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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 22-0292 – *Eugene F. Boyce and Kimberly D. Boyce v. Monongahela Power Co. et al.*

WOOTON, J., dissenting:

Encountering low-hanging communications wires while driving a delivery truck, petitioner Eugene F. Boyce ("Mr. Boyce") attempted to move the wires so that his truck could pass beneath by climbing atop the truck, wrapping the communications wires with plastic wrap, and hoisting them out of the way. Mr. Boyce was electrocuted in this endeavor, sustaining severe injuries. He and his wife brought a negligence action against the respondents – Monongahela Power Company ("Mon Power"), Frontier Communications of America ("Frontier"), and Atlantic Broadband – which maintained the lines at the site of the accident. The circuit court ultimately granted summary judgment for the respondents on the ground that Mr. Boyce's conduct was not foreseeable to the respondents and was the proximate cause of his injuries. A majority of this Court has affirmed the lower court's reasoning and its judgment. However, I disagree with the majority's reasoning and result. While Mr. Boyce's conduct was undoubtedly negligent in its own right – one would be hard-pressed to argue otherwise – there are questions of foreseeability and causation in this case that should have been presented to a jury for resolution. Accordingly, I respectfully dissent.

The thrust of the majority's analysis is that Mr. Boyce's conduct and resulting injury were not reasonably foreseeable to the respondents. The majority further concludes that Mr. Boyce's conduct, being both willful and unforeseeable, constituted an

intervening cause of his injury such that the respondents are not liable. While that may well be what a jury finds at the end of the day, after considering all of the evidence and determining the credibility of the witnesses, the fact is that determinations of foreseeability, causation, and the apportionment of fault among the parties are decisions for the jury to make, not the circuit court.

The standard of review for this Court's review of the circuit court's grant of summary judgment is:

> Summary judgment is appropriate if, from the totality of the evidence presented, the record 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.

Syl. Pt. 2, *Williams v. Precision Coil, Inc*., 194 W. Va. 52, 459 S.E.2d 329 (1995). The majority concludes that as a matter of law Mr. Boyce's conduct and injury were not reasonably foreseeable to the respondents, and therefore no rational trier of fact could have found for the petitioners.[1] I strongly disagree with the majority's assessment with respect to the respondent Mon Power, and also disagree with the majority's assessments regarding

[1] *See Wal-Mart Stores East, L.P. v. Ankrom*, 244 W. Va. 437, 854 S.E.2d 257 (2020) ("As to the first element, duty, '[i]n order to establish a *prima facie* case of negligence in West Virginia, it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. No action for negligence will lie without a duty broken.' As we have explained, foreseeability is key when determining whether a particular actor operates under a duty of care: 'The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?'") (footnote and citation omitted).

the remaining respondents. This Court has made clear that persons and companies operating or maintaining dangerous instrumentalities such as electrical lines are held to a higher degree of care than the average person; they must exercise care "commensurate with the dangers to be reasonably apprehended" from the instrumentality they manage. Syl. Pt. 1, *Maggard v. Appalachian Elec. Power Co*., 111 W. Va. 470, 163 S.E. 27 (1932) ("Those who operate and maintain wires charged with dangerous voltage of electricity are required to exercise a degree of care commensurate with the dangers to be reasonably apprehended therefrom; but they are not insurers against all injury therefrom."). We have further explained that "[a] person in charge of or maintaining an instrumentality inherently dangerous is not liable to one who is injured thereby in a manner *which could not be reasonably anticipated*." Syl. Pt. 3, *Musser v. Norfolk & W. Ry. Co*., 122 W. Va. 365, 9 S.E.2d 524 (1940) (emphasis added).

