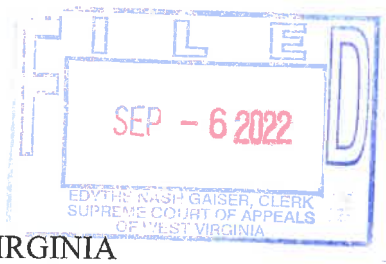

No. 22-0207

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.

REPLY BRIEF OF PETITIONER

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II. REBUTTAL TO RESPONDENTS STATEMENT OF THE CASE

In their response brief, the Respondents cite to Petitioner's brief and submit that there is no evidence in the record that Petitioner notified Respondent Kanawha Valley Regional Transportation Authority's (hereinafter "KRT") bus driver (i.e., Daniel Taylor- hereinafter sometimes referred to herein as "Mr. Taylor") that her apartment complex on Frame Road was approaching. (*See* pg. 3 of *Respondents' Response Brief*). Yet, Respondent failed to include the remaining part of that sentence in Petitioner's brief, which states "...by using the passenger notification system available on the bus." (*See* pg. 4 of *Petitioner's Brief*). It is clear from the video contained in the appendix record that Petitioner, Sandy K. Hayes, used the passenger notification system to notify KRT bus driver Daniel Taylor that her apartment complex on Frame Road was approaching (Cameras 4 and 5) and that her apartment complex was the only physical structure in the area (Camera 6)(*See* Hayes Appx. - Vol. I: 207).

Respondents also submit in their response brief that the Petitioner has relied on KRT bus driver Daniel Taylor's testimony to establish a duty in this matter. (*See* pg. 3 of *Respondents' Response Brief*). Contrary to the Respondents' assertion, Petitioner relied on the testimony from Respondent KRT's management and the immediate supervisor of KRT bus driver Daniel Taylor, to establish a duty owed in this case that coincides with West Virginia law regarding common carriers. Specifically, Petitioner presented the undisputed testimony of KRT's Operations Supervisor, James Smith – the immediate supervisor of the KRT bus driver Daniel Taylor – regarding the duties of a bus driver if a bus stop is unsafe:

> 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.

Petitioner also presented the testimony in the record from KRT's Director of Operations, Mic Peaytt, 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.

In turn, Respondents' argument that Petitioner relied upon the testimony of KRT bus driver Daniel Taylor to establish a duty in this matter is misplaced.

Next, Respondents now argue that KRT bus driver Daniel Taylor's testimony, that the bus stop on the night of the subject incident was not safe, was hindsight. However, there is nothing in the record to indicate Mr. Taylor's testimony was hindsight. In fact, Mr. Taylor identified at his deposition that any stop where passengers are dropped off on a 50-m.p.h. road, with no streetlights, is an unsafe stop and that there are a bunch of them:

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)(**emphasis added**).

Prior to the subject incident, KRT bus driver Daniel Taylor had been with KRT since December 2017, and officially became a bus operator in January, 2019, nine (9) months before the subject incident occurred on October 14, 2019. (*See* Hayes Appx. - Vol. I: 119). Later in discovery, KRT produced a document showing that Mr. Taylor had been on Route 23 for a "ride-along" in July, 2018. As such, Mr. Taylor had the familiarity and ability to identify which stops are unsafe for passengers to be dropped off: on a 50-mile-an-hour roadway where there are no streetlights. Based upon his familiarity and prior travel on Route 23, Mr. Taylor identified the location where he dropped off the Petitioner on the night of the subject incident as being an unsafe environment:

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.

Based upon the foregoing, the record does not support the Respondents argument that KRT bus driver Daniel Taylor's testimony was hindsight.

Finally, the section of Respondents' response brief titled *Statement of the Case* focuses on the actions of the Petitioner, and not the duty of the Respondents. Specifically, the Respondents claim that no duty was owed to the Petitioner once she safely alighted from the bus. (*See* pgs. 3-6 of *Respondents' Response Brief*). Contrary to their position, 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 the duties of KRT's bus drivers and Mr. Taylor's preceding recognition that Petitioner was being dropped off into an unsafe environment.

III. ARGUMENT

A. THE RESPONDENTS, AS A COMMON CARRIER IN THE STATE OF WEST VIRGINIA, OWED A LEGAL DUTY TO THE PETITIONER UNDER THE UNDISPUTED FACTS OF THIS CASE.

