IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 22-625

DENISE ORSO,

Petitioner,

v.

THE CITY OF LOGAN, WEST VIRGINIA,
A municipal corporation,

Respondent.

(On Appeal From the Final Order of the Honorable Miki Thompson; Circuit Court of Logan County, West Virginia; Case No. 20-C-22)

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Respondent notes that Petitioner's *Brief* contains no assignments of error, which violates Rule 10(c) of the West Virginia Rules of Appellate of Procedure. Respondent nonetheless responds to Petitioner's argument sections as follows.

- **I. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT THE TORT CLAIMS ACT GOVERNS PETITIONER'S CLAIMS.**
  - **a. PETITIONER DID NOT PRESERVE ITS ARGUMENT THAT W. VA. CODE § 17-10-17 OPERATES WITHIN W. VA. CODE § 29-12A-4 BELW.**
- **II. THE CITY CANNOT BE LIABLE BECAUSE IT DID NOT OWN OR CONTROL THE WIRE LOOP.**
- **III. THE CIRCUIT COURT PROPERLY CONCLUDED THAT, UNDER CITY ORDINANCES, THE CITY IS NOT RESPONSIBLE FOR SIDEWALK MAINTENANCE.**
- **IV. THE ACTUAL OR CONSTRUCTIVE KNOWLEDGE REQUIREMENT APPLIES TO PETITIONER'S CLAIMS, AND THE CIRCUIT COURT PROPERLY CONCLUDED THAT THE CITY HAD NO ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE WIRE LOOP.**
- **V. THE CIRCUIT COURT CORRECTLY FOUND NO GENUINE DISPUTE OF MATERIAL FACT AS TO THE APPLICATION OF THE OPEN AND OBVIOUS DOCTRINE.**

STATEMENT OF THE CASE

Respondent states as follows for its response to Petitioner's Statement of the Case. Whether Petitioner's injuries were serious is not pertinent to the issues decided by the Circuit Court.[1] The Circuit Court granted summary judgment for want of duty, breach, and causation.

Petitioner cites to photos depicting the wire loop she alleges caused her fall. To further clarify Petitioner's footnote 1, Petitioner testified that the subject loop depicted in the photos, taken October 4, 2018—days after the alleged fall—is not positioned the same way it was when she fell.[2] Further, Petitioner's *Brief* cites to nothing in the record indicating that the locations of the posts are at the same spots as they were at the time of the injury.

[1] Pet'r Br. 1.
[2] App. 240–242, Pet'r's Test., Dep. Tr. 60–62.

Petitioner's Statement of the Case ignores undisputed, relevant evidence. Petitioner has worked in the Logan County Circuit Clerk's Office for ten years,[3] and since 2017 she takes walks around the block where the Courthouse is located, which includes walking past Defendant First Baptist Church.[4] She walks the same route two to three times every day, four to five times per week.[5]

On October 1, 2018, she walked this same route, past the First Baptist Church. She smoked a Marlboro Light as she walked.[6] She walked past the First Baptist Church once or twice without falling. On her second or third time walking past the Church during her lunchbreak,[7] three women approached, causing Petitioner to walk to the right, toward the church.[8] As she spoke to the women and raised her hand, her right foot got caught in a wire loop and she fell.[9] Petitioner testified that, before she fell, the wire was stretched out onto the sidewalk.[10] No evidence corroborates this testimony.

As Petitioner avers, the wire loop was attached to a post at the entrance of the First Baptist Church parking lot on Stratton Street in Logan. The First Baptist owned and controlled the post and the wire and would use it to block entry to its parking lot.[11] Petitioner does not dispute the Church's ownership of the wire below.[12] Sometime after October 1, 2018, the Church removed the wire and replaced it with a yellow chain.[13]

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[3] App. 200, Pet'r's Test., Dep. Tr. 20.
[4] App. 218–219, 226.
[5] App. 216, 218, 221.
[6] App. 223.
[7] App. 222, 224.
[8] App. 227–228.
[9] App. 228–229.
[10] App. 237, Pet'r's Test., Dep. Tr. 57.
[11] App. 342, 343, 346, Def. First Baptist Church Answers to Pl's Ints. 2, 3, 5, and Answer to Request for Admission No. 1; App. 250, Pet'r's Test., Dep. Tr. 70.
[12] App. 246, Pet'r's Test., Dep. Tr. 66.
[13] App. 577; App. 344, Def. First Baptist Church Answers to Pl's Int. 6; App. 250, Pet'r's Test., Dep. Tr. 70.

According to the Defendant Church, the wire had been around the pole for at least ten years.[14] Petitioner did not dispute below that she had passed by the wire numerous times since 2017. Petitioner testified she saw the looped wire immediately before her fall.[15] Nothing obstructed Petitioner's view of the wire, and her testimony shows that, had she looked earlier, she could have seen it.[16] Prior to Petitioner's fall, the City had received no complaints and no notice of any hazard or danger posed by the wire.[17]

SUMMARY OF ARGUMENT[18]

The Circuit Court correctly decided the issue of Respondent's immunity and correctly granted summary judgment in Respondent's favor. The West Virginia Tort Claims and Insurance Reform Act (Tort Claims Act) governs Petitioner's claim against the Respondent City of Logan, a political subdivision under the Act. Under the Act, the summary judgment standard, and progeny, the Petitioner must produce proper evidence that a City employee acted negligently under one of the enumerated exceptions to the City's immunity in W. Va. Code § 29-12A-4(c). Under these exceptions, traditional negligence principles apply, including premises liability principles that are compatible with the Act. This includes the actual and constructive knowledge requirement and the open and obvious doctrine but does not include any "absolute liability" under W. Va. Code § 17-10-17. Thus, to the extent § 17-10-17 is not compatible with the Tort Claims Act,[19] the Tort Claims Act governs because it applies specifically to political subdivisions, such as the City of Logan, and

[14] App. 342, Defendant First Baptist Church Answers to Pl's Ints. 2.
[15] App. 317–318, Pet'r's Test., Dep. Tr. 137–138.
[16] App. 236–237, 315–316, Pet'r's Test., Dep. Tr. 56–57, 135–136.
[17] App. 236, Pet'r's Test., Dep. Tr. 56; App. 509–511, 514, Marcum Test., Dep. Tr. 47–49, 52; *See* App. 343, 344–345, Defendant First Baptist Church Answers to Pl's Ints. 4, 5, 9.
[18] Respondent notes that Petitioner's *Brief* fails to include a summary of argument section in violation of Rule 10(c).
[19] Respondent notes that, historically, the Court has interpreted W. Va. Code § 17-10-17 to operate within an exception to the Tort Claims Act under W. Va. Code § 29-12A-4(c). However, Petitioner's arguments invoking § 17-10-17 do not comport with the Tort Claims Act, as explained.

becaues this Court has explained that immunity of political subdivisions is governed exclusively by the Tort Claims Act.

