMENT OF THE CASE 4

IV. SUMMARY OF ARGUMENT 10

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION 11

VI. ARGUMENT 11

A. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS AS THERE ARE NO GENUINE ISSUES OF MATERIAL FACT THAT THE RESPONDENTS DID OWE THE PETITIONER A LEGAL DUTY AS A COMMON CARRIER IN THE STATE OF WEST VIRGINIA 12

B. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS AS THERE ARE, AT A MINIMUM, GENUINE ISSUES OF MATERIAL FACT THAT THE HARM SUFFERED BY THE PETITIONER WAS FORESEEABLE TO THE RESPONDENTS FOR NOT EXERCISING THEIR HEIGHTENED DUTY OF CARE 17

C. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS AS PUBLIC POLICY DICTATES THE RESPONDENTS OWED THE PETITIONER A LEGAL DUTY IN THIS CASE 22

VII. CONCLUSION 24

I. TABLE OF AUTHORITIES

CASES **Page(s)**

Abdulla v. Pittsburgh & Weirton Bus Co., 213 S.E.2d 810 (W.Va. 1975).....14,15

Aetna Casualty Co. v. Fed. Ins. Co. of N.Y., 133 S.E.2d 770 (W.Va. 1963).....11,12

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).....18

Bennett v. Bartlett, 158 S.E. 712 (W.Va. 1931).....13,14

Dotts v. Taressa J.A., 390 S.E.2d 568 (W.Va. 1990).....17,FN1

Fayette County Nat'l Bank v. Lilly, 484 S.E.2d 232 (1997).....12

Harbaugh v. Coffinbarger, 543 S.E.2d 338 (W.Va. 2000).....21

Isgan v. Jenkins, 59 S.E.2d 689 (W.Va. 1950).....14

Jones v. Perrine et al., 331 S.E.2d 842 (W.Va. 1985).....15,16,17

Kaufman v. Charleston Transit Co., 186 S.E. 617 (W.Va. 1936).....14

Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).....18

Painter v. Peavy, 451 S.E.2d 755 (W.Va. 1994).....11

Powderidge Unit Owners v. Highland Properties, 474 S.E.2d 872 (W.Va. 1996)...12

Strahin v. Cleavenger, 603 S.E.2d 197 (W.Va. 2004).....20

Williams v. Precision Coil, 459 S.E.2d 329 (W.Va. 1995).....12

Wilson v. Daily Gazette Co., 588 S.E.2d 197 (W.Va. 2003).....12

RULES

West Virginia Rules of Civil Procedure, Rule 56.....4

Wes Virginia Rules of Appellate Procedure, Rule 18.....11

II. ASSIGNMENTS OF ERROR

A. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS AS THERE ARE NO GENUINE ISSUES OF MATERIAL FACT THAT THE RESPONDENTS DID OWE THE PETITIONER A LEGAL DUTY AS A COMMON CARRIER IN THE STATE OF WEST VIRGINIA.

B. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS AS THERE ARE, AT A MINIMUM, GENUINE ISSUES OF MATERIAL FACT THAT THE HARM SUFFERED BY THE PETITIONER WAS FORESEEABLE TO THE RESPONDENTS FOR NOT EXERCISING THEIR HEIGHTENED DUTY OF CARE.

C. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS AS PUBLIC POLICY DICTATES THE RESPONDENTS OWED THE PETITIONER A LEGAL DUTY IN THIS CASE.

III. STATEMENT OF THE CASE

This appeal arises from the dismissal under Rule 56 of the West Virginia Rules of Civil Procedure by the Circuit Court of Kanawha County, West Virginia of Civil Action No. 20-C-1013, of the Petitioner, Sandy K. Hayes' lawsuit asserting negligence against the Respondents Kanawha Valley Regional Transportation Authority (hereinafter "KRT") and John Doe employee bus driver of KRT (hereafter "Daniel Taylor")(collectively hereinafter "Respondents"), as a result of a pedestrian incident that occurred on October 14, 2019, on Frame Road in Elkview, West Virginia.

On the day of the incident, Ms. Hayes boarded a KRT bus designated for Route 23 to take her to her apartment complex on Frame Road in Elkview, West Virginia. While in route to Ms. Hayes' apartment, she notified the KRT bus driver (i.e., Daniel Taylor) that her apartment complex on Frame Road was approaching by using the passenger notification system available on the bus. At around 8:04 p.m., the KRT bus driver stopped the bus in the middle of its lane on Frame Road – which has a designated speed limit of 50 m.p.h.

Ms. Hayes and her friend accompanying her, exited the KRT bus onto Frame Road and the bus driver immediately began accelerating the bus to continue on the bus route. (*See* Hayes Appx.