In the section of their response brief titled *Petitioner Can Identify No Legal Authority Recognizing A Duty, Heightened or Not, Under Said Undisputed Facts,* Respondents have shaped the issue presented as whether a heightened duty of care is owed to a person after they've alighted from a bus and crossed the road. (*See* pg. 10 of *Respondents' Response Brief*). This is simply not the case. While the West Virginia Supreme Court has not decided a case directly on point to the facts of this case, the Respondents are missing the point of when the duty of KRT bus driver Daniel Taylor begins in this matter under West Virginia law.

This Court has long held 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. *See generally, Jones v. Perrine et al.*, 331 S.E.2d 842 (W.Va.

1985)(emphasis added). When a passenger is preparing to alight or has signaled to a bus driver that they are prepared to alight, the bus driver must evaluate the stop before the passenger's feet hit the ground to ensure they are exiting into a safe environment. This was confirmed in the record below wherein the undisputed testimony demonstrated 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; instead, the bus driver is to let the passenger off at the nearest safe location. KRT's Operations Supervisor, James Smith testified to this 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).

Based upon the undisputed testimony of the Respondents as set forth above, KRT bus driver Daniel Taylor's duty, as soon as he was notified that the Petitioner wanted to be dropped off on the night of the subject incident, was to determine whether the Petitioner could *alight* into a safe environment. Mr. Taylor confirmed that KRT bus drivers have a duty to ensure that passengers exit KRT buses into a safe environment. (*See* Hayes Appx. - Vol. I: 123-24). At the time Daniel Taylor was preparing to drop off the Petitioner on the night of the incident, it was deemed by him to be an unsafe environment, just like "at a bunch of these stops." (*See* Hayes Appx. - Vol. I: 124). Based upon his time as a bus operator for KRT, Mr. Taylor was familiar with unsafe environments for passenger drop-off like this one, which required the Petitioner to travel in peril across a highway, in the dark, where speeds of vehicular traffic were at or in excess of fifty (50) m.p.h. Thus, Respondents' argument that the focus on appeal should be on whether any duty is owed to passengers after they exit a bus and travel from the stopped bus is misplaced.

Respondents next argue that the long-standing law of this Court regarding common carriers is not applicable because KRT is considered a political subdivision, invoking the West Virginia

Tort Claims and Insurance Reform Act ("WVGTCIRA")(*See* pg. 11 of *Respondents' Response Brief*). This is simply incorrect. In the very case cited by the Respondents, this Court stated that the standard set forth in the WVGTCIRA is a negligence standard and that a plaintiff still must prove the elements of negligence. *Wheeling Park Commission v. Dattoli*, 787 S.E.2d 546, 552 (W.Va. 2016). The Court in *Dattoli* also stated that "negligence is the violation of the duty of taking care under the given circumstances." *Id.* at 551. This Court did not limit the specific elements of negligence (duty, breach, causation, damages) with respect to a political subdivision in *Dattoli*, but simply stated the traditional elements of negligence apply. Thus, Respondents' argument that this Court's decisions regarding the heightened duty of common carriers is inapplicable in the face of the WVGTCIRA is in error.

B. JURISDICTIONS ACROSS THE COUNTRY RECOGNIZE THAT COMMON CARRIERS OWE A DUTY TO ITS PASSENGERS TO DISCHARGE THEM INTO A REASONABLY SAFE ENVIRONMENT.

In their response brief, Respondents submit that this Court has not addressed the factual scenario and/or issue presented in this matter. Again, the Respondents have shaped the issue presented in this case as whether common carriers owe a duty to passengers after they have exited the vehicle and traveled from the stop. (*See* pg. 13 of *Respondents' Response Brief*). As set forth above in the previous section herein, this is not the issue presented on this appeal with respect to the duty of common carriers, as this Court has long declared that common carriers have the duty to use the utmost care, diligence and foresight to protect passengers when they are boarding, riding and alighting from a bus.

Petitioner agrees with the Respondents that jurisprudence from other jurisdictions is not binding on this Court but is regarded as persuasive authority. Many jurisdictions around the country agree with the West Virginia Supreme Court that common carriers owe its passengers the

highest degree of care when boarding, riding in and alighting therefrom. Contrary to Respondents' argument that case law from across the country demonstrates that there is no duty under the facts of this case, many jurisdictions have found that a common carrier has an affirmative duty to discharge a passenger into a reasonably safe environment.