Under the Act and longstanding negligence principles, the Respondent City cannot be liable because the City did not own or control the wire loop that Petitioner alleges caused her injury; it is undisputed that the First Baptist Church owned and controlled the wire loop. This undisputed fact alone supports a grant of summary judgment. With or without the City's ordinances (that transfer responsibility of sidewalks to the property owners whose properties abut the sidewalks), the City cannot be liable because it does own the wire loop. Moreover, the City had no actual or constructive knowledge of the wire loop or that the wire loop posed a hazard. This undisputed fact alone supports a grant of summary judgment. Because the City had no actual or constructive knowledge of the wire loop, the City was as aware of the wire loop as Petitioner; thus, the open and obvious doctrine applies. This undisputed fact alone supports a grant of summary judgment.

Petitioner raises several arguments that were not presented below that fail on their merit and do not affect the outcome below, but otherwise are not proper subjects of consideration before this Court as they were not preserved for appeal. These arguments include (1) §17-10-17 operates within the Tort Claims Act, (2) that it was undisputed below that the wire loop was stretched out onto the sidewalk, and (3) that parties may be jointly liable.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary because the appeal is frivolous, the dispositive issues have been authoritatively decided, and the facts and legal arguments are adequately presented in the briefs.[20]

[20] W. Va. R. App. P. 18(a).

ARGUMENT

Adding to Petitioner's "Introduction" argument section, Respondent notes that 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."[21] If the moving party shows no genuine issue of material fact, then the moving party is entitled to judgment as a matter of law.[22] "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."[23]

"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."[24] Summary judgment is a device designed to effect a prompt disposition of controversies on their merits without resorting to a lengthy trial if, in essence, there is no real dispute as to salient facts or if only a question of law is involved.[25]

It is not the Respondent's burden "to negate the elements of claims on which [plaintiff] would bear the burden at trial."[26] Rather, it is the Respondent's burden "only [to] point to the absence of evidence supporting [plaintiffs'] case."[27] When a motion for summary judgment is properly supported, the burden shifts to the opposing party to demonstrate that summary judgment

[21] W. Va. R. Civ. P. 56.
[22] *Id.*
[23] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
[24] Syl. pt. 4, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).
[25] *Williams v. Precision Coil*, 194 W. Va. 52, 58, 459 S.E.2d 329 (1995).
[26] *Powderidge Unit Owners Ass 'n v. Highland Props.*, Ltd, 196 W. Va. 692, 698–99, 474 S.E.2d 872, 879 (1996) (citation omitted).
[27] *Id*. at 699 (internal quotations and citations omitted).

is not appropriate.[28] 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."[29]

To meet their burden, plaintiffs "must identify specific facts in the record and articulate the precise manner in which that evidence supports [their] claims."[30] 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."[31] "The evidence illustrating the factual controversy cannot be conjectural or problematic."[32]

Here, summary judgment is especially appropriate because, as explained below, governmental immunity is involved, and the legal question of immunity must be decided at the earliest possible stage in litigation. This Court has mandated "claims of immunities, where ripe for disposition, should be summarily decided before trial."[33]

I. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT THE TORT CLAIMS ACT GOVERNS PETITIONER'S CLAIMS

Petitioner takes exception with the Circuit Court's conclusion:

> 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

[28] *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 60, 459 S.E.2d 329, 337 (1995).
[29] *Id.*
[30] *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[.]").
[31] *Precision Coil* 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.").
[32] *Id.* at 60, 337.
[33] *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)).

> the Plaintiff to be injured; and (4) that Plaintiff suffered damages as a result of Defendant's breach.[34] Under West Virginia law, traditional negligence and premises liability principles apply to political subdivisions under the Tort Claims Act.[35] Accordingly, the Court finds and concludes that the City is entitled to immunities under the Act unless Plaintiff shows by specific evidence that the immunities do not apply.[36]

Based on this language, Petitioner argues that the Circuit Court concluded that no duty existed. Petitioner misconstrues the *Order*. The Circuit Court explained that traditional negligence and premises liability principles apply under the Tort Claims Act. To sustain any negligence claim, a plaintiff must establish duty; this is what the Court was explaining in paragraph 16 of its *Order*. The Circuit Court was not concluding that no duty existed in this part of the *Order*, but was explaining how immunity must be overcome to sustain a claim under the Tort Claims Act. The Circuit Court never characterized immunity under W. Va. Code § 29-12A-4 as "absolute immunity." The Circuit Court did not discuss evidence in this section of its *Order*.[37] The Circuit Court was correct and in paragraphs prior explained how and why the Tort Claims Act applies.

It applies because the City is a political subdivision. It was not disputed below, and is otherwise not subject to any genuine dispute, that the City of Logan is a political subdivision as defined in W. Va. Code § 29-12A-3(b) and (c). As a political subdivision, the immunity and liability of the City is "governed exclusively by the West Virginia Tort Claims and Insurance Reform Act."[38] As the Circuit Court explained, "[t]he Tort Claims Act exists

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[34] *See Webb v. Brown & Williamson Tobacco Co*., 121 W. Va. 115, 2 S.E.2d 898, 898 (1939).
[35] *Wheeling Park Comm'n v. Dattoli*, 237 W. Va. 275, 282, 787 S.E.2d 546, 553 (2016) (the Tort Claims Act *does* "expressly provide that the traditional elements of negligence apply in actions brought for injuries incurred on the property of political subdivisions.").
[36] Pet'r Br. 4; App. 14, ¶ 16 (citing *See Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649, 657–658 (1996)).
[37] App. 12–14, ¶¶ 12–16.
[38] *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*.

> 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."[39]

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

> Except as provided in subsection (c) of this section, a political subdivision **is not liable in damages in a civil action for injury**, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function[.][40]

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

Under subsection (c),

> (1) Except as otherwise provided in this article, political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent operation of any vehicle by their employees when the employees are engaged within the scope of their employment and authority.
>
> (2) Political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent performance of acts by their employees while acting within the scope of employment.
>
> (3) Political subdivisions are liable for injury, death, or loss to persons or property caused by their negligent failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, or free from nuisance, except that it is a full defense to such liability, when a bridge within a municipality is involved, that the municipality does not have the responsibility for maintaining or inspecting the bridge.
>
> (4) Political subdivisions are liable for injury, death, or loss to persons or property that is caused by the negligence of their employees and that occurs within or on the grounds of buildings that are used by such political subdivisions, including, but not limited to,

[39] App. 13 (citing *Dattoli*, 237 W. Va. at 282, 787 S.E.2d at 553 (internal quotations omitted)).
[40] W. Va. Code § 29-12A-4(b)(1)(emphasis added).