- Vol. I: 207). After the bus passed, Ms. Hayes and her acquaintance looked both ways, and started crossing Frame Road to Ms. Hayes' apartment. While Ms. Hayes was crossing Frame Road, she was struck by an oncoming vehicle. As a result, Ms. Hayes suffered severe and permanent injuries to her right leg, knee and pelvis – requiring surgical intervention. (*See generally* Hayes Appx. - Vol. I: 3-10).

During the course of discovery in the underlying matter, multiple depositions of KRT representatives were taken by the Petitioner. KRT's Operations Supervisor, James Smith – the immediate supervisor of the KRT bus driver (Daniel Taylor) who dropped Ms. Hayes off on Frame Road the night of the subject incident – discussed the duties of a bus driver if a bus stop is unsafe. Significantly, Mr. Smith testified to the following:

> Q: Switching gears. If a bus driver faces what I term and what this CDL manual that you saw the phrase terms as an unsafe condition on a route, are they to report that to their supervisor if they see an unsafe condition or feel that one exists?
>
> A: If a driver sees that a stop is unsafe, they are not to let an individual off at that location. They're to let them off at the nearest location. Then they report that to the supervisor, which in this case, in today's time, would be me or Jamie Snodgrass, and we would visually go out and inspect that location.
>
> Q: And that could be any situation that the bus driver deems to be unsafe, correct?
>
> A: Yes, sir.
>
> Q: And they're trained to report that to their immediate supervisor, correct?
>
> A: Yes, sir.
>
> Q: But given your testimony, prior to a bus driver reporting it to KRT, the bus driver is to ensure that the passengers are safe from the unsafe condition, correct?
>
> [objection asserted]
>
> A: Yes.

(*See* Hayes Appx. - Vol. I: 81).

Mr. Smith further testified that it is the KRT bus drivers' duty to ensure that passengers exit their buses into a safe environment because doing so ensures the health, safety, and welfare of all the passengers. *Id.* at 72.

The deposition of KRT's Director of Operations, Mic Peaytt. was also taken in the underlying matter. Mr. Peaytt testified to the following regarding the duties of KRT bus drivers when passengers are alighting from their buses:

> Q: […] Would you agree, sir, with me that KRT bus drivers have a duty to ensure that passengers exit their buses into a safe environment?
>
> [objection asserted]
>
> A: I would – just like I was trained, I was trained to let them off in a safe spot.
>
> (*See* Hayes Appx. - Vol. I: 177).

Mr. Peaytt also testified to the following:

> Q: Okay. My understanding is as it's kind of stated in the "Have a Nice Day" policy that basically the bus drivers are trained that if they identify a stop location as being unsafe, they're not to let the passengers off, that's how they're trained, and to find the next safest location.
>
> A: I would agree to that.
>
> *Id.* at 180.

Daniel Taylor, the KRT bus driver identified as driving the bus the night of Ms. Hayes' incident, was asked at his deposition about safe places to stop and let passengers off along a KRT bus route. Mr. Taylor testified to the following in this regard:

> Q: …Would you agree with me that there are safe places to stop and let passengers off along KRT routes?
>
> A: There are some safe places, yes.

Q: Would you agree with me that each driver before driving a route for the first time should be trained by KRT to know where the safest place to let passengers off are along that route?

[objection asserted]

A: They train us to where the stops are.

Q: And it's determined by KRT where the safest place is to let those passengers off along that route?

A: I don't think all of the stops are in the safest place.

Q: You don't? And why not?

A: Well, you're out on the road in a 50-mile-an-hour speed zone, no lights. There's no street lights or nothing at a bunch of these stops.

Q: And, to you, that's not a safe place?

A: Right. Yes.

(*See* Hayes Appx. - Vol. I: 124).

Importantly, Mr. Taylor identified the location where he dropped off Ms. Hayes the night of her incident as being an unsafe place for passenger drop-off:

Q: …You're familiar with this area of Elk Crossings Apartment Complex and the area in front of it, correct?

A: Yes.

Q: And, as you testified earlier, it's a 50-mile-an-hour road right there?

A: Yes.

Q: And it's a dark area. It doesn't have any street lights, does it?

A: I'm sorry? I didn't understand.

Q: It's a dark area. It doesn't have any street lights in this area, correct?

A: Right. Yes.

Q: Is this one of those places that you testified earlier that you consider is not a safe place to drop passengers off because it's dark and a 50-mile-an-hour road?

A: Yes.

Id. at 131.

Mr. Taylor confirmed that KRT bus drivers have a duty to ensure that passengers exit KRT buses into a safe environment. *Id.* at 123-24.