In *O'Malley v. Laurel Line Bus Co.*, the plaintiff and two companions became passengers in a motorbus of the public service company defendant around midnight on the day of the incident. 166 A. 868, 869 (1933).[1] The night was dark and stormy. While in transit, the plaintiff advised the motorbus driver that he and his companions desired to be let off at a certain location. At the stop, the plaintiff's companions exited safely. As the plaintiff exited, he started towards the sidewalk and was struck by an automobile traveling in the direction opposite of the bus. At the time of the incident, the motorbus was several hundred feet away from the regular drop-off point and was in the center of the street instead of on the right-hand side of the street, of which the plaintiff was not advised. *Id.* Judgement was entered in favor of the defendant, and plaintiff appealed. *Id.* at 868.

The Supreme Court of Pennsylvania stated that a "common carrier for hire owes to its passengers the highest degree of care and diligence in carrying them to their destination and enabling them to alight safely and to avoid any possible danger while doing so. *Id.* at 869 (internal citations omitted). The Court further stated that "[i]f the person in charge of a car used for the carriage of passengers for hire knowingly permits one of them to get off the vehicle at a dangerous place, which is not the usual stopping place, and the dangerous character of which the passenger could not see and did not know, the carrier will be liable for the resulting injuries, if any, to the

[1] *See* Hayes Appx. - Vol. I: 944-46.

passenger." Because the plaintiff was discharged at an obviously perilous point, the Court reversed the judgment in favor of the defendant below. *Id.* at 870.

In *Connolly v. Rogers*, plaintiffs were injured when they were struck by a motor vehicle while crossing a street after they had exited a bus owned and operated by defendant transportation authority. 195 A.D.2d 649, 650 (1993).[2] Plaintiffs were on the bus headed for the State University of New York at Albany campus on the south side of Washington Avenue. The bus pulled off of Washington Avenue onto a gravel area of the shoulder, which was designated as a bus stop, along the north side of the street across from the entrance to the campus. Plaintiffs got off of the bus and, less than a minute after the bus pulled away, they started to cross Washington Avenue after checking to see that the street was clear of traffic. Having safely crossed the westbound lanes of Washington Avenue, plaintiffs were confronted with oncoming traffic in the eastbound lanes and they stopped on the double yellow line in the center of the street, where they were struck by an eastbound traveling vehicle. *Id.* Defendant transportation authority's motion for summary judgment was denied; and it appealed. *Id.*

In affirming the denial of the defendant transportation authority's motion for summary judgment, the New York Supreme Court, Appellate Division stated that "a common carrier owes a duty to an alighting passenger to stop at a place where the passenger may safely disembark and *leave the area. Id.* (*emphasis added*)(internal citations omitted). The Court in *Connolly* noted that it had been explained in a prior opinion that:

> "Plainly, then, the case law obligates the public carrier, in discharging passengers, to provide a reasonably safe point from which the passengers can alight and walk away without incurring a risk of injury. After all, the passenger has no choice but to exit through the bus doors. Beyond that point, however, when it is a passenger's individual choice which directs where he or she will walk, then common sense, logic and public policy simply do not support extending a duty of care to the public

[2] *See* Hayes Appx. - Vol. I: 948-51.

> carrier to ensure that once the passenger has safely departed, the city's streets or sidewalks will be absolutely free from defect. *Only when the placement of the bus dictates that the passenger navigate a treacherous path should the public carrier be held liable for any injuries proximately caused by that hazardous condition.*"
>
> *Id.* at 650-651 (*emphasis added*)(internal citations omitted).

The Court in *Connolly* recognized that the complaint of a passenger injured while leaving the area where the bus stopped for disembarkation will not be dismissed on a summary judgment motion if there is a factual dispute over whether there was *any* safe alternative route which plaintiff could have taken. *Id.* at 651 (internal citations omitted). In reviewing the facts relating to the safety of the path chosen by the plaintiffs, the transportation authority submitted evidence that the bus stop had been used for many years by students and there had been no incidents or accidents prior to plaintiffs' injuries. The Plaintiffs, however, submitted an affidavit of an engineer who opined that at the time of the accident, the configuration of Washington Avenue (two lanes of travel in each direction), the speed limit (50 miles per hour) and the contour of the street (a curve and downgrade about 300 feet west of the accident site) provided both pedestrians and motorists with inadequate sight distances to permit safe crossing by pedestrians. *Id.* The *Connolly* Court concluded that the defendant transportation authority was not entitled to summary judgment. The Court determined that questions of fact had been raised as to whether the path which plaintiffs used to leave the area of disembarkation was reasonably safe as the defendant transportation authority submitted no evidence of any alternative path. *Id.*