> office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility.
>
> (5) In addition to the circumstances described in subdivisions (1) to (4), subsection (c) of this section, a political subdivision is liable for injury, death, or loss to persons or property when liability is expressly imposed upon the political subdivision by a provision of this code. Liability shall not be construed to exist under another section of this code merely because a responsibility is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue and be sued.[41]

Thus, under the Tort Claims Act, and because a political subdivision can only act through its employees, Petitioner must prove that a City employee acted negligently. To prove negligence, Petitioner must establish that (1) Respondent owed the Petitioner a duty of care; (2) Respondent breached said duty by failing to exercise ordinary care; (3) Respondent's breach caused the Petitioner to be injured; and (4) that Petitioner suffered damages as a result of Respondent's breach.[42]

Under the Tort Claims Act, the City can only be liable if Petitioner establishes with specific evidence that immunity under the Tort Claims does not apply.[43] Indeed, as quoted above, under the act, "(e)xcept as provided in subsection (c) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." Subsection (c) lists certain negligence claims that are allowed under the Tort Claims Act. To sustain a negligence claim under the Act,

[41] W. Va. Code § 29-12A-4(c).
[42] *See Webb v. Brown & Williamson Tobacco Co*., 121 W. Va. 115, 2 S.E.2d 898, 898 (1939) (emphasis added).
[43] *See Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649, 657–658 (1996).

Petitioner must put forth evidence establishing negligence.[44] The Circuit Court's recitation of the City's immunity in paragraphs 12–16 were correct statements of the applicable law as cited therein. This Court should affirm summary judgment.

To the extent Petitioner asserts that W. Va. Code § 17-10-17 trumps the Tort Claims Act, W. Va. Code § 17-10-17 was enacted in 1933, fifty-three years before the Tort Claims Act was enacted. Applying traditional tools of statutory construction, the "absolute liability" imposed by W. Va. Code § 17-10-17 must yield to the Tort Claims Act's immunity.[45] The Tort Claims Act does not allow for "absolute liability." Thus, to the extent Petitioner advocates for "absolute liability" under § 17-10-17, Petitioner's argument fails under longstanding tools of statutory construction. "Even if we believed there was conflict between the statutes, we would resolve such tension in favor of the more recent and specific statute."[46] "If . . . two statutes cannot be reconciled, the language of the more specific promulgation prevails. The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." [47] The Tort Claims Act is more recent and

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[44] *Wheeling Park Comm'n v. Dattoli*, 237 W. Va. 275, 282, 787 S.E.2d 546, 553 (2016) (the Tort Claims Act *does* "expressly provide that the traditional elements of negligence apply in actions brought for injuries incurred on the property of political subdivisions.").

[45] *Burdick v. Huntington*, 133 W. Va. 724, 727–28, 57 S.E.2d 885, 888 (1950) ("The liability of the defendant for injuries caused by a sidewalk being out of repair is absolute. *Chapman v. Milton*, 31 W. Va. 384, 7 S.E. 22; *Gibson v. City of Huntington*, 38 W. Va. 177, 18 S.E. 447. But the word 'absolute' is used in a restricted sense, and its meaning explained in the following language: 'It is meant that, when the basis or cause of the liability exists, that liability is absolute in the sense that no want of notice or other excuse for the defect in the street will exonerate the town. But this idea of absoluteness does not refer at all to the cause of liability, but only to the liability when it exists. It does not mean that the state of the street must be perfect. Before imposing this absolute liability, we must determine whether the street is out of repair in the sense of the statute.'").

[46] *State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 124 n.4, 464 S.E.2d 763, 766 (1995); *see State ex rel. Simpkins v. Harvey*, 172 W. Va. 312, 305 S.E.2d 268 (1983); *RMLL Enters. v. Matkovich*, No. 13-1275, 2014 W. Va. LEXIS 1087, at *5 (Oct. 17, 2014).

[47] *Zimmerer v. Romano*, 223 W. Va. 769, 784, 679 S.E.2d 601, 616 (2009) (internal quotation omitted); Syl. pt. 1, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984). *Accord Tillis v. Wright*, 217 W. Va. 722, 728, 619 S.E.2d 235, 241 (2005) ("[S]pecific statutory language generally takes precedence over more general statutory provisions."); *Bowers v. Wurzburg*, 205 W. Va. 450, 462, 519

specific. The Act only allows liability for political subdivision in specific situations and otherwise provides immunity to political subdivisions.[48] The Tort Claims Act does not allow for "absolute liability" of political subdivisions. The Court in *Dattoli* reiterated that the Tort Claims Act exists

> to limit liability of political subdivisions and provide immunity to political subdivisions in certain instances and to regulate the costs and coverage of insurance available to political subdivisions for such liability. W. Va. Code § 29-12A-1 (1986). Considering these purposes, there is no basis for a finding that W. Va. Code § 29-12A-4(c) reduces a plaintiff's evidentiary burden in proving the negligence of a political subdivision under the statute.[49]

Statutory immunity and liability of a political subdivision are now specifically "governed exclusively by the West Virginia Tort Claims and Insurance Reform Act."[50] For this reason, Petitioner's citations to outdated case law does not support her position. *Burdick*, *Johnson*, *Watkins*, *Bowen*, and *Lewis*—were decided in 1950, 1918, 1972, 1891, and 1969, respectively—well before the Tort Claims Act was enacted.[51] Thus, Petitioner's reliance on an outdated reading of W. Va. Code § 17-10-17 and outdated case law that conflicts with the Tort Claims Act must fail.

Further Petitioner's outdated cases are inapposite to our facts. In *Johnson* and *Bowen*, the city was aware of/involved with the construction and excavation that resulted in plaintiffs' injury, and it was never alleged that the city did not own or control the construction/excavation; here,

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S.E.2d 148, 160 (1999) ("Typically, when two statutes govern a particular scenario, one being specific and one being general, the specific provision prevails." (citations omitted)); *Daily Gazette Co., Inc. v. Caryl*, 181 W. Va. 42, 45, 380 S.E.2d 209, 212 (1989) ("The rules of statutory construction require that a specific statute will control over a general statute when an unreconcilable conflict arises between the terms of the statutes." (citations omitted)).

[48] W. Va. Code § 29-12A-4.

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

[50] *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*.

[51] *See Burdick v. City of Huntington*, 57 S.E. 2d 885 (1950); *Johnson v. City of Huntington*, 95 S.E. 1044 (1918); *Watkins v. City of Clarksburg*, 155 S.E. 2d 1 (W.Va. 1972); *Bowen v. City of Huntington*, 14 S.E. 217 (1891); *Lewis v. City of Bluefield*, 48 F.R.D. 435 (S.D. W.Va. 1969).

Petitioner has produced no evidence that the City of Logan had any notice, and the City does not own or control the wire loop. *Burdick, Watkins,* and *Lewis* involved repair issues with sidewalks owned and controlled by cities, including a hole in a sidewalk and uneven sidewalks; these cases were decided before West Virginia required that owners, including political subdivisions, must have actual or constructive knowledge of the condition causing injury to be liable; these cases were even decided before West Virginia adopted modified comparative fault in 1979. Here the Petitioner was not injured by an out of repair sidewalk, and the City did not have notice of the wire loop. Petitioner's case law does not support her claim and does not overcome the immunity to which the City is entitled under the Tort Claims Act.