Throughout the underlying litigation, KRT maintained that Mr. Taylor was trained on Route 23 prior to the subject incident. Later in discovery, KRT produced a document showing that Mr. Taylor had been on Route 23 for what KRT deemed a "ride-along." During Mr. Taylor's deposition, he testified regarding his lack of training on the safest place to drop passengers off at stops along Route 23:

Q: ...Prior to October 14, 2019, did Mr. Mullins train you on the safest place to allow passengers off at stops along Route 23?

A: Was trained at the stops, not the safest places.

Id at pg. 125.

In accordance with the Circuit Court's scheduling order, the Petitioner filed a *Motion for Partial Summary Judgment* and the Respondents filed a *Motion for Summary Judgment*. (*See* Hayes Appx. - Vol. I: 208-237 and 238-677). The Respondents' *Motion for Summary Judgment* asserted that they owed no legal duty under West Virginia law to the Petitioner after she exited the bus on the night of the subject incident. The Petitioner and the Respondents filed their respective responses and reply to the competing motions for summary judgment. (*See* Hayes Appx. - Vol. I: 678-759 and 760-836 and 837-922).

On January 31, 2022, a hearing was held on the Petitioner and the Respondents' motions for summary judgment. During the hearing, the Petitioner identified West Virginia case law

regarding common carriers' duties that was not cited in her previously filed motions. Following the hearing, the Circuit Court entered a Briefing Schedule, finding that additional briefing was necessary to rule on the parties' dispositive motions and to specifically consider the issue of whether the Respondents owed the Petitioner a duty as discussed during the hearing. The Circuit Court also requested the parties submit proposed orders. (*See* Hayes Appx. - Vol. I: 923-924).

In accordance with the Circuit Court's Briefing Order, Petitioner filed her *Supplemental Motion in Accordance with the Court's Briefing Order*, which outlined this Honorable Court's precedent regarding the duties of common carriers under West Virginia law. (*See* Hayes Appx. - Vol. I: 925-993). The Respondents' filed their response to Petitioner's supplemental motion. (*See* Hayes Appx. - Vol. I: 994-1068). Both parties filed and submitted proposed orders regarding the outstanding motions for summary judgment. (*See* Hayes Appx. - Vol. I: 1069-1100 and 1101-1120).

On February 18, 2022, the Circuit Court entered its *Order Granting Defendants' Motion for Summary Judgment.* (*See* Hayes Appx. - Vol. I: 1121-1129). The Circuit Court found that there is no West Virginia case law that imposes a duty on common carriers to passengers after they have alighted from a bus. *Id.* at 1127. The Circuit Court then shifted its attention to the actions of the Petitioner and further found that the Petitioner failed to establish that Respondents 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. *Id.* at 1128. The Circuit Court dismissed the Petitioner's action, with prejudice. *Id.*

Petitioner respectfully submits that the Respondents, as a common carrier under West Virginia law, owed the Petitioner a duty to use the highest degree of care. Petitioner submits that the Respondents, as a common carrier, had a duty to use the utmost care, diligence and foresight

to protect passengers, like the Petitioner, when *boarding*, *riding* in and *alighting* therefrom; and the Respondents are liable, for even the slightest negligence on its part, under West Virginia law. The Circuit Court granted summary judgment in favor of the Respondents, finding that the Petitioner had failed to establish that she was owed a legal duty after she alighted the bus. The Petitioner submits that the Circuit Court erred in granting Defendants' *Motion for Summary Judgment*.

For these and other reasons more fully set forth in the Petitioner's brief herein, the Petitioner requests that the Circuit Court's *Order Granting Defendants' Motion for Summary Judgment* be reversed and that this matter be remanded for further proceedings consistent with the law.

IV. SUMMARY OF ARGUMENT

The Petitioner's civil action against the Respondents should not have been dismissed by the Circuit Court because the Petitioner had come forward with evidence that common carriers, like the Respondents in this matter, have a heightened duty imposed upon them under our common law. The duty of common carriers in West Virginia is broad and has not been narrowed by any particular circumstance or factual scenario by this Court. As a common carrier, the Respondents have a duty to use the utmost care, diligence and foresight to protect passengers, like the Petitioner, when *boarding*, *riding* in and *alighting* therefrom; and it is liable, for even the slightest negligence on its part, by failing to exercise the high degree of care imposed upon it. The Circuit Court improperly found that no duty was owed to the Petitioner by the Respondents in this matter.

In its *Order Granting Defendants' Motion for Summary Judgment*, the Circuit Court recognized that 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 Circuit Court's *Order* stated that 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. However, the Circuit Court did not appropriately weigh the evidence proffered by the Respondents and the evidence presented by the Petitioner, and find that at a minimum, there were genuine issues of material fact that the harm suffered by the Petitioner was foreseeable to the Respondents for not exercising their heightened duty of care.