In *Roden v. Connecticut Co.*, the plaintiff, a boy 7 years old, rode as a passenger in a bus of the defendant to the end of its route. 155 A. 721 (1931).[3] When the bus reached the end of its run, the driver drove it toward the left side of the road, so that at least a part of it was upon the

[3] *See* Hayes Appx. - Vol. I: 953-56.

shoulder of the roadway. The only door in the bus used by passengers was upon its right side. The driver opened the door, and the plaintiff descended the steps to the roadway, to go to his home on the opposite side of the street. He was struck by an automobile truck proceeding in the same direction as the bus and received injuries for which he sought a recovery in the action. Id. at 721-722. A jury returned a verdict in favor of the plaintiff and against the defendant bus company, and the defendant appealed. *Id.* at 721.

On appeal, the Supreme Court of Errors of Connecticut stated that "the duty of a common carrier of passengers includes an obligation to furnish them a safe place in which to alight, as far as that place is provided by it or is affected or conditioned by the movement of the vehicle, and that duty is only satisfied if it exercises the highest degree of care and skill which reasonably may be expected of intelligent and prudent persons engaged in such a business, in view of the instrumentalities employed and the dangers naturally to be apprehended." The Court further stated that "[a]n automobile bus is able to move or stop in the street at the will of its driver, and the safety of the place he offers its passengers to alight may be affected or conditioned by the passing traffic." "When, however, the duty of the carrier to provide a safe place to alight has been fulfilled and the passenger has left the vehicle, it ceases to owe to him any duty other than that which it owes to any person coming within the range of its activities, not to do him injury by a failure to exercise reasonable care." *Id.* at 722 (internal citations omitted).

In reviewing the facts of the trial, the Court in *Roden* took note that the evidence showed a jury might reasonably have found, among other things, that the bus company could have stopped upon the right–hand side of the street; the highway curved just before the place where the bus stopped, in such a way that the view of any one on that side of the street was restricted; one could not see automobiles approaching until they were about two hundred feet away; there was

considerable passing of vehicles and certainly the possibility of automobiles approaching. *Id.* 722. Importantly, the Court in *Roden* found that the bus stopped and required the plaintiff to alight in the traveled portion of a paved highway, when the bus driver had the abundant opportunity to let the plaintiff out at the side of the road, off the highway, in a place of safety. *Id.* at 722-723.

In affirming judgment for the plaintiff, the Court in *Roden* stated "[t]he trial court properly based the plaintiff's right to recover, if any, upon the breach of the defendant's duty in failing to afford him a safe place to alight, and the question whether such a breach of duty, if found to exist, was a proximate cause of the plaintiff's injury, was properly submitted to the jury as one of fact." *Id.* at 724.

As set forth above and as the Petitioner set forth in the record below, the common theme among many jurisdictions around the country is a common carrier's heightened duty owed to its passengers includes a duty to provide them with a reasonably safe place to alight. Many jurisdictions recognize that this means the duty requires the passenger to be discharged into a relatively safe space, and does not end just because he/she alights safely from the bus when he/she is discharged into a dangerous area. *See, e.g., Cleveland R. Co. v. Crooks*, 181 N.E. 102 (1932)(finding that the passenger was not discharged in a place of safety and was struck by a motor vehicle and the Court stated that "the safe and sane point for the stoppage of a motorbus, whether the stop be regular or irregular, is at the curb, where there can be no danger to the passenger who is alighting from vehicular traffic)[4]; *Dietrich v. Community Traction Co.,* 203 N.E.2d 344 (1964)(holding that a passenger is not discharged at a 'reasonably safe place' merely because he is not injured in the very act of alighting and that a motorbus common carrier may be liable for injuries proximately resulting from its negligence in failing to afford a passenger an opportunity

[4] *See* Hayes Appx. - Vol. I: 958-59.