As explained in § II *infra*, the City cannot be liable because it did not own the mechanism that caused injury. Under the Tort Claims Act, Petitioner's negligence claim failed, and the City is immune under the Tort Claims Act. Summary judgment was warranted.

a. PETITIONER DID NOT PRESERVE ITS ARGUMENT THAT W. VA. CODE § 17-10-17 OPERATES WITHIN W. VA. CODE § 29-12A-4

Besides misconstruing the Circuit Court's *Order*, Petitioner raises an argument she did not raise below. Petitioner did not argue below that W. Va. Code § 17-10-17 is an exception to W. Va. Code § 29-12A-4(c)(3). Rather, Petitioner argued that W. Va. Code § 17-10-17 applies and W. Va. Code 29-12A-4 does not apply.[52]

Under West Virginia law, "[o]ur general rule is that nonjurisdictional questions not raised at the circuit court level, but raised for the first time on appeal, will not be considered."[53] "To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect."[54] "Although we liberally construe briefs

[52] App. 639, 642–643.
[53] *Skaff v. Pridemore*, 200 W. Va. 700, 704, 490 S.E.2d 787, 791 (1997).
[54] Syl. Pt. 2, *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 470 S.E.2d 162 (1996).

in determining issues presented for review, issues which are not raised, and those mentioned only in passing but are not supported with pertinent authority, are not considered on appeal."[55]

Here, Petitioner cannot raise an argument for the first time on appeal. Petitioner's first argument in her *Brief* needn't be considered by the Court.

II. THE CITY CANNOT BE LIABLE BECAUSE IT DID NOT OWN OR CONTROL THE WIRE LOOP

Addressing Petitioner's arguments in turn, Petitioner asserts that it is undisputed that the wire was "stretched out onto the sidewalk." To support this assertion, Petitioner first cites to the *Complaint*, then to Kevin Marcum's testimony, and finally to Petitioner's testimony.[56] Petitioner's argument fails for multiple reasons.

First, Petitioner did not raise this argument below. Again, "[o]ur general rule . . . is that, when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal."[57] Nowhere in Petitioner's *Response to City of Logan's Motion for Summary Judgment* did Petitioner argue that it was undisputed that "the wire was stretched out onto the sidewalk." Because Petitioner did not raise it below, this Court should not consider it.

Second, the testimony and pleading Petitioner cites to are problematic under the summary judgment standard. Petitioner's reliance on her *Complaint* does not sustain her claim. Under Rule 56, "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading."[58]

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[55] *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996).
[56] Pet'r Br. 6.
[57] *Whitlow v. Bd. of Educ. of Kanawha Cnty*., 190 W.Va. 223, 226, 438 S.E.2d 15, 18 (1993).
[58] W. Va. R. Civ. P. Rule 56(e); *see* syl. pt. 1, *Butner v. Highlawn Mem'l Park Co.*, No. 21-0387, 2022 W. Va. LEXIS 708, at *2 (Nov. 17, 2022) ("unsworn and unverified documents are not of sufficient evidentiary quality to be given weight in a circuit court's determination of whether to grant a motion for summary judgment.").

Third, Mr. Marcum never testified that the wire was "stretched out on the sidewalk." App. 463–532. On the page of the deposition transcript Petitioner cites to, Petitioner's counsel questioned Mr. Marcum about a photo. Pet'r Br. 6; App. 596, Marcum Test., Dep. Tr. 57–58. Unfortunately for Petitioner, the photo was not attached to the transcript. In any event, Petitioner testified that the photos produced by Petitioner below do not depict the wire as it was on October 1, 2018.[59] As Petitioner avers in her Statement of the Case at footnote 1, the photos do not depict the wire as it was before Petitioner allegedly fell on October 1, 2018.[60] Petitioner has identified no photos showing the wire as it was on October 1, 2018, when the alleged fall occurred. Thus, Mr. Marcum's testimony about what some unidentified photo depicted does not establish that the wire was stretched out on the sidewalk before Petitioner fell as alleged.

Fourth, Petitioner cannot rely on her own uncorroborated testimony to sustain her claim.[61] "[S]elf-serving assertions without factual support in the record will not defeat a motion for summary judgment."[62] As discussed, Petitioner produces nothing but her own testimony to support that the wire was "stretched out on the sidewalk." Accordingly, Petitioner's argument is without merit. Even if the wire were stretched out on the sidewalk, the City cannot be liable for the wire when (1) the City does not own or control the wire, (2) the City had no notice of the wire or any danger posed by it, and (3) the wire was apparent, or more apparent, to Petitioner as it was to the City.

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[59] App. 241–242, 574, 247–248, 575, 250, 576, 251, 577, 252, 578, Pet'r's Test. and exs., Dep. Tr. 61–62, 67–68, 70, 71, 72.
[60] App. 241–242, 574, 247–248, 575, 250, 576, 251, 577, 252, 578, Pet'r's Test. and exs., Dep. Tr. 61–62, 67–68, 70, 71, 72; *see* App. 521, Marcum Test., Dep. Tr. 59.
[61] *See* Pet'r Br. 6 (citing App. 552, Pet'r's Test.).
[62] *Gomez v. A.C.R. Promotions, Inc.*, No. 21-0807, 2022 W. Va. LEXIS 660, at *5 (Oct. 26, 2022) (quoting *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 61 n.14, 459 S.E.2d 329, 338 n.14 (1995)).

Next, Petitioner makes another argument not asserted below: that "parties may be jointly liable in this kind of case." Petitioner did not raise this argument below.[63] Because Petitioner did not raise this argument below, the Court need not consider it here. Also, the new argument distracts from and misses the point that the City cannot be liable for a mechanism (the wire) (1) the City did not own or control, (2) the City had no actual or constructive knowledge about, and (3) that was as or more apparent to Petitioner as it was to the City.

Petitioner next asserts that the ordinances establish the City's control over the sidewalks. Contrary to Petitioner's argument, the ordinances state:

> Sec. 23-7.1. Duty of property owner.
> It shall be the duty of the owner of any real property abutting on or next adjacent to any sidewalk, footway or gutter, to lay and construct proper sidewalks, and to curb, recurb, pave, repave or repair, and constantly keep the same in good repair, clean condition and free from snow, ice, dirt or refuse. (6-11-68.)
> . . .
> Sec. 29. Duty of owner of abutting property with reference to sidewalks
>
> It shall be the duty of the owner of any real property abutting on or next adjacent to or on any sidewalk, footway, or gutter, to lay and construct proper sidewalks, and to curb, recurb, pave, repave, or repair, and keep the same in constant good and clean condition in the manner and within the time required by the council. And if any owner of any such real estate shall fail or refuse to lay and construct such sidewalks, and to do such curbing, recurbing, paving, repaving, or repairing, or to keep the same constantly in good condition and clean, in the manner and within the time required by the said council, it shall be the duty of the said county to cause the same to be done at the expense of the city, and to assess the amount of such expense against said property, and upon the owner thereof, and the amount so assessed against said property shall constitute a lien thereon and shall be collected by the city treasurer in the same manner and at the same time that city taxes on property assessed within the city are collected.[64]

[63] App. 635–648.
[64] App. 352, 368. The City is authorized to enact these ordinances under W. Va. Code §§ 17-10-17 and 8-11-1.

