

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

**EUGENE F. BOYCE, and
KIMBERLY D. BOYCE,**

Civil Action No. 16-C-219

Plaintiffs,

v.

**MONONGAHELA POWER COMPANY,
FRONTIER COMMUNICATIONS OF
AMERICA, INC., FRONTIER
COMMUNICATIONS CORPORATE
SERVICES INC., FRONTIER
COMMUNICATIONS ONLINE AND LONG
DISTANCE INC., FRONTIER
COMMUNICATIONS ILEC HOLDINGS
LLC, ATLANTIC BROADBAND (PENN),
LLC, and, ATLANTIC BROADBAND
FINANCE, LLC,**

Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

On February 18, 2020, the Parties appeared by counsel for argument on Defendants' Motions for Summary Judgment. After considering the written memoranda, applicable law, record evidence and arguments of counsel, the Court, for the reasons stated herein, GRANTS the Motions for Summary Judgment filed by: 1) Monongahela Power Company; 2) the Atlantic Broadband Defendants; and 3) the Frontier Defendants (all of the defendants collectively "Defendants").

I. FINDINGS OF FACT

1. On April 11, 2014, Plaintiff Eugene Boyce ("Plaintiff"), while acting in the course and scope of his employment with Lowe's as a boom operator, arrived at 191 Sand Springs Road, Morgantown, West Virginia ("Property") and began driving his truck up the driveway to Brandon Tucker's residence to deliver various materials.

2. Upon realizing that his truck would not clear overhead utility lines that ran above the driveway, Plaintiff stopped the truck and decided to attempt to move the overhead lines, which consisted of two Frontier communications lines, an Atlantic Broadband communication line, and two electrical lines.

3. Plaintiff initially enlisted the help of Mr. Tucker to push on the bottom of the communications lines with a wooden board.

4. When this proved unsuccessful, Plaintiff climbed on top of his uninsulated truck without any protective gear, wrapped shrink-wrap around the communications lines and grabbed the live electrical line with his bare hand, which resulted in Plaintiff sustaining serious injuries. These actions violate a variety of laws, including, but not limited to OSHA.

5. There was no dispute that the various lines were owned by the respective Defendants and that when Plaintiff came into contact with them in an attempt to move them, he was doing so as a trespasser.

6. Plaintiff testified he never received any training regarding: electrical utility lines; the identification of electrical utility lines versus other types of utility lines; the National Electrical Safety Code ("NESC"); and/or utility lines in general.

7. In fact, Plaintiff was not even generally familiar with the NESC and admittedly had no understanding as to whether it was acceptable to use shrink-wrap to move/wrap utility lines.

8. Plaintiffs filed the Complaint against Defendants on April 08, 2016, therein advancing negligence claims against the Frontier Communications and Atlantic Broadband defendants, which allegedly owned/operated the subject communications lines, and Monongahela Power Company, which owned/operated the subject electrical lines.

9. Plaintiffs' sole basis for the negligence claim against Monongahela Power Company is that the "neutral" electrical line was installed above the live electrical line, which Plaintiffs claim is a violation of unknown "customs, practices and standards of care."

10. Plaintiffs assert their claims against the Frontier and Atlantic Defendants on the basis that the subject communications lines allegedly did not have sufficient clearances.

II. CONCLUSIONS OF LAW

1. "The questions of negligence, contributory negligence, proximate cause, intervening cause and concurrent negligence are questions of fact for the jury where the evidence is conflicting or when the facts, though undisputed, are such that reasonable men draw different conclusions therefrom." *Harbaugh v. Coffinbarger*, 209 W. Va. 57, 65, 543 S.E.2d 338, 346 (2000).

2. For the reasons that follow, the Court finds that the undisputed facts in the instant matter are such that reasonable persons can draw only conclusion with respect to proximate causation and intervening/superseding cause.

A. Defendants did not Proximately Cause the Incident and/or Plaintiffs' Alleged Injuries.

3. "To be actionable, negligence must be proximate cause of injury complained of and must be such as might have been reasonably expected to produce injury," *Anderson v. Moulder*, 183 W.Va. 77, 88, 394 S.E.2d 61 (1990).

4. "A person is not liable for damages which result from an event which was not expected and could not reasonably have been anticipated by an ordinarily prudent person."

5. "[W]here all the evidence relied upon by a party is undisputed and susceptible of only one inference, the question of proximate cause becomes a question of law." *Harbaugh, supra*, at 65.

6. The Supreme Court of Appeals addressed the issue of proximate cause extensively in *Matthews v. Cumberland & Allegheny Gas Co.*, 138 W.Va. 639, 77 S.E.2d 180 (1953).

7. In *Matthews*, a plaintiff employee of a gas supply company was struck by oncoming traffic while running away from a situation involving a gas line that he believed to be dangerous.

8. Addressing proximate causation, the *Matthews* Court explained:

In order to recover in an action based on negligence, the plaintiff must prove that the defendant was guilty of primary negligence and that such negligence was the proximate cause of the injury of which the plaintiff complains. Negligence to be actionable must be the proximate cause of the injury complained of and must be such as might have been reasonably expected to produce an injury. Actionable negligence necessarily includes the element of reasonable anticipation that some injury might result from the act of which complaint is made. Failure to take precautionary measures to prevent an injury which if taken would have prevented the injury is not negligence if the injury could not reasonably have been anticipated and would not have happened if unusual circumstances had not occurred 'Where course of conduct is not prescribed by mandate of law, foreseeability of injury to one to whom duty is owed is of the very essence of negligence.' [citation omitted]. 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. 'If an occurrence is one that could not reasonably have been expected, the defendant is not liable. Foreseeableness or reasonable anticipation of the consequences of an act is determinative of defendant's negligence.' [citation omitted]. In the recent case of *Wilson v. Edwards*, W.Va. 77 S.E.2d 164, this Court used this quotation from the case of *Osborne v. Atlantic Ice & Coal Company*, 207 N.C. 554, 177 S.E. 796: 'The law only requires reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, the party whose conduct is under investigation is not answerable therefor. Foreseeable injury is a requisite of proximate cause, and proximate cause is a requisite for actionable negligence, and the actionable negligence is a requisite for recovery in an action for personal injury negligently inflicted.'