to alight in a reasonably safe place even though the passenger had alighted and had taken two or three steps before he was injured)[5]; *Waldsachs v Inland Marine Service, Inc.* 2011 WL 3813093 (2011)(stating that a "carrier's duty is merely not to hazard the safety of the passenger by putting him off or allowing him to get off at a place which the carrier, through its employe[e], knows or ought to know is unsafe")(internal citations omitted)[6]; *Lewis v. Pacific Greyhound Lines*, 34 P.2d 616, 617 (1934)(stating "[u]nder ordinary circumstances, when a passenger is discharged safely upon the street the liability of such carrier for injuries ceases. An automobile bus is able to move or stop in the street at the will of the driver. Ordinarily, stations are not maintained by such carriers. The safety of the place afforded the passenger for alighting is entirely within the control of the driver, and passengers are discharged to suit their convenience. The degree of care to be exercised must be commensurate with the danger involved. To discharge a passenger on a highway where he would be subject to the dangers of vehicular traffic would clearly not meet the degree of care which the law exacts.")[7]

The Respondents claim that the Petitioner has identified no law with facts analogous to this case where any Court has found a duty owed in a situation similar to the underlying incident that occurred on October 14, 2019. (*See* pg. 17 of *Respondents' Response Brief*). Respondents' assertion in this regard is unfounded as the Petitioner submitted the above-referenced cases in other jurisdictions to the Circuit Court and the Respondents in the case below. (*See* Hayes Appx. - Vol. I: 925-42). Petitioner maintains that just like the cases cited *supra*, the law announced by the West Virginia Supreme Court with respect to common carriers captures the duty of common carriers to

[5] *See* Hayes Appx. - Vol. I: 961-66.
[6] *See* Hayes Appx. - Vol. I: 968-71.
[7] *See* Hayes Appx. - Vol. I: 973-79.

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.

C. THE CIRCUIT COURT DID NOT PROPERLY CONSIDER THE EVIDENCE PRESENTED AND ERRED IN FINDING THAT THE RESPONDENTS OWED NO DUTY TO THE PETITIONER.

On Page Seventeen (17) of their response brief, the Respondents attempt to limit Petitioner's argument and claim that Petitioner *only* relied on one purported fact on the issue of foreseeability – that Mr. Taylor testified where Petitioner requested to be let off was not safe. (*See* pg. 17 of *Respondents' Response Brief*). As set forth in *Petitioner's Brief*, Petitioner points out the error of the Circuit Court with respect to foreseeability: failing to focus on the Respondents' lack of adherence to their duty owed to the Petitioner, and instead, focusing on the actions of the Petitioner *after* she alighted from the bus.[8] (*See* pgs. 17-21 of *Petitioner's Brief*).

In eliciting the undisputed facts on foreseeability, the Petitioner did not focus solely on the testimony of KRT bus driver Daniel Taylor but demonstrated that the Respondents require its bus drivers to ensure its passengers exit into a safe environment; and if they cannot do so, the bus driver is let the passenger off at the nearest safe location. The Respondents' duty, in this regard, ensures the health, safety and welfare of its passengers. (*See* pg. 18 of *Petitioner's Brief).* It is only after the Respondents established the duty of its bus operators through undisputed testimony, did Petitioner direct the Circuit Court's attention to the testimony of KRT bus driver Daniel Taylor. Not only did KRT bus driver Daniel Taylor agree that a KRT bus driver has a duty to ensure

[8] The Circuit Court's focus on the Petitioner's actions do not go to foreseeability of the Respondents but would 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").

passengers exit into a safe environment, but he admitted that the area where he dropped the Petitioner off the night of the subject incident was an unsafe environment. (*See* pg. 18 of *Petitioner's Brief).* Thus, Petitioner did not solely rely on the testimony of KRT bus driver Daniel Taylor to establish foreseeability as suggested by the Respondents.

Next, the Respondents submit that the Circuit Court properly found that the Respondents owed no duty at law to the Petitioner and that the Petitioner's injury was not foreseeable. (*See* pgs. 18-19 of *Respondents' Response Brief).* In support, the Respondents cite to Paragraph Twenty-Three (23) of the Circuit Court's *Order Granting Defendants' Motion for Summary Judgment* wherein it determined that the Respondents owed no duty to the Petitioner after she alighted, that she was not in danger until after she crossed the road, that the Respondents did not know where the Petitioner was going, and the Respondents did not control her path. (*See* Hayes Appx. - Vol. I: 1127-28). This is the very essence of the error of the Circuit Court and the position of the Respondents.