Mr. Marcum testified consistent with the ordinances:

> Q. All right. And what is your understanding, at least, as Street Commissioner, of your duties, if any, as with regard to sidewalks in the City of Logan?
>
> A. None in that area. Property owners are in charge of sidewalks.
>
> Q. Okay. In this case, if the property abutting that is the First Baptist Church, is it your belief that that's their duty?
>
> A. Oh, it's definitely their duty. Even I own real estate in the town, and I own buildings and I have to -- you know, I've replaced my sidewalks whenever they've needed it, you know, so.
>
> Q. And how long has that been the practice or the -- what I'll call the law -in Logan that the –
>
> A. As far as I -- as long as I've known, it's always been the code.
>
> Q. Okay. And is that the -- you rely on the City ordinance for that?
>
> A. Yes, sir.[65]

The ordinances and Mr. Marcum's testimony are not in dispute. "The mere contention that issues are disputable is not sufficient to preclude summary judgment."[66] Petitioner's argument fails.

Petitioner's *Brief* does not account for the applicable law correctly recited by the Circuit Court.[67] Under West Virginia law, "[t]he bare fact of an injury standing alone, without supporting evidence, is not sufficient to justify an inference of negligence. The burden is on the plaintiff to prove by a preponderance of the evidence that the defendant was negligent and that such negligence was the proximate cause of the injury."[68] "No action for negligence will lie without a duty broken," and a duty cannot be broken if it's not owed.[69] The West Virginia Supreme Court

[65] App. 585, Marcum Test., Dep. Tr. 11–12; *see* App. 585–595.
[66] *Conley v. Stollings*, 223 W. Va. 762, 768, 679 S.E.2d 594, 600 (2009).
[67] App. 15.
[68] *Walton v. Given*, 158 W. Va. 897, 902, 215 S.E.2d 647, 651 (1975); *See also Mrotek v. Coal River Canoe Livery, Ltd*., 214 W. Va. 490, 492, 590 S.E.2d 683, 685 (2003).
[69] *Parsley v. Gen. Motors Acceptance Corp*., 280 S.E.2d 703, 706 (W. Va. 1981).

has held that "the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law."[70] In the premises liability context, if a defendant does not own or control the subject property causing injury, there can be no liability:

> "[I]n cases dealing with premises liability we have generally adhered to the principle that liability results either from control of the subject area or from a specific wrongful act." *Durm v. Heck's Inc*., 184 W. Va. 562, 565, 401 S.E.2d 908, 910 (1991). In other words, "liability should be assessed against the party having control of the premises." *Id*. at 565, 401 S.E.2d at 910. **"[A] defendant [generally] cannot be held liable for a defective or dangerous condition of property which it does not own, possess or control[.]"** *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 710, 421 S.E.2d 247, 251 (1992), quoting *Southland Corp. v. Superior Court*, 203 Cal.App.3d 656, 664, 250 Cal.Rptr. 57, 61 (1988). *Accord Gover v. Mastic Beach Property Owners Association*, 57 A.D.3d 729, 869 N.Y.S.2d 593 (2008); *Contreras v. Anderson*, 59 Cal.App.4th 188, 69 Cal.Rptr.2d 69 (1997); 62 Am. Jur. 2d. Premises Liability § 4 (2005).[71]

The Circuit Court correctly reasoned and concluded as a matter of law that "a party owes no duty for any injury caused by a property condition he or she does not own or control."[72]

Whether or not the City owned or controlled the sidewalk, the City cannot be liable for the wire because the City did not own the wire. The City does not own or control, and did not exert any ownership or control, over the subject wire loop. Mr. Kevin Marcum, the City's Steet Commissioner, testified:

> Q. Does the City own that wire, to your knowledge?
> A. No, sir.
> Q. Okay. Is that wire a part of the - of any City-owned property?
> A. No, sir.[73]

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[70] Syl. pt. 5, in part, *Aikens v. Debow*, 208 W. Va. 486, 541 S.E.2d 576 (2000); syl. pt. 4, in part, *Conley v. Stollings*, 223 W. Va. 762, 764, 679 S.E.2d 594, 596 (2009).
[71] *Conley v. Stollings*, 223 W. Va. 762, 766–67, 679 S.E.2d 594, 598–99 (2009) (emphasis added).
[72] App. 15; Respondent's Reply, Supp. App. 671–675.
[73] App. 509, Marcum Test., Dep. Tr. 47.

It is undisputed that the Church owned and controlled the subject wire loop. The Church admits ownership,[74] and the Petitioner posits the same:

> Q. All right. So you don't have any information that the City of Logan placed that wire there?
> A. I don't know who put that wire there. I would think that the church is the one that put the wire there.[75]

That the Church owned and controlled the wire is not only admitted by and undisputed by the parties, but also, the Church's actions in removing the wire and replacing the same with a chain demonstrates the Church's ownership and control. The Circuit Court was correct in concluding that the City does not own or control the wire loop, and the City has never exerted any control over the wire loop.[76] Only the Church has. Petitioner does not dispute that the City did not own the wire.[77] Therefore, the Court correctly concluded that the City cannot be liable for the Petitioner tripping over the Church's wire. Accordingly, Petitioner's negligence claim failed, and the City is entitled to immunity under the Tort Claims Act and summary judgment.

III. THE CIRCUIT COURT PROPERLY CONCLUDED THAT, UNDER CITY ORDINANCES, THE CITY IS NOT RESPONSIBLE FOR SIDEWALK MAINTENANCE

As block-quoted in the preceding section, under City ordinance section 23-7.1, "[i]t shall be the duty of the owner of any real property abutting on or next adjacent to any sidewalk . . . to . . . repair and constantly keep the same in good repair, clean condition and free from snow, ice, dirt or refuse."[78] Under section 29, similarly, it is the duty of a property owner to keep sidewalks adjacent to his or her property "in constant good and clean condition."[79] Petitioner does not dispute

[74] App. 342–344, 346, Def. Church discovery responses.
[75] App. 246, Pet'r's Test., Dep. Tr. 66; *see* App. 236.
[76] *See* App. 511–512, 514, Marcum Test., Dep. Tr. 49–50, 52:19–22.
[77] *See generally* Pet'r Br.
[78] App. 93.
[79] App. 368.

the authority of the ordinances,[80] but attempts to limit these sections to mean an owner must repair or construct abutting sidewalks. But the ordinances' plain language makes clear that property owners must not only construct or repair them, but also keep them in clean condition and free from refuse.

