

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

**Kenneth Rush, as Personal Representative
of the Estate of Timothy Rush,
Petitioner Below, Petitioner**

v.) No. 23-437 (ICA No. 22-ICA-133)

**DanasDome, LLC, dba the Dome Bar
and Grill, Dana Pitchford,
Kuppel, LLC, Ha To Ta, and Thanh Ta,
Respondents Below, Respondents**

MEMORANDUM DECISION

Petitioner Kenneth Rush, as personal representative of the Estate of Timothy Rush (the Estate), appeals the June 15, 2023, memorandum decision of the Intermediate Court of Appeals of West Virginia (ICA), affirming three orders of the Circuit Court of Kanawha County entered on August 24, 2022.¹ *See Rush v. Danasdome, LLC*, No. 22-ICA-133, 2023 WL 4027503 (W. Va. Ct. App. June 15, 2023) (memorandum decision). The circuit court orders on appeal to the ICA granted summary judgment to Respondents DanasDome, LLC (DanasDome), Dana Pitchford, and Kuppel, LLC (Kuppel), and granted the motion to dismiss filed by Respondents Ha To Ta and Thanh Ta (the Tas). The Estate argues that issues of fact existed that precluded granting summary judgment for Respondents DanasDome, Dana Pitchford, and Kuppel; that the respondents owed a legal duty to Timothy Rush that they breached; and that the Estate asserted a viable claim against the Tas as landlords in these circumstances. Upon our review, finding no substantial question of law and no prejudicial error, we determine that oral argument is unnecessary and that a memorandum decision affirming the ICA's memorandum decision is appropriate. *See W. Va. R. App. P. 21(c)*.

Joseph Lucas Jr., a co-defendant below and customer of the Dome Bar and Grill (the Dome), shot and killed Timothy Rush, another customer of the Dome, on the street outside the Dome after hours, around 6:00 a.m., in September 2018. *See Rush*, 2023 WL 4027503, at *1-2. At the time of the shooting, DanasDome, whose sole member was Dana Pitchford, operated the Dome. The complaint alleges that the Tas own the real property on which the Dome operated.

¹ The petitioner is represented by counsel David A. Dobson and Peter A. Pentony. Respondents DanasDome, LLC, and Dana Pitchford are represented by counsel R. Scott Long and David F. Nelson. Respondent Kuppel, LLC, is represented by counsel Stuart A. McMillan, Gabriele Wohl, Unaiza R. Tyree, and J. Tyler Barton. Respondents Ha To Ta and Thanh Ta are represented by counsel Johnnie E. Brown and James A. Muldoon.

Kuppel, whose sole member was Ha To Ta, leased the commercial building to DanasDome. Prior to DanasDome assuming operations of the Dome, Kuppel operated the Dome. While Kuppel or its sole member Ha To Ta operated the Dome, it was cited for illegal sale of alcoholic beverages, a fight broke out, and there was a prior shooting inside the bar. *See Rush*, 2023 WL 4027503, at *3.

The Estate filed a complaint as a result of the shooting that killed Timothy Rush, including claims of negligence against DanasDome and Dana Pitchford; wrongful death against Joseph Lucas Jr.; public nuisance against the Tas; negligence against Kuppel and Ha To Ta; and a separate claim of negligence against only Kuppel. After conducting discovery, DanasDome, Dana Pitchford, and Kuppel filed motions for summary judgment and the Tas filed a motion to dismiss. The circuit court heard the motions and granted each in three separate orders. The Estate appealed to the ICA, and the ICA issued a memorandum decision affirming the circuit court's orders, concluding, in relevant part, that the respondents did not owe Timothy Rush a legal duty under the circumstances presented in this case. *See Rush*, 2023 WL 4027503, at *3-4. The Estate appeals the ICA's memorandum decision.²

On appeal of a decision from the ICA reviewing a circuit court's grant of a motion to dismiss, we apply a de novo standard of review. Syl. Pt. 1, *Folse v. Rollyson*, 251 W. Va. 566, 915 S.E.2d 344 (2025). When considering a motion to dismiss under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, a court considers the allegations in a complaint as true and construes the complaint in the light most favorable to the plaintiff. *John W. Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978). Likewise, we apply a de novo standard of review to the circuit court's entry of summary judgment. Syl. Pt. 1, *Moorhead v. W. Va. Army Nat'l Guard*, 251 W. Va. 600, 915 S.E.2d 378 (2025). Summary judgment is appropriate when "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." W. Va. R. Civ. P. 56(a), in part. *See also* Syl. Pt. 4, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994) ("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.").

Here, the Estate raises assignments of error for each respondent related to its claims for negligence against them and specifically focuses on the foreseeability and the legal duties of the respondents under the circumstances of the case.³ Based on our de novo review of the record on

² Claims in this case remain pending against Joseph Lucas Jr., and the ICA considered the circuit court orders on appeal under West Virginia Rule of Civil Procedure 54(b). *See Rush*, 2023 WL 4027503, at *1 n.1.

³ Before this Court the Estate did not assert an assignment of error or present argument related to the circuit court's dismissal of the public nuisance claim asserted by the Estate against the Tas or the ICA's conclusion affirming the dismissal of that claim. Instead, the Estate's assignment of error related to the Tas focused on the circuit court's granting of the Tas' motion to dismiss on the basis that a landlord owed no duty to Timothy Rush, taking the allegations in the complaint as true. Accordingly, we do not address the conclusions of either lower court regarding the Estate's nuisance claim.

appeal, both the circuit court and the ICA aptly addressed the arguments advanced by the Estate before this Court. We agree with the lower courts that in these circumstances no respondent had a legal duty to Timothy Rush. *See Rush*, 2023 WL 4027503, at *3-4.

For the foregoing reasons, we affirm the memorandum decision of the ICA affirming the circuit court's orders in favor of the respondents.

Affirmed.

ISSUED: September 16, 2025

CONCURRED IN BY:

Chief Justice William R. Wooton
Justice C. Haley Bunn
Justice Charles S. Trump IV
Justice Thomas H. Ewing
Senior Status Justice John A. Hutchison