Id. at 652-655.

9. The *Mathews* Court further explained that the last negligent act contributing to the injury and without which the injury would not have occurred is the proximate cause of the injury.

Id. at 655.

10. Applying the foregoing, the *Matthews* Court concluded that the plaintiff's action of fleeing into oncoming traffic was the last negligent act which contributed to his injury and that this negligent act broke any causal connection with work on the pipeline.

11. The case *sub judice* is analogous to *Matthews* as the last negligent act of Mr. Boyce (which consisted of climbing on top of his truck, applying shrink-wrap to communications lines and grabbing a live electrical wire with his bare hand) caused the Incident and broke any causal connection with any alleged acts of Defendants.

12. Furthermore, utility providers such as Defendants are not "insurers against all injury" resulting from dangers associated with high voltage electricity. *Sutton v. Monongahela Power Co.*, 151 W.Va. 961, Syllabus ¶ 7, 158 S.E.2d 98 (1967).

13. Defendants are "not liable to one who is injured thereby in a manner which could not be reasonably anticipated." *Id. at* Syllabus ¶ 8.

14. The Supreme Court of West Virginia considered a case with a nearly identical fact pattern in *Maggard v. Appalachian Electric Power Co.*, 111 W.Va. 470 (1932). Reversing the trial court's judgment in favor of the plaintiff, the court held that the defendant power company could not have reasonably anticipated that a construction company, "with gross negligence, [would] elevate the end of the boom of the shovel near the wires [32 feet above the road] and send one of its workers up the boom into imminent danger from contact with the wires. *Id.* at Syllabus ¶ 2.

15. The *Maggard* Court further explained:

The law does not make an electric company an insurer against injury from its high-tension wires. If so, it would be required to insulate them in uninhabited places where persons might go in pursuit of pleasure, or other purpose. If such was the law, the occupants of an airplane could recover if, perchance, the plane came in contact with such wires in lawfully flying on its journey and the occupants injured by the electric current.

* * *

We think it unreasonable to hold defendant responsible for the gross negligence of the contractor, or to hold that defendant could reasonably anticipate that the contractor would conduct his operations other than in a prudent and reasonable manner. The proximate cause of plaintiff's injury was the negligent act of the contractor. Of course, if the wires had not been there no electrocution would have resulted; but it must be remembered that they were there of prior right.

* * *

On the whole, we have come to the conclusion that defendant could not reasonably anticipate the injury to plaintiff and no legal duty rested upon it to insulate its wires at that place or raise them higher.

Id.

16. *Maggard* is particularly persuasive in the case *sub judice* as instant facts are nearly identical.

17. Pursuant to *Maggard*, "where the wires are at a height in the air at which they would not come in contact or dangerous proximity to persons not reasonably expected to come near them, the owner or operator of the lines is not chargeable with negligence where someone, doing an act which he had no reason to expect or anticipate, suffers an injury which might not have been suffered if the wires had been at a higher elevation." *Id.*

18. Negligence is the failure to use reasonable care to prevent harm to oneself or others. West Virginia Pattern Jury Instructions for Civil Cases, § 901.

19. Plaintiffs' expert, James Orosz, conceded in his deposition that anyone not authorized who touched power lines was a trespasser. Orosz depo. at 95-96.

20. He further testified that it was never okay for a lay person to touch utility-owned equipment. *Id.*

21. It is not disputed that the Defendants are the owners of the communication lines and power lines. Plaintiffs Complaint.

22. The Occupational Safety and Health Administration (OSHA), 29 C.F.R. § 1926.1410 requires a minimum clearance of 10 feet when working around power lines.

23. OSHA regulations §§ 1926.1418 (e) and (g) state that power lines are presumed to be energized.

24. In *Lancaster v. Potomac Edison Co. of West Virginia*, 156 W.Va. 218, 220, 192 S.E.2d 234 (1972), the Court, citing a number of cases, found that liability may attach if the victim is lawfully on the premises, and the victim's contact was accidental or inadvertent.

25. *Lancaster* and the cases cited therein hold that it's reasonably foreseeable that people may accidentally or inadvertently contact power lines in places they have a right to be, and utility companies must take proper precautions.

26. *Lancaster*, and the cases cited therein, further teach that a defendant is not liable if a plaintiff is in a place he should not be and intentionally makes contact with a power line.

27. Under *Lancaster and Harbaugh*, it is not necessary for this Court to determine whether the Defendants' utility lines had the proper clearance or configuration, because reasonable minds could not differ that Plaintiff was in a place he had no legal right to be, and he intentionally make contact with the power line.

28. Defendants could not have reasonably anticipated that a truck driver without any training and/or experience in the electrical field would: 1) climb on top of a truck into imminent danger with contact from utility wires; 2) apply shrink-wrap around the communications lines; and 3) grab a live electrical line with his bare hand.