The ordinances put the onus of responsibility on abutting property owners to maintain sidewalks. The fact that Mr. Marcus, the Mayor, or meter readers walk the streets does not undo the import of said ordinances. Further, a newspaper article does not create an issue of fact.[81] The Circuit Court correctly interpreted and applied the pertinent portions of said ordinances. Further, as discussed *infra*, under the open and obvious doctrine, the City did owe a duty to Petitioner, and the Circuit Court was correct for concluding as such.

Petitioner argues elsewhere in her *Brief* that the City's reliance on the ordinance amounts to a "disregard[]" of duty.[82] Petitioner's allegation is tantamount to charging the City with negligence for adopting an ordinance. However, under the Tort Claims Act at § 29-12A-5(a), "[a] political subdivision is immune from liability is a loss or claim results from . . . [a]doption . . . [of an] ordinance."[83] This Court has described the immunities in W. Va. Code § 29-12A-5(a) as providing political subdivisions with "absolute immunity."[84] The Court has explained, "[t]o read into these

[80] Here, it appears Petitioner has abandoned her "home rule" argument raised below, as well as her argument that the ordinances evince some "purposeful" neglect of duty. *See* App. 640, 647. These arguments were addressed in the City's *Reply* below and in the Circuit Court's *Order*. App. 675–678, 18–22. Further, it appears Petitioner has abandoned her argument that the sidewalk was "out of repair" under W. Va. Code § 17-10-17. The Circuit Court's *Order* aptly addresses this argument. App. 16–18.

[81] Pet'r Br. 5; *see* syl. pt. 6, *Butner v. Highlawn Mem'l Park Co.*, No. 21-0387, 2022 W. Va. LEXIS 708 (Nov. 17, 2022).

[82] *See* Pet'r Br. 10.

[83] W. Va. Code § 29-12A-5(a)(4).

[84] *See State ex rel. City of Bridgeport v. Marks*, 233 W. Va. 449, 456, 759 S.E.2d 192, 199 (2014); *Hutchison v. City of Huntington*, 198 W. Va. 139, 151, 479 S.E.2d 649, 661 (1996) ("To read into these words [W. Va. Code 29-12A-5(a)(1)] anything but a grant of absolute immunity would take us beyond the plain meaning of the statute."); *Albert v. City of Wheeling*, 238 W. Va. 129, 133, 792 S.E.2d 628, 632 (2016) (holding that W. Va. Code 29-12A-5(a) provides immunity "regardless of whether such loss or claim, asserted under West Virginia Code § 29-12A-4(c)(2), is caused by the negligent performance of acts by the

words [as stated W. Va. Code § 29-12A-5(a)] anything but a grant of absolute immunity would take us beyond the plain meaning of the statute."[85] Importantly, "[i]n absolute statutory immunity cases, the lower court has little discretion, and the case must be dismissed if one or more of the provisions imposing absolute immunity applies."[86] Thus, to the extent Petitioner now claims that the City is liable for enacting and relying on its ordinance, the City is entitled to absolute immunity.

IV. THE ACTUAL OR CONSTRUCTIVE KNOWLEDGE REQUIREMENT APPLIES TO PETITIONER'S CLAIMS, AND THE CIRCUIT COURT PROPERLY CONCLUDED THAT THE CITY HAD NO ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE WIRE LOOP.

Under West Virginia law, "before an owner of land may be held liable for negligence, "he must have had actual or constructive knowledge of the defective condition which caused the injury."[87] "The mere occurrence of a fall on the business premises is insufficient to prove negligence on the part of the proprietor."[88] This Court has stated, "[t]he element of foreseeability is particularly crucial in premise liability cases because before an owner or occupier may be held liable for negligence, 'he must have had actual or constructive knowledge of the defective condition which caused the injury.'"[89] Likewise, a landowner has no duty to warn about dangers unknown to the owner.[90]

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political subdivision's employees while acting within the scope of employment."); syl. pt. 4, *Hose v. Berkeley County Planning Commission*, 194 W.Va. 515, 460 S.E.2d 761 (1995) (holding that immunity under 29-12A-5(a)(9) renders a political subdivision immune regardless of any negligent act); *Standard Distrib. v. City of Charleston*, 218 W. Va. 543, 549, 625 S.E.2d 305, 311 (2005) (citing *Hose* to conclude that, regardless of any negligence, § 29-12a-5(a)(1) and -(a)(9) provide political subdivisions with immunity).

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

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

[87] *Wheeling Park Comm'n v. Dattoli*, 237 W. Va. 275, 280, 787 S.E.2d 546, 551 (2016) (citing *Hawkins v. U.S. Sports Ass'n*., 219 W. Va. 275, 279, 633 S.E.2d 31, 35 (2006); *Neely v. Belk Inc*., 222 W. Va. 560, 571, 668 S.E.2d 189, 199 (2008)).

[88] *Hawkins v. U.S. Sports Ass'n, Inc*., 219 W. Va. 275, 279, 633 S.E.2d 31, 35 (2006).

[89] *Neely v. Belk Inc*., 222 W. Va. 560, 570, 668 S.E.2d 189, 199 (2008) (quoting *Hawkins v. United States Sports Assoc., Inc*., 219 W. Va. 275, 279, 633 S.E.2d 31, 35 (2006)).

[90] *Burdette v. Burdette*, 147 W. Va. 313, 318, 127 S.E.2d 249, 252 (1962); *Estate of Helmick by Fox v. Martin*, 192 W. Va. 501, 505, 453 S.E.2d 335, 339 (1994); *McDonald v. Univ. of W. Virginia Bd. of*

Petitioner brazenly asserts that no premises liability principles apply to her claims. Here, Petitioner confuses premises liability principles that this Court has explained do not apply under the Tort Claims Act, with premises liability principles that the Court has applied under the Tort Claims Act. While this Court has explained that invitee, licensee, and trespasser distinctions do not apply under the Tort Claims Act,[91] this Court has held that the actual or constructive knowledge requirement remains vital, good law in the Tort Claims Act context.[92]

In 1998, when this Court in *Carrier* held that premises liability principles did not apply to political subdivisions, West Virginia law still recognized distinctions between licensees and invitees in the premises liability context. The Court in *Carrier* explained, "[t]he reason for not applying premises liability principles to actions under W. Va. Code § 29-12A-4(c)(3) . . . is that the statute[] do[es] not expressly provide for the distinctions contained in premises liability principles."[93] In 1999, the year after *Carrier* was decided, the Court in *Mallet v. Pickens* held in syllabus that said distinctions were abolished.[94] Thus, in 2016, when *Dattoli* was decided, the Court acknowledged the abolishment and applied traditional negligence and premises liability principles to hold that a political subdivision was not liable because it had no actual or constructive knowledge of the property condition that caused injury.