Finally, the Circuit Court failed to consider the public policy implications with its grant of summary judgment to the Respondents. Petitioner submits that the Circuit Court failed to balance all the circumstances in this case with public policy considerations in finding whether a legal duty exists. The Petitioner respectfully submits that public policy dictates the Respondents owed the Petitioner a legal duty in this case based upon the undisputed evidence and the heighted standard of care owed to the Petitioner that exists under the law.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18 of the West Virginia Rules of Appellate Procedure, Petitioner submits that oral argument is not necessary as the facts and legal arguments are adequately presented in the Petitioner's brief and the record below and the law in West Virginia regarding common carrier's is well established. As such, the Petitioner submits that the decisional process by this Honorable Court will not be significantly aided by oral argument.

VI. ARGUMENT

"[A] circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 451 S.E.2d 755 (W.Va. 1994). "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *See* Syl. Pt. 3, *Aetna Casualty & Surety Co. v.*

Federal Ins. Co. of N.Y., 133 S.E.2d 770 (W.Va. 1963). "The essence of the inquiry the court must make is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Wilson v. Daily Gazette Co.*, 588 S.E.2d 197 (W.Va. 2003)(*quoting Williams v. Precision Coil,* 459 S.E.2d 329, 338 (W.Va. 1995)). "The dispute about a material fact is genuine only when a reasonable jury could render a verdict for the nonmoving party if the record at trial were identical to the record compiled in the summary judgment proceedings." *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 474 S.E.2d 872, 878 (W.Va. 1996).

Additionally, "[a]lthough our standard of review for summary judgment remains *de novo*, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and *undisputed*." Syl. Pt. 3, *Fayette County Nat'l Bank v. Lilly,* 199 W.Va. 349, 484 S.E.2d 232 (1997)(*emphasis added*).

A. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS AS THERE ARE NO GENUINE ISSUES OF MATERIAL FACT THAT THE RESPONDENTS DID OWE THE PETITIONER A LEGAL DUTY AS A COMMON CARRIER IN THE STATE OF WEST VIRGINIA.

In the Circuit Court's *Order Granting Defendants' Motion for Summary Judgment*, the Circuit Court stated the following: "[t]he Court finds no West Virginia law that imposes a duty on common carriers to passengers after they have alighted from the bus." (*See* Hayes Appx. - Vol. I: 1127). Contrary to the Circuit Court's finding, Petitioner respectfully submits that this Honorable Court has declared that a common carrier owes to its passengers the duty to use the highest degree of care. This duty to use the utmost care, diligence and foresight to protect passengers extends to when passengers are boarding, riding and alighting from a bus. As set forth below, the duty

common carriers owe to passengers is long-standing law in West Virginia. The duty of common carriers is broad and encompasses circumstances when passengers are boarding, riding and alighting from a common carrier.

In *Bennett v. Bartlett et al.*, the plaintiff was a passenger in a public bus operated by the defendant. While plaintiff was a passenger, the bus was rounding a curve and got partly on the right–hand berm of the road, and before it entirely regained the hard surface, it ran into the side wall of a bridge, which tore out its right side and caused some of the seats to "pile up" on the plaintiff. 158 S.E. 712, 713(W.Va. 1931). The cause of the wreck was a jury question; and the jury awarded the plaintiff damages. The defendant appealed. *Id.* One of the issues on appeal before this Court was a jury instruction that was given as proposed by the plaintiff, which charged the jury initially that the defendants, as common carriers, were liable "for the slightest negligence," and later that they were held "to the greatest possible care and diligence compatible with the practicable operation of the vehicle." *Id.* at 714. This Court stated that "[t]he rule of care, stated in this instruction, "is now established beyond controversy." *Id.*

The Syllabus Points announced by this Court in *Bennett*, affirming the jury verdict were as follows:

> "Motorbus owner must exercise highest degree of care for safety of passengers consistent with practical operation of vehicle; "highest degree of care" implies highest care which man of ordinary prudence would bestow under similar circumstances, not continuity of most perfect human care."
>
> "It is now a settled rule that the owner of a motorbus operated as a common carrier, owes to passengers for hire the duty to exercise for their safety the highest degree of care which is consistent with the practical operation of the vehicle. The "highest degree of care," however, is not an absolute but a relative phrase. It does not imply continuity of the most perfect human care, but the highest degree of care which a man of ordinary prudence would bestow under similar circumstances."
>
> *Id.* at 712.