The Circuit Court's error and the Respondents' belief is that the focus of duty and foreseeability should be on the actions of the Petitioner after she alighted from the bus and where the Petitioner was eventually injured. To the contrary, the undisputed facts in the underlying case demonstrate that KRT required its bus drivers, once they identify a stop is unsafe, to not to 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 KRT bus driver Daniel Taylor. Petitioner's apartment complex was the only physical structure in the area where Mr. Taylor stopped his bus the night of the subject incident. (*See* Hayes Appx. - Vol. I: 207-Camera 6).

It is undisputed that KRT bus driver Daniel Taylor testified that he discharged the Petitioner into an unsafe environment. The Respondents contend that this testimony was "hindsight." (*See* pg. 20 of *Respondents' Response Brief*). As discussed *supra*, there is nothing in the record to indicate that his testimony was hindsight. KRT bus driver Daniel Taylor had been with KRT since December 2017, and officially became a bus operator in January, 2019, nine (9) months before the subject incident occurred on October 14, 2019. (*See* Hayes Appx. - Vol. I: 119). Later in discovery, KRT produced a document showing that Mr. Taylor had been on Route 23 for a "ride-along" in July, 2018, the very route the Petitioner was traversing the night of the incident.

Moreover, Mr. Taylor had the familiarity and ability as a bus operator to identify which stops, on any route, are unsafe for passengers prior to dropping them off. Mr. Taylor testified that a bunch of stops were unsafe where passengers are dropped off on a 50-mile-an-hour roadway with no streetlights. (*See* Hayes Appx. - Vol. I: 124). Where Petitioner was permitted to alight on the night of the subject incident fit this unsafe environment that Mr. Taylor had identified on a bunch of stops. *Id. See also*, *Id.* at 131. Clearly, this is not hindsight as portrayed by the Respondents.

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. This is because KRT bus driver Daniel Taylor's duty began at the time when Petitioner notified him that she wanted to alight from the bus. Mr. Taylor's preceding recognition that Petitioner was going to be alighting into an unsafe environment (i.e., across a highway, in the dark, where she was exposed to the dangers of vehicular traffic at speeds of 50-m.p.h.) establishes that he anticipated the harm that was eventually suffered by the Petitioner. The Circuit Court's *Order Granting Defendants' Motion for Summary Judgment* and Respondents position clearly illustrates

both an overlook of foreseeability and the weight it gave to the actions of the Petitioner instead of the moment the Respondents established duty began - when the Petitioner notified KRT bus driver Daniel Taylor that she wanted to alight from the KRT bus.

Lastly, the Respondents argue that Petitioner has improperly framed the issue of KRT bus driver Daniel Taylor's insufficient training. Respondents submit that Petitioner has assumed, without support, that there was a requirement by the Respondents to train its bus drivers on "safe places" but that Mr. Taylor nevertheless completed his training in this regard. (*See* pg. 22-23 of *Respondents' Response Brief*). Contrary to the Respondents' argument, KRT's Director of Operations, Mic Peaytt testified that KRT bus drivers are to be trained on individual routes before driving them. (*See* Hayes Appx. - Vol. I: 177-78). Despite this requirement, KRT bus driver Daniel Taylor testified that he was not trained on the safest places to allow passengers to alight at stops along Route 23, the route the Petitioner was injured on the night of the subject incident. (*See* Hayes Appx. - Vol. I: 125). As such, Petitioner's argument regarding the lack of training on Route 23 is fully supported in the record.[9]

This Court has long held 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. *See generally*, *Jones v. Perrine et al.*, 331 S.E.2d 842 (W.Va. 1985). When a passenger is preparing to alight or has signaled to a bus driver that they are prepared to alight, the bus driver must evaluate the stop before the passenger's feet hit the ground to ensure it is a safe environment for the passenger to alight. This was confirmed in the record below wherein it was

[9] While the Respondents argue on Page 21 of their *Response Brief* and the Circuit Court's *Order* states that the Petitioner fell victim to a hit-a-run; the undisputed facts show that this is not the case as the women that struck the Petitioner, Taylor Jenkins was not prosecuted with a hit-and-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).

established that a KRT bus driver's duty requires the bus driver, if he/she observes that a bus stop is unsafe, to not let a passenger alight at that location; instead, the bus driver is to let the passenger off at the nearest safe location. KRT's Operations Supervisor, James Smith testified to this 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). Thus, a duty was owed to the Petitioner prior to and at the time she alighted from the KRT bus on the night of the subject incident.

