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Motorcyclist hit by bus settles for \$7.5 million

Sovereign immunity was key issue in case

A motorcyclist who suffered a brain injury after he was hit on the helmet by the mirror on a passing school bus has mediated his claim against the driver and the school board for \$7.5 million.

A key issue in the case: Whether the bus driver could claim the sovereign immunity enjoyed by his employer, the Hampton School Board.

By virtue of Virginia Code sections 22.1-190 and 22.1-194, school boards are immune for any damages in excess of \$50,000. But in a declaratory judgment action, a Hampton judge ruled that the bus driver, though he was acting within the scope of his employment, is not eligible for that protection because at the time he had not picked up any students.

The case is *Watford v. Briggins and the School Board for the City of Hampton, Va.*

School bus collision

The plaintiff was riding his motorcycle to work on the morning of Oct. 11, 2001. The defendant driver was traveling in the opposite direction at approximately 30 mph in a Hampton City School bus he had just picked up from the bus lot. According to defense attorneys, he was on his way to pick up the first child on his route. Before he could do so, the driver failed to yield the right of way while making a left turn and struck the plaintiff in the head with the left front mirror of the bus. The plaintiff, who was wearing a motorcycle helmet,



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careened off the road, striking a telephone pole and a tree. He suffered a brain stem contusion and hemorrhage, as well as fractures to his pelvis, right tibia and right ankle. According to plaintiff's experts, he will never be able to walk unassisted or be gainfully employed for the rest of his life.

The bus driver testified to have not having seen the plaintiff, and only stopped the bus after he heard something collide with the driver's side-mirror. There were no eyewitnesses to the accident.

Sovereign Immunity

The key to the case, according to both plaintiff's and defendant's counsel, was the determination of whether the driver was subject to immunity under Va. Code Sections 22.1-190 and 22.1-194, which grants sovereign immunity to a school board and its employees for damages exceeding \$50,000.

"That was the major part of this case," said plaintiff's attorney John E. Zydron. "At first

it seemed that [the driver] was subject to the immunity because he was operating under the scope of his employment."

But in a declaratory judgment action filed by plaintiff's counsel, the 1938 Virginia Supreme Court case of *Wynn v. Gandy*, 170 Va. 590, was cited. In that case, a bus driver was denied immunity because at the time of a collision, he was not engaged in the "governmental duty of transporting children."

"This whole case focused on the existence of [Wynn v. Gandy] because the Supreme Court holds that the mere operation of a school bus is ministerial," said Zydron.

In a similar 2001 Supreme Court case, *Linhart v. Lawson* (VLW 001-6-016), a bus driver was granted sovereign immunity because there were students on board the bus at the time an accident occurred.

For this reason, a Hampton judge ruled that the driver was not subject to sovereign immunity.

Liability was contested throughout the settlement process, with the defense arguing that the plaintiff was exceeding the speed limit. In the end though, both parties sought to avoid a jury trial and a settlement of \$7.5 million was mediated.

"No one disputed the injuries suffered by [the plaintiff]," said defense attorney Alan B. Rash-kind of Norfolk.

"Both parties reached a compromise to ensure that funds were available to care for him and to end litigation without the risk that a jury would decide the case in a way that would be devastating to one side or the other," he said.

SETTLEMENT REPORT

[NOTE: The following information was provided by the counsel for the winning party and represents the attorney's characterization of the case.]

Plaintiff, age 57, was operating his motorcycle on his way to work in the pre-dawn hours of Oct. 11, 2001. The defendant, Briggins, operating a school bus, failed to yield the right-of-way when he made a left turn in front of the plaintiff's motorcycle and caused the collision. The impact was from the left front mirror of the school bus to the plaintiff's head. The plaintiff was wearing a motorcycle helmet at the time of the accident. There were no eyewitnesses.

Discovery revealed that the defendant school bus driver suffered diabetic retinopathy and that his blood sugar was not under control during the week before the accident and that he had complained of blurred vision in a visit to his internal medicine physician a week before the accident. The defendant driver also suffered a cortical-type cataract which adversely affected his vision, rendering it difficult for him to deal with approaching headlights and compromising and limiting his distance vision at the time of the accident.

As a result of the collision, the plaintiff suffered a brain stem contusion and hemorrhage; fractures of his pelvis, right tibia and right ankle. Plaintiff will never be able to walk unassisted and will never be gainfully employed.

Medical expenses totaled \$445,791. Plaintiff's loss of income was calculated at \$1.17 million assuming that he would have worked until age 70.

Because of plaintiff's severe cognitive impairments and limited physical abilities, a life care plan and related care costs was prepared. Plaintiff's life care planner estimated annual support care at \$227,000 per year. The defense life care planner estimated annual support care at \$130,000 per year. The defense maintained through its experts that plaintiff's life expectancy was decreased to 10-12 years. Plaintiff maintained through his experts that his life expectancy was approximately 20 years.

The issue of sovereign immunity was litigated in the context of a declaratory judgment action, wherein it was determined that the School Board is immune for any damages in excess of \$50,000 by virtue of Va. Code Sects. 22.1-190 and 22.1-194. However, it also was determined that the driver of the school bus, despite acting within the scope of his employment, does not share in the School Board's immunity, as he had not yet picked up any students before the accident, and thus had not yet assumed his governmental duty. Irrespective of the School Board's own immunity, its non-immune employee benefits under the School Board's Self-Insurer Certificate, which does not limit coverage.

The case settled shortly before trial after an initial unsuccessful mediation effort.

Type of Action — Negligence

Type of Injuries — Traumatic brain injury, fracture of right tibia, right ankle and pelvis fractures

Name of Case — *Watford v. Briggins and The School Board for the City of Hampton*

Court / Case No. — Hampton Circuit Court

Name of Judge — J. Warren Stephens

Name of Mediator — John H. O'Brien Jr.

Awarded / Settled — Mediated

Amount — \$7.5 million

Plaintiff's Attorneys — John E. Zydron and Catherine MacLean-Six, Virginia Beach

Plaintiff's Experts — Robert D. Voogt, Ph.D., life care planner, Va. Beach; Charles DeMark, certified rehabilitation counselor, Portsmouth; Warren Foer, M.D., neurosurgeon, Va. Beach; Richard

B. McAdam, M.D., neurosurgeon, Hampton; Jeffrey Carlson, M.D., orthopaedics, Newport News; Richard A. Hoefer, Jr., M.D., surgeon, Newport News; G. Peyton Neatrou, M.D., ophthalmologist, Va. Beach; John T. Sinacori, M.D., otolaryngologist, Norfolk; Ronald Washburn, M.D., radiologist, Va. Beach; Eric Darby, M.D., urologist, Newport News; Robert S. Winfield, M.D., psychiatry and pain management, Newport News; Duane Harding, Ph.D., meteorologist, Va. Beach; and David McAllister, accident reconstruction, Richmond.