"Reasonable anticipation" is simply another formulation of the well-established rule that an injury must have been reasonably foreseeable, which in turn is a requisite for determining the proximate cause of the injury. *See* Syl. Pt. 4, *Matthews v. Cumberland & Allegheny Gas Co*., 138 W. Va. 639, 77 S.E.2d 180 (1953); *see also id*. at 653, 77 S.E.2d at 188 ("A person is not liable for damages which result from an event which was not expected and could not have been anticipated by an ordinarily prudent person."). In light of the enhanced degree of care required of Mon Power in this case pursuant to our precedents, the question is whether a company in Mon Power's position would have reasonably foreseen the inciting event here — Mr. Boyce's attempt to tie up

the communications lines in order to enable his truck to pass under them. The testimony from Mon Power's own employee, Paul Corbin, confirms that Mr. Boyce's actions were indeed foreseeable;[2] when asked whether he had seen other instances of unauthorized persons moving electrical lines, Mr. Corbin stated, "Not as much with cellophane, but I've actually seen where people has [sic] tied it up with like shoestrings or rope or something, yes." Although one could argue that Mr. Corbin's observations were uncorroborated by other evidence and thus an insufficient basis for finding that the power company was on notice that individuals might attempt to tie up their low-hanging lines, that is an argument

[2]At least one other jurisdiction has found it to be reasonably foreseeable that a motorist encountering a low-hanging electrical or communications line might attempt to raise that line so that his or her vehicle may pass beneath it. *See Alejandro-Ortiz v. Puerto Rico Elec. Power Auth.*, 908 F.Supp.2d 290 (D.P.R. 2012), *rev'd in part and vacated in part on other grounds*, 756 F.3d 23 (1st Cir.2014). In *Alejandro-Ortiz*, a case factually similar to the one at bar, the plaintiff was driving a garbage truck, encountered low-hanging lines, sought to move those lines by tying them up with rope, and came into contact with an electrical line resulting in severe injuries. The court held:

> Here, the line was apparently low enough that the truck could not clear it, and Alejandro testified that he felt . . . obligated to continue on his route and that it was a common practice to move the lines when they hung low (and he testified, moreover, that he had previously had to move this particular line). We find, therefore, that it is easily foreseeable that [the defendant's] allowing a cable to hang low enough to block vehicles' passage—even if only large vehicles—could result in individuals attempting to move the cables themselves, and thus continue on their wav, *even if such conduct was itself negligent.*

Id. at 295.

for the jury, not for the circuit court. Likewise a jury could reasonably find that the other respondents, in maintaining lines on the same poles, were similarly aware of this type of conduct. In short, the circuit court erred in deciding the issue of foreseeability as a matter of law, as the evidence was sufficient to create a genuine issue of material fact for resolution by a jury. As this Court has held,

> "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," [Syl. Pt. 5, in part, *Aikens v. Debow*, 208 W. Va. 486, 541 S.E.2d 576 (2000),] but we have also recognized that the duty determination may depend, in part, on the resolution of factual questions, particularly questions of foreseeability. To that end, "'[w]hen the facts about foreseeability as an element of duty are disputed and reasonable persons may draw different conclusions from them, two questions arise—one of law for the judge and one of fact for the jury.'" [Syl. Pt. 8, *Marcus v. Staubs*, 230 W. Va. 127, 736 S.E.2d 360 (2012) (quoting Syl. Pt. 11, *Strahin v. Cleavenger*, 216 W. Va. 175, 603 S.E.2d 197 (2004)].

Jones v. Logan Cnty. Bd. of Ed., 247 W. Va. 463, __, 881 S.E.2d 374, 384 (2022); *accord Strahin*, 216 W. Va. at 180, 603 S.E.2d at 202, Syl. Pt. 12, in part ("If the court determines that disputed facts related to foreseeability, viewed in the light most favorable to the plaintiff, are sufficient to support foreseeability, resolution of the disputed facts is a jury question.").

After careful review of the record in this case, I find that there were sufficient facts – including the Mon Power employee's testimony, discussed *supra* – which, when viewed in the light most favorable to the petitioners, warranted putting before a jury the question of foreseeability and whether respondents owed a duty to safeguard against

conduct like Mr. Boyce's under these circumstances. There were disputed facts that required a jury's resolution of whether the respondents bore some percentage of fault[3] for Mr. Boyce's injuries, given: (1) the existence of low-hanging lines owned by the Frontier and Atlantic Broadband respondents which were well below the height required by the safety standards in effect at the time of their installation,[4] and (2) the evidence that Mon Power (and inferentially the other respondents, as noted above) was aware of other instances in which lines had been tied up, albeit with rope or string rather than cellophane. *See id*.