D. RESPONDENTS PUBLIC POLICY ARGUMENT IS MISPLACED AS IT IGNORES THE ACTS AND OMMISSIONS OF THE RESPONDENTS.

Respondents submit that public policy dictates finding no duty in this matter as imposing a duty on KRT would require it to take burdensome steps, impede its operations and make it an absolute insurer of passenger safety. Respondents provide examples of what steps it would have to take if such a duty was imposed; but each example involves steps to be taken by KRT after a passenger has alighted from a bus. (*See* pg. 24 of *Respondents' Response Brief*). Again, the Respondents have failed to recognize when the duty under West Virginia law is imposed on it and its own acts and omissions.

Once again, the Petitioner points out that this Court has long held 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 from a bus. *See generally*, *Jones v. Perrine et al.*, 331 S.E.2d 842 (W.Va. 1985). Given the duty imposed on the Respondents under West Virginia law, KRT bus drivers have a duty to ensure that passengers exit KRT buses into a safe environment. This duty does not require a bus driver to exit the bus with every passenger and walk the passenger all the way home as suggested by the Respondents. Instead, this duty requires the bus driver to assess whether it is safe for a passenger to alight into an environment from the

bus. This duty begins before the passenger even exits the bus, so as to prevent foreseeable injury to the passenger.

For example, if a bus driver is notified that a passenger wants to alight at a certain location and there is a rabid black bear growling at that location, does a bus driver's duty permit the passenger to alight into this environment? No, because the bus driver's duty to ensure the passenger alights the bus into a safe environment began before the passenger was allowed to alight- observing the bear upon approach to the stop location. The bus driver has control over where a passenger alights so as to prevent foreseeable injury. Thus, Respondents' argument that the duty owed to the Petitioner ended when she alighted and left the bus ignores when the duty actually began in this case, as well as the acts and omissions of KRT bus driver Daniel Taylor.

Additionally, Respondents argue that West Virginia statutory law addresses whose duty it is to yield to traffic, whose duty it is to yield to pedestrians, and when drivers who hit pedestrians and flee are criminalized. (*See* pgs. 25-26 of *Respondents' Response Brief*). These statutory prohibitions do not focus on the acts or omissions of the Respondents. Respondents ignore their own acts and omissions and cite to these laws to shift focus on the acts of the Petitioner and the driver of the car that struck the Petitioner on the night of the subject incident. These statutory laws have no bearing on the duty of common carriers as announced by this Honorable Court long ago. Public policy dictates the Respondents owed the Petitioner a legal duty in this case based upon the undisputed evidence and West Virginia law requiring the Respondents to protect passengers when they request to alight.

IV. RESPONSE IN OPPOSITION TO RESPONDENTS CROSS-ASSIGNMENT OF ERROR

Respondents have asserted a cross-assignment of error, arguing that the Circuit Court erred in not granting summary judgment on immunity grounds. Respondents have provided five (5)

reasons Respondents should have been granted summary judgment based upon the immunity provisions contained within the WVGTCIRA. (*See* pgs. 26-27 of *Respondents' Response Brief*). However, Respondents' cross-assignment of error in this regard is unsupported based upon West Virginia law and the undisputed facts of this case.

First, Respondents argue that KRT is entitled to absolute immunity as the Petitioner's claims are based on KRT adopting or failing to adopt certain policies. (*See* pg. 26 of *Respondents' Response Brief*). A cursory review of the appendix record cited to by the Respondents in this regard (i.e., discovery responses of the Petitioner and Petitioner's expert disclosure) is devoid of any claim KRT adopted or failed to adopt certain policies. In fact, Petitioner's retained expert offered opinions that amount to KRT's negligent training, supervision and monitoring of its bus driver, Daniel Taylor and his negligent acts and omissions; not the failure to enact policies and procedures. (*See* Hayes Appx. - Vol. I: 618-622).

Additionally, Petitioner's Complaint against Respondent KRT does not contain any claim for it adopting or failing to adopt certain policies. (*See* Hayes Appx. - Vol. I: 3-10). In particular, Petitioner alleged that KRT failed to, among other things: (a) properly hire, retain, train and supervise John Doe Bus Driver (i.e., Daniel Taylor); (b) properly monitor John Doe Bus Driver (i.e., Daniel Taylor); (c) failed to properly train, supervise and monitor John Doe Bus Driver (i.e., Daniel Taylor) on his bus routes, including but not limited, Route 23 and (d) properly evaluate the bus stops along Route 23 to ensure passenger protection. *Id.* Petitioner also asserted that Respondent KRT is vicariously liable for the acts of its employee bus driver, Daniel Taylor; and that Mr. Taylor is liable as well for his reckless acts and/or omissions. *Id.* Respondents have attempted to frame Petitioner's claim against Respondent KRT as one that results from the failure

to enact policies and procedures when it does not exist. Accordingly, Respondent KRT is not afforded immunity pursuant to the WVGTCIRA in this regard.