Of note, the plaintiffs in *Dattoli* made the same arguments Petitioner makes now: that premises liability principles do not apply under the Tort Claims Act per *Carrier*. The Court refused the argument:

Trustees, 191 W. Va. 179, 182, 444 S.E.2d 57, 60 (1994); *see* syl. pt. 1, *Sesler v. Rolfe Coal & Coke Co*., 51 W. Va. 318, 41 S.E. 216 (1902).

[91] *Wheeling Park Comm'n v. Dattoli*, 237 W. Va. at 281, 787 S.E.2d at 552 (explaining the limited holding of *Carrier v. City of Huntington*, 202 W. Va. 30, 501 S.E.2d 466 (1998) as it relates to premises liability principles).

[92] *Id.* at 280, 551.

[93] *Carrier v. City of Huntington*, 202 W. Va. 30, 34–35, 501 S.E.2d 466, 469–470 (1998).

[94] Syl. pt. 4, *Mallet v. Pickens*, 206 W. Va. 145, 522 S.E.2d 436 (1999).

> This Court finds that the Dattolis' reliance on W. Va. Code § 29-12A-4(c) and *Carrier* is misplaced. The standard for liability set forth in W. Va. Code § 29-12A-4(c) is, by its plain terms, a negligence standard. In other words, for a plaintiff to prevail in a claim brought against a political subdivision under W. Va. Code § 29-12A-4(c), the plaintiff still must prove the elements of negligence. When this Court opined in *Carrier* that ordinary premises liability principles do not apply to a claim brought under W. Va. Code § 29-12A-4(c), we were referring specifically to the fact that the law imposed different duties of care on possessors of premises with regard to whether a person on private property is an invitee, licensee, or trespasser. Therefore, Carrier simply stands for the fact that these distinctions do not apply to claims brought against political subdivisions under W. Va. Code § 29-12A-4(c).[95]

Thus, the Court held that "traditional elements of negligence apply in actions brought for injuries incurred on the property of political subdivisions" [96] and "before an owner of land may be held liable for negligence, he must have had actual or constructive knowledge of the defective condition which caused the injury."[97] Thus, under *Dattoli*, traditional negligence and premises liability principles apply, including the actual/constructive knowledge requirement. Indeed, this Court has applied or acknowledged that other premises liability principles, such as the open and obvious doctrine, apply to claims against political subdivisions and municipalities.[98] Petitioner's argument lacks merit. Whether it is called a negligence principle or premises liability principle, Petitioner must be able to show that the City had actual or constructive knowledge of the defect that caused injury.

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[95] *Wheeling Park Comm'n v. Dattoli*, 237 W. Va. 275, 281–82, 787 S.E.2d 546, 552–53 (2016).
[96] *Id.* at 282, 553.
[97] *Id.* at 280, 551 (internal quotation marks omitted) (citing *Hawkins v. U.S. Sports Ass'n*., 219 W. Va. 275, 279, 633 S.E.2d 31, 35 (2006); *Neely v. Belk Inc*., 222 W. Va. 560, 571, 668 S.E.2d 189, 199 (2008)).
[98] *See Fuller v. City of Huntington*, No. 19-0881, 2020 W. Va. LEXIS 541, at *1 (July 30, 2020); *Reynolds v. Milton*, 93 W. Va. 108, 109, 116 S.E. 516, 516 (1923).

Here, Petitioner cannot show that the City had actual or constructive knowledge of the wire. Mr. Marcum, the Street Commissioner for the City of Logan, testified that the City had no knowledge or notice of and had received no complaints about any hazard posed by the wire loop:

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

> A. No, sir.
>
> Q. Did you receive any complaints about that wire prior to Ms. Orso's fall?
> A. No, sir.
> . . .
> Q. Okay. You don't know of any other · injuries occurring on the sidewalk abutting the First Baptist Church's parking lot, do you?
> A· No.[99]

Petitioner produced no evidence of any prior fall caused by, or any knowledge on part of the City about, the wire loop. Petitioner testified:

> Q. Had you ever informed the city that that loop wire was a danger?
> A. No.
>
> Q. Did you ever ask the city to remove the loop wire?
> A. No.
>
> Q. Did you ever ask the church to remove the loop wire?
> A. No.
>
> Q. Are you aware of anyone asking the city to remove the loop wire?
> A. No.[100]
>
> Q. Okay. And you don't know of anybody that reported to you that that cable wire was there?
> A. No.
>
> Q. And you don't know -- I'm sorry. And nobody reported that to the City of Logan?
> A. Not that I am aware of.
>
> Q. All right. And are you aware of anybody that told the City of Logan that that cable wire had a loop on it?
> A. I don't think so, you know.[101]

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

[99] App. 509–511, 514, Marcum Test., Dep. Tr. 47–49, 52.
[100] App. 236, Pet'r's Test., Dep. Tr. 56.
[101] App. 246–247, Pet'r's Test., Dep. Tr. 66–67.

Moreover, assuming *arguendo* that the wire was stretched out on the sidewalk, Petitioner produced no evidence showing how long the wire had been stretched out onto the sidewalk.[102] It is undisputed that Petitioner walked by it moments earlier during her lunchbreak without incident and without noticing it, suggesting that the wire had not been "stretched out" as alleged for any significant amount of time. As discussed, the City breached no duty to Petitioner as it does not own the wire, is not responsible for maintaining the sidewalk under controlling ordinances, and had no knowledge of any hazard posed by the wire. Petitioner's negligence claim failed, and the City is entitled to immunity. The Circuit Court was right.

V. THE CIRCUIT COURT CORRECTLY FOUND NO GENUINE DISPUTE OF MATERIAL FACT AS TO THE APPLICATION OF THE OPEN AND OBVIOUS DOCTRINE

Petitioner argues that the Circuit Court mischaracterized Petitioner's testimony regarding seeing the wire loop.[103] The Circuit Court found that she saw the wire loop "immediately before she fell but did not see the wire the first time she passed it during her walk."[104] This is exactly how Petitioner testified:

> Q. On that day, prior to your fall, was there anything blocking your view of the loop wire?
> A. No. No.[105]
>
> Q. Had you looked down prior to your fall, would you have been able to see the loop wire?
> A. Well, I guess I would have, yes.[106]
>
> Q. Okay. And I believe you testified that if you had looked down, you would have seen the loop wire, correct?
> A. Yes. I would have. Yes.[107]

[102] App. 235–236, 321–322, Pet'r's Test., Dep. Tr. 55–56, 141–142.
[103] Pet'r Br. 11.
[104] App. 27.
[105] App. 236, Pet'r's Test., Dep. Tr. 56.
[106] App. 237.
[107] App. 315, 316.