Around five (5) years following the decision in *Bennett*, this Court issued an opinion in *Kaufman v. Charleston Transit Co.*, 186 S.E. 617 (W.Va. 1936). In *Kaufman*, the plaintiff sustained a personal injury when alighting from a bus of the defendant where the door of the bus caught her neck, causing an aneurysm or dilatation of the carotid artery. *Id.* at 618. The jury awarded the plaintiff damages, and the defendant appealed. *Id.* In affirming the judgment, this Court again recognized the duty of a common carrier; that an operator of a motorbus owes to passengers the highest degree of care, and found that the bus driver's negligence found by the jury was proper. *Id.* at 620.

In *Isgan v. Jenkins*, this Court again recognized that "[i]t is now a settled rule that the owner of a motorbus operated as a common carrier, owes to a passenger for hire a duty to exercise for their safety the highest degree of care which is consistent with the practicable operation of the vehicle. The *'highest degree of care*,' however, is not an absolute but a relative phrase. It does not imply continuity of the most perfect human care, but the highest degree of care which a man of ordinary prudence would bestow under similar circumstances." 59 S.E.2d 689, 691 (W.Va. 1950).

This Court also addressed a common carrier's duty in *Abdulla v. Pittsburgh & Weirton Bus Co.*, 213 S.E.2d 810 (W.Va. 1975). In *Abdulla*, a motor vehicle accident occurred involving a bus owned and operated by Pittsburgh & Weirton Bus Co. as a common carrier and an automobile operated by a released party. Mr. Abdulla was a passenger in the bus at the time of the accident, and brought an action for injuries sustained by him when he was thrown forward at the time the collision occurred. *Id.* at 815. Mr. Abdulla was awarded a verdict and the bus company appealed. *Id.* One of the assignments of error was the trial court's refusal to direct a verdict in the bus company's favor. *Id.* at 817. This Court found that there was sufficient evidence of the bus company's actionable negligence to take the case to the jury. *Id.*

In reaching this finding, this Court outlined the duties of a common carrier toward its passengers. The Court stated that a common carrier is not an insurer of its passengers' safety; but nevertheless, it is held accountable to very high standards as follows: "[w]here the relation of common carrier and passenger exists, the carrier owes to the passenger the duty to use the Highest degree of Care compatible with the practical operation of a vehicle." *Id.* at 817 (internal citations omitted). This Court further recognized that "[a] carrier of passengers can not excuse the Slightest negligence on its part, resulting in injury to a passenger, by showing negligence of an intervening agency, contributing to or proximately causing the injury. It must be Wholly free from negligence on its part...In other words, any showing of negligence on the part of the bus company which proximately contributed to the accident and plaintiff's injuries is actionable." *Id.* at 817 (internal citations omitted).

This Court in *Abdulla* announced the following Syllabus Points, among others:

> "2. Although a common carrier is not an insurer of its passengers' safety, where the fare-paying relationship exists, the carrier owes the passenger the duty to use the highest degree of care compatible with the practical operation of a vehicle.
>
> 3. A carrier of passengers cannot excuse the slightest negligence on its part, resulting in injury to a passenger, by showing concurrent negligence of another agency, contributing to or immediately causing the injury because any showing of negligence on the part of the carrier which proximately contributes to a passenger's injuries is actionable."

Id. at 813.

In *Jones v. Perrine et al.*, this Court was called upon to address, among another assignment of error, jury instructions on the duty owed to passengers by a common carrier. 331 S.E.2d 842 (W.Va. 1985). In *Jones*, the appellant/plaintiff, after consuming his lunch, and an unspecified quantity of beer, telephoned appellee City Cab to secure transportation to his apartment at a building owned by appellee Perrine. A taxicab, driven by appellee Smith, arrived a short time later.

While the appellant was exiting the vehicle after its arrival at his apartment building, he slipped and fell on an oil deposit apparently left by vehicles that parked on the building's parking lot, sustaining permanent injuries. *Id.* at 843. The jury returned a verdict in favor of the appellees, and the appellant/plaintiff appealed. *Id.*

The appellant's first assignment of error involved the trial court's modification of his proffered jury instructions regarding the duty a common carrier owes its passengers. The trial court modified the appellant's jury instructions by deleting the phrase "slightest negligence" and adding the phrase "failure to exercise the highest degree of care" so that they read as follows:

> "The Court instructs the jury that it was the duty of the Defendant, Roles Transport Inc., as a common carrier ... to use the highest degree of care for [the appellant's] safety known to human care, prudence and foresight, and is liable for the failure to exercise the highest degree of care which human care and foresight might have guarded.
>
> The Court further instructs the jury that Roles Transport Inc. **as a common carrier has the duty to use the utmost care, diligence and foresight to protect passengers when boarding, riding in and alighting** from its automobile and is therefore liable if negligent by failing to exercise the high degree of care imposed upon a common carrier."
>
> *Id.* at 844. (**emphasis added**).