[3] In 2015, the West Virginia Legislature adopted a modified comparative negligence system wherein fault may be apportioned among the plaintiff and the defendant or defendants according to their degree of responsibility for the injury. *See* W. Va. Code §§ 55-7-13a to -13d (2016). In particular, section 55-7-13c(c) explains that "[a]ny fault chargeable to the plaintiff shall not bar recovery by the plaintiff unless the plaintiff's fault is greater than the combined fault of all other persons responsible for the total amount of damages, if any, to be awarded." To that end, section 55-7-13d provides that the trier of fact—whether the judge or a jury—"shall consider the fault of all persons who contributed to the alleged damages" and that "the court shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating the percentage of the total fault that is allocated to each party[.]" *Id*. § 55-7-13d(a)(1), -13d(6).

[4] The majority glosses over the fact that this alone establishes a prima facie case of negligence against those respondents insofar as the lines did not meet the height requirements established in the then-applicable versions of the National Electric Safety Code, adopted by the West Virginia Public Service Commission in the West Virginia Code of State Rules sections 150-3-5.1.1 and -5.1.2 (2018). *See* Syl. Pt. 1, in part, *Johnson v. Monongahela Power Co*., 146 W. Va. 900, 123 S.E.2d 81 (1961) ("Valid rules and regulations of the Public Service Commission of West Virginia, which incorporate and adopt certain minimum requirements of the National Safety Code with regard to the external installation of electrical equipment, have the force of statutory law and the failure to comply therewith would constitute *prima facie* negligence.").

Instead, the majority makes precisely the same error the circuit court did, concluding as a matter of law that Mr. Boyce's conduct and injury here were foreseeable, even though there are obvious disputes of fact that call that determination into question. Our law is plain: "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 may draw different conclusions from them." Syl. Pt. 10, *Harbaugh v. Coffinbarger*, 209 W. Va. 57, 543 S.E.2d 338 (2000) (internal citation omitted).

The majority compounds its error by agreeing with the circuit court on the issue of causation that Mr. Boyce's conduct constituted an intervening cause as a matter of law because he "willfully" attempted to move the obstructing cables. *See Yourtree v. Hubbard*, 196 W. Va. 683, 690, 474 S.E.2d 613, 620 (1996) ("Generally, a willful, malicious, or criminal act breaks the chain of causation.") (citation omitted). However, this Court has further explained that

> [a]n intervening cause, however, may jump in, break that chain of causation, and so constitute the new, effective cause of the injury. We have held that "'"'[a]n intervening cause, in order to relieve a person charged with negligence in connection with an injury, must be a negligent act, or omission, which constitutes a new effective cause and operates independently of any other act, making it and it only, the proximate cause of the injury.' Syllabus Point 16, *Lester v. Rose*, 147 W. Va. 575, 130 S.E.2d 80 (1963) [*modified on other grounds*, *State ex rel. Sutton v. Spillers*, 181 W. Va. 376, 382 S.E.2d 570 (1989)]." Syllabus Point 1, *Perry v. Melton*, 171 W. Va. 397, 299 S.E.2d 8 (1982).' Syl. Pt. 3, *Wehner v. Weinstein*, 191 W. Va. 149, 444 S.E.2d 27 (1994)." But not every intervening event wipes out

> another's preceding negligence. In fact, "'[a] tortfeasor whose negligence is a substantial factor in bringing about injuries is not relieved from liability by the intervening acts of third persons if those acts were reasonably foreseeable by the original tortfeasor at the time of his negligent conduct.' Syl. Pt. 13, *Anderson v. Moulder*, 183 W. Va. 77, 394 S.E.2d 61 (1990)."

Wal-Mart Stores East, 244 W. Va. at 450, 854 S.E.2d at 270 (footnotes omitted).

I agree that there is little if any question that Mr. Boyce acted willfully in attempting to move the lines; however, the question remains as to whether that conduct was reasonably foreseeable by the respondents, and if so, to what extent, if any, the respondents were also at fault for the resultant injury. This is a factual question that can only be decided by a trier of fact – a jury. *See Harbaugh*, 209 W. Va. at 60, 543 S.E.2d at 341, Syl. Pt. 10. Assuming that Mr. Boyce's fault did not outweigh the combined fault of the respondents, he could still recover notwithstanding his willfulness in engaging in this behavior. W. Va. Code § 55-7-13c(c).

For the foregoing reasons, I respectfully dissent. I am authorized to state that Justice Hutchison joins in this separate opinion.