Second, Respondents argue that KRT cannot be liable for negligence as the Petitioner can show no breach and no causation; therefore, Respondents are immune under the WVGTCIRA. (*See* pgs. 26-27 of *Respondents' Response Brief*). As a matter of brevity, Petitioner incorporates its argument as set forth below at Hayes Appx. - Vol. I: 680-685 and 686-687. Simply put, Respondent KRT bus driver Daniel Taylor owed Petitioner a duty to ensure she alighted into a safe environment, and Mr. Taylor breached this duty owed by dropping her off at a location he knew was unsafe, causing her injuries. This incident would have never occurred had Mr. Taylor adhered to his duty owed to the Petitioner and dropped her off at the nearest safe location. Accordingly, Respondents are not afforded immunity pursuant to the WVGTCIRA in this regard.

Third, Respondents argue that Taylor Jenkins' hit-and-run is the proximate and/or intervening cause of the Petitioner's injury; and in turn, Respondents are somehow immune because of this under the WVGTCIRA. (*See* pg. 27 of *Respondents' Response Brief*). Petitioner submits that the subject incident would have never occurred had KRT employee bus driver, Daniel Taylor dropped the Petitioner off at the next safest location instead of into an unsafe environment. Nevertheless, Respondents' argument in this regard fails as questions of proximate cause or intervening cause cannot be decided by the Respondents but are questions of fact for the jury. "The 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." *See* Syl. Pt. 10, *Harbaugh v. Coffinbarger*, 543 S.E.2d 338 (W.Va. 2000). Moreover, and as a matter of brevity, Petitioner incorporates its argument as set forth below at Hayes Appx. - Vol. I:

688-690. Accordingly, Respondents are not afforded immunity pursuant to the WVGTCIRA in this regard.

Fourth, Respondents argue that KRT bus driver Daniel Taylor is immune because Petitioner can produce no evidence that he acted recklessly; therefore, Respondents are immune under the WVGTCIRA. (*See* pg. 27 of *Respondents' Response Brief*). Petitioner fully briefed this argument below. As a matter of brevity, Petitioner incorporates its argument as set forth below at Hayes Appx. - Vol. I: 691-693. Additionally, Jamie Snodgrass, Respondent KRT's current Director of Operations, testified that KRT bus driver Daniel Taylor's actions on the night of the subject incident were *reckless*. (*See* Hayes Appx. - Vol. I: 198). Accordingly, Respondents are not afforded immunity pursuant to the WVGTCIRA in this regard.

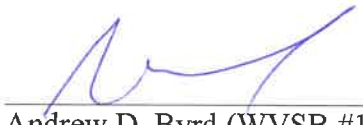
Fifth and lastly, Respondents argue that summary judgment was warranted on Petitioner's failure to train claim because it is undisputed that Daniel Taylor was trained on Route 23; and in turn, Respondents are immune under the WVGTCIRA. (*See* pg. 27 of *Respondents' Response Brief*). As discussed *supra*, it is undisputed that KRT bus driver Daniel Taylor was not trained on the safe places to allow passengers to alight at stops along Route 23, as was required by the Respondents. (*See* Hayes Appx. - Vol. I: 125 and 177-78)(*Also see* Hayes Appx. - Vol. I: 685-686). Accordingly, Respondents are not afforded immunity pursuant to the WVGTCIRA in this regard or any of the arguments they have presented herein.

V. CONCLUSION

WHEREFORE, for the reasons set forth herein and in the original *Brief of Petitioner*, Petitioner Sandy K. Hayes, by and through her counsel of record, respectfully prays that this Honorable Court **GRANT** Petitioner's Petition for Appeal, **DISMISS** Respondents' Cross-Assignment of Error, 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 further prays for such further and full relief as this Honorable Court deems appropriate under the circumstances.

Submitted by:



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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 6th day of September, 2022, a true copy of the foregoing ***"Reply Brief of Petitioner"*** was served upon counsel of record via hand delivery addressed as follows:

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