In assessing whether there was any error in the trial court's modification of the appellant's proposed jury instructions, this Court importantly recognized that the "slightest negligence" standard has been applied in several common carrier tort actions in West Virginia. *Id.* (internal citations omitted). This Court in *Jones* held that while it would not have been erroneous to include the "slightest negligence" language requested, it was not erroneous for the trial court to exclude such language given the sufficiency of the "highest degree of care ... known to human care, prudence and foresight" language substituted. Thus, this Court, in affirming the trial court's jury instructions, affirmed that a common carrier's duty is to use the highest degree of care for safety

known to human care, prudence and foresight to protect passengers when boarding, riding in and alighting. *Id., generally.*[1]

Based upon the foregoing, Petitioner submits that the law regarding common carriers in the State of West Virginia is well established and clear. This Court has declared that the Respondents owed the Petitioner a heightened duty of care. There are no genuine issues of material fact that as a common carrier, the Respondents have a duty to use the utmost care, diligence and foresight to protect passengers, like the Petitioner, when boarding, riding in and *alighting* therefrom; and it is liable, for even the slightest negligence on its part, by failing to exercise the high degree of care imposed upon it. *See Jones, supra.* The duty on common carriers in West Virginia is broad and has not been narrowed by any particular circumstance or factual scenario by this Court; and in turn, captures the duty of common carriers to stop at a reasonably safe place for its passengers to alight, so they can reach a place of safety without incurring a risk of injury.

Accordingly, the Circuit Court erred in granting summary judgment to the Respondents, finding no legal duty in this matter was owed to the Petitioner. The Circuit Court's *Order Granting Defendants Motion for Summary Judgment* should be reversed, and this matter remanded for further proceedings.

B. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS AS THERE ARE, AT A MINIMUM, GENUINE ISSUES OF MATERIAL FACT THAT THE HARM SUFFERED BY THE PETITIONER WAS FORESEEABLE TO THE RESPONDENTS FOR NOT EXERCISING THEIR HEIGHTENED DUTY OF CARE.

The function of the circuit court at the summary judgment stage is not to determine the truth of a matter or to weigh the credibility of the evidence, but is to determine whether there is any genuine

[1] *See also Dotts v. Taressa J.A.*, 390 S.E.2d 568, 757 (W.Va. 1990)(stating that "a common carrier, under our law and general law elsewhere, owes to its passengers the duty to use the highest degree of care to transport them safely).

issue of fact that can only be properly resolved by a finder of fact because it could reasonably be resolved in favor of either party. *See e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). In performing this threshold inquiry, a circuit court must be mindful that any permissible inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion, in this instance, the Petitioner. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

In the Circuit Court's *Order Granting Defendants' Motion for Summary Judgment*, the Circuit Court stated the following: "[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?" (*See* Hayes Appx. - Vol. I: 1127). Instead of focusing on the foreseeability of the Respondents, the Circuit Court turned its attention to the actions of the Petitioner. Petitioner respectfully submits that the undisputed facts in this matter as set forth herein were sufficient to support foreseeability, and created, at a minimum genuine issues of material fact.

The undisputed testimony from the Respondents in this matter demonstrates that a KRT bus driver's duty requires the bus driver, if he/she sees that a bus stop is unsafe, to not let a passenger alight at that location; and instead, the bus driver is to let the passenger off at the nearest safe location. KRT's Operations Supervisor, James Smith confirmed this very duty under oath at his deposition. Mr. Smith further testified that once the bus driver deems a bus stop to be unsafe, the bus driver is to ensure that the passengers are safe from the unsafe condition. (*See* Hayes Appx. - Vol. I: 81). Mr. Smith explained that a KRT bus driver's duty is to ensure that passengers exit their buses into a safe environment because doing so ensures the health, safety, and welfare of all

the passengers. *Id.* at 72. KRT's Director of Operations, Mic Peaytt, agreed with Mr. Smith's testimony in this regard. (*See* Hayes Appx. - Vol. I: 177 and 180).

The key testimony in this case that further establishes foreseeability is that of KRT bus driver, Daniel Taylor. First, Mr. Taylor testified he was not trained on the safest place to drop passengers off along Route 23. (*See* Hayes Appx. - Vol. I: 125). Second, Mr. Taylor testified that KRT bus drivers have a duty to ensure that passengers exit KRT buses into a safe environment. *Id.* at 123-24. Despite this confirmed duty, Mr. Taylor testified that he knew the location where he dropped the Petitioner off on the night of the subject incident was not a safe place to drop passengers off because it was dark, there were no lights and it was a 50-m.p.h. road. (*See* Hayes Appx. - Vol. I: 124 and 131).