> A. And that's why I knew it was looped. It was stretched out in front of me. It was in front of me. Because that's -- my husband was like, how did you fall? I said, it was a loop wire. You know, I only seen it for a second. And I knew, I mean, I was gone. I mean--[108]
>
> Q. I may have asked this, but I don't know. Do you know how long that cable had been strung across the sidewalk?
> A. No. I never knew it existed till that day.
>
> Q. Do you know if on your first trip on that route if you passed the cable that day that you fell?
>
> A. I never seen it.[109]

The Circuit Court relied on and cited this testimony in its *Order*. The Circuit Court accurately found that the Petitioner saw the loop immediately before she fell and not during her multiple, prior walks by the wire. Petitioner's assertion that a genuine dispute of material fact exists is not supported in the record. Again, self-serving assertions do not overcome summary judgment. "The mere contention that issues are disputable is not sufficient to preclude summary judgment."[110]

Petitioner ignores how the Circuit Court's finding triggers the open and obvious doctrine. Under the open and obvious doctrine,

> A possessor of real property, including an owner, lessee or other lawful occupant, **owes no duty** of care to protect others against dangers that are open, obvious, reasonably apparent **or as well known to the person injured as they are to the owner or occupant**, and shall not be held liable for civil damages for any injuries sustained as a result of such dangers.[111]

[108] App. 317–318,
[109] App. 321.
[110] *Conley v. Stollings*, 223 W. Va. 762, 768, 679 S.E.2d 594, 600 (2009).
[111] W. Va. Code § 55-7-28 (effective Feb. 18, 2015) (emphasis added).

As the Circuit Court explained, this accords with the longstanding principles that a landowner "is not legally responsible for every fall which occurs on his premises,"[112] and every person has a duty "to look, and to look effectively, and to exercise ordinary care to avoid a hazard."[113]

The open and obvious doctrine clarifies:

> It is the intent and policy of the Legislature that this section reinstates and codifies the open and obvious hazard doctrine in actions seeking to assert liability against an owner, lessee or other lawful occupant of real property to its status prior to the decision of the West Virginia Supreme Court of Appeals in the matter of *Hersh v. E-T Enterprises, Limited Partnership*, 232 W. Va. 305 (Nov. 12, 2013).[114]

Pre-*Hersh* and currently, the West Virginia Supreme Court has consistently held that the duty to keep premises safe applies only to conditions that are in the nature of hidden dangers, traps, snares, pitfalls, and the like, in that they are not known the invitee and would not be observed in the exercise of ordinary care.[115] Thus, there is no liability for injuries from dangers that are obvious, reasonably apparent, or as well known to the person injured as they are to the owner or occupant.[116] This Court and federal courts in West Virginia consistently affirm that dismissal is warranted when a plaintiff has as much knowledge, or more knowledge, of the defect as the landowner.[117]

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[112] *McDonald*, 444 S.E.2d at 60.
[113] *Birdsell v. Monongahela Power Co.*, 181 W. Va. 223, 225, 382 S.E.2d 60, 62 (1989).
[114] W. Va. Code § 55-7-28.
[115] *McDonald*, 444 S.E.2d at 61.
[116] *Id.*
[117] *Fuller v. City of Huntington*, 2020 W. Va. LEXIS 541, 2020 WL 4355652 (W. Va. July 30, 2020); *McDonald v. Univ. of W. Va. Bd. of Trs*., 191 W. Va. 179, 444 S.E.2d 57 (1994); *Estate of Helmick by Fox v. Martin*, 192 W. Va. 501, 453 S.E.2d 335 (1994); *Aitcheson v. Dolgencorp, LLC*, No. 20-1207, 2020 U.S. App. LEXIS 38658, (4th Cir. Dec. 10, 2020); *Mundell v. Consolidation Coal Co*., No. 95-2739, 1996 U.S. App. LEXIS 14296, (4th Cir. June 13, 1996); *Alexander v. Curtis*, 808 F.2d 337, 340 (4th Cir. 1987); *Horton v. Family Dollar Stores of W. Va. Inc*., No. 2:16-cv-05361, 2017 U.S. Dist. LEXIS 80962, (S.D. W. Va. May 26, 2017); *Scaggs v. United States*, Civil Action No. 2:14-cv-19304, 2015 U.S. Dist. LEXIS 90911, (S.D. W. Va. July 14, 2015); *Adams v. United States*, No. 5:11-cv-00660, 2013 U.S. Dist. LEXIS 125158, (S.D. W. Va. Sep. 3, 2013); *Bullington v. Lowe's Home Ctrs., Inc*., No. 5:10-cv-00293, 2011 U.S. Dist. LEXIS 97507 (S.D. W. Va. Aug. 30, 2011); *White v. Home Depot U.S.A., Inc*., No. 2:10-cv-01016, 2011 U.S. Dist. LEXIS 78672 (S.D. W. Va. July 19, 2011); *Vance v. Wal-Mart Stores E., LP*, Civil Action No. 2:07-CV-101, 2009 U.S. Dist. LEXIS 144573 (N.D.W. Va. June 17, 2009); *Harris v. United States*,

Based on this applicable law, the Circuit Court's *Order* goes on to explain that because nothing blocked Petitioner's view of the wire, because she saw it immediately before she fell, and because the City had no notice of the wire or any hazard posed by it, the wire was as apparent to her as it was to the City. Even if Petitioner had not seen it immediately prior to her fall, Petitioner would have been as aware of the wire as the City was, considering the City had no notice whatsoever of the wire or any hazard posed by it. Thus, the Circuit Court was correct in concluding that the open and obvious doctrine applies.

CONCLUSION

Please see Summary of Argument above. Respondent requests the Court deny Petitioner's appeal and affirm the Circuit Court's thorough and well-reasoned *Order Granting City of Logan's Motion for Summary Judgment*.

CITY OF LOGAN, WEST VIRGINIA

/s/ Duane J. Ruggier II
Duane J. Ruggier II, WV State Bar No. 7787
Evan S. Olds, WV State Bar No. 12311

Civil Action No. 1:05CV17 (STAMP), 2006 U.S. Dist. LEXIS 63939, (N.D.W. Va. Sep. 6, 2006); *Eichelberger v. United States*, No. 1:04CV45, 2006 U.S. Dist. LEXIS 19250, (N.D.W. Va. Mar. 3, 2006); *Phillips v. Superamerica Grp.*, 852 F. Supp. 504, 506 (N.D.W. Va. 1994). App. 371–442, caselaw attached to Def's Mot. for Summ. J. as Ex. 6

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 22-625

DENISE ORSO,

Petitioner,

v.

THE CITY OF LOGAN, WEST VIRGINIA,
A municipal corporation,

Respondent.

(On Appeal From the Final Order of the Honorable Miki Thompson; Circuit Court of Logan County, West Virginia; Case No. 20-C-22)

CERTIFICATE OF SERVICE

The undersigned counsel for Respondent, Logan County Board of Education, do hereby certify that on this 12th day of December, 2022, a true copy of the foregoing ***"Respondent's Brief"*** was served via filing with File and Serve Express upon all counsel of record as follows:

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