Prior to arrival at the Petitioner's stop on the night of the subject incident, Daniel Taylor had deemed the stop to be an unsafe environment. The only path provided to the Petitioner to safely arrive at her apartment was for her to alight and travel in peril (a peril known to KRT's bus driver) across a highway, in the dark, where speeds of vehicular traffic were at or in excess of fifty (50) m.p.h. Daniel Taylor had ample opportunity to require the Petitioner to stay on the bus until he was traveling inbound on Route 23 by her apartment complex. This would have afforded the Petitioner the ability to alight from the bus on the same side of the road as her apartment complex, instead of having to take the perilous path of traveling across a 50-m.p.h. highway in the dark.

In the case *sub judice*, the undisputed facts in the underlying case demonstrate that KRT requires its bus drivers, once they identify a stop is unsafe, to not let a passenger off at that location; and instead, the bus driver is to let the passenger off at the next nearest safe location. The safety of the place afforded to the Petitioner for alighting on the night of the subject incident was entirely within the control of the Respondents (i.e. Daniel Taylor's training and through his own acts and/or

omissions). Daniel Taylor testified that he discharged the Petitioner into an unsafe environment. This subjected the Petitioner to only one path to reach a place of safety: across a highway, in the dark, where she was exposed to the dangers of vehicular traffic at speeds of 50-m.p.h.

As a result, there are, at a minimum, genuine issues of material fact that the injuries suffered by the Petitioner were foreseeable to the Respondents. This Court has declared that "[w]hen the facts about foreseeability as an element of duty are disputed and reasonable persons may draw different conclusions from them, two questions arise—one of law for the judge and one of fact for the jury" and that "[a] court's overall purpose in its consideration of foreseeability in conjunction with the duty owed is to discern in general terms whether the type of conduct at issue is sufficiently likely to result in the kind of harm experienced based on the evidence presented. If the court determines that disputed facts related to foreseeability, viewed in the light most favorable to the plaintiff, are sufficient to support foreseeability, resolution of the disputed facts is a jury question." *See* Syl. Pts. 11-12, *Strahin v. Cleavenger*, 603 S.E.2d 197 (W.Va. 2004). The Respondents failed to meet the highest degree of care required of them – to train Mr. Taylor on the safest places to drop passengers off along Route 23 and for Mr. Taylor to simply stop in a safe place/environment for the Petitioner to exit and reach her apartment without harm. Accordingly, the Circuit Court's grant of Respondents' motion for summary judgment was in error.

In addition, as set forth above, instead of focusing on the foreseeability of the Respondents, the Circuit Court turned its attention to the actions of the Petitioner in its *Order Granting Defendants' Motion for Summary Judgment*. The Circuit Court found that the Respondents owed no duty to the Petitioner 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.[2] The Circuit Court further

[2] The Circuit Court's *Order* states that the Petitioner fell victim to a hit-a-run. (*See* Hayes Appx. - Vol. I: 1128). In actuality, the women that struck the Petitioner, Taylor Jenkins was not prosecuted with a hit-and-

stated in its *Order* that Petitioner "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." (*See* Hayes Appx. - Vol. I: 1128).

Contrary to the Circuit Court's finding, the Respondents' duty owed to the Petitioner as a common carrier did not end because the Petitioner safely alighted from the bus onto the pavement, but continued to prevent *foreseeable* injury given Mr. Taylor's preceding recognition that Petitioner was being dropped off into an unsafe environment. The Circuit Court's finding ignores the duty of KRT bus drivers and the undisputed fact that Mr. Taylor dropped the Petitioner off at an unsafe location, with only one path for her to safely arrive at her apartment, a path of peril. In addition, the Circuit Court's focus on the Petitioner's actions do not go to foreseeability of the Respondents, but instead go to proximate cause and/or any comparative negligence on the part of the Petitioner. *See* Syl. Pt. 10, *Harbaugh v. Coffinbarger*, 543 S.E.2d 338 (W.Va. 2000)(stating that"[t]he questions of negligence, contributory negligence, proximate cause, intervening cause and concurrent negligence are questions of fact for the jury where the evidence is conflicting or when the facts, though undisputed, are such that reasonable men draw different conclusions from them").

Because the Circuit Court's *Order Granting Defendants' Motion for Summary Judgment* clearly illustrates both its overlook of foreseeability and the improper weight it gave to the actions of the Petitioner in order to justify its grant of summary judgment on the issue of duty, the same should be reversed and this matter remanded to the Circuit Court for further proceedings.

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run; and on the night her car struck the Petitioner, she thought it was a deer and did not have any formed intent to strike anyone and leave the scene. (*See* Hayes Appx. - Vol. I: 162 and 167).

C. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS AS PUBLIC POLICY DICTATES THE RESPONDENTS OWED THE PETITIONER A LEGAL DUTY IN THIS CASE.

In the Circuit Court's *Order Granting Defendants' Motion for Summary Judgment*, the Circuit Court recognized that "[b]eyond the question of foreseeability, the existence of a 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." (*See* Hayes Appx. - Vol. I: 1127). While recognizing the existence of a duty involves policy considerations, the Circuit Court did not balance the circumstances in this case with public policy considerations in finding whether a legal duty exists. The Petitioner respectfully submits that public policy dictates the Respondents owed the Petitioner a legal duty in this case based upon the undisputed evidence and the heighted standard of care that exists under the law.

In weighing such considerations such as the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the Respondents, such policy considerations clearly weigh in favor of a duty being owed to the Petitioner by the Respondents. First, KRT's Operations Supervisor, James Smith, testified that at the end of the day at KRT, they want to see passengers get home safely. (*See* Hayes Appx. - Vol. I: 72). In turn, KRT bus drivers have a duty to ensure that passengers exit KRT buses into a safe environment. A KRT bus driver's duty in this regard is that if a bus driver sees that a stop is unsafe, they are not to let a passenger off at that location; and instead, the bus driver is to let the passenger off at the nearest safe location. This duty is to eliminate the likelihood of injury to a passenger. KRT's bus driver, Daniel Taylor recognized the area where he dropped off the Petitioner on the day of the subject incident was an unsafe environment, but still allowed her to alight across a highway, in the dark,

where speeds of vehicular traffic were at or in excess of fifty (50) m.p.h.; subjecting the Petitioner to a likelihood of injury. Thus, this policy consideration weighs in favor of the existence of a duty.

Second, assessing the magnitude of the burden of guarding against the injury to the Petitioner and the consequences of placing that burden on the Respondents go hand-in-hand. However, any such burden related to these two policy considerations is non-existence. The guard against the Petitioner's injuries was already an established duty at KRT prior to the subject incident. As testified to by KRT's Operations Supervisor and Director of Operations, a KRT bus driver's duty requires the bus driver, if he/she sees that a bus stop is unsafe, to not let a passenger alight at that location; and instead, the bus driver is to let the passenger off at the nearest safe location. (*See* Hayes Appx. - Vol. I: 81 and 180). As such, there is no burden on the Respondents guarding against the Petitioner's injuries and no consequence to the Respondents. These policy considerations weigh in favor of the existence of a duty in this matter.

The Petitioner submits that public policy dictates a finding of a legal duty being owed to her in this case. Respondents should not be allowed to escape liability when the Petitioner was dropped off in a known unsafe environment. Furthermore, the Circuit Court's *Order* implies that the duty of the Respondents ended when the Petitioner alighted from the KRT bus. This finding goes against the public policy of this State and this Honorable Court's declaration of the heightened duty required of common carriers. The duty of common carriers to provide a safe place/environment for its passengers to alight arises when the common carrier is preparing to use that specific place/environment for passengers to disembark. To accept the conclusion of the Circuit Court that any duty owed to the Petitioner ended when she alighted onto the pavement and physically left its bus is equivalent to saying that any duty owed stops almost at the same time it starts.

Accordingly, public policy dictates the Respondents owed the Petitioner a legal duty in this case based upon the undisputed evidence and the heighted standard of care owed to her that exists under the law. Thus, the Circuit Court' grant of summary judgment should be reversed and this matter remanded for further proceedings.

VII. CONCLUSION

WHEREFORE, for the reasons set forth herein, Petitioner Sandy K. Hayes, by and through her counsel of record, respectfully prays that this Honorable Court **GRANT** Petitioner's Petition for Appeal, and reverse the Circuit Court of Kanawha County's February 18, 2022 *Order Granting Defendants' Motion for Summary Judgment* and remand the case for trial. In addition, Petitioner prays for such further and full relief as this Honorable Court deems appropriate under the circumstances.

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No. 22-0207

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SANDY K. HAYES

Petitioner/Plaintiff Below,

v.

(ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA CIVIL ACTION NO. 20-C-1013)

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

Respondents/Defendants Below.

CERTIFICATE OF SERVICE

I, Andrew D. Byrd, counsel for Petitioner/Plaintiff Below, certify that on this 21st day of June, 2022, a true copy of the foregoing ***"Brief of Petitioner,"*** and ***"Appendix of Exhibits to Petition for Appeal – Volume I"*** was served upon counsel of record via hand delivery addressed as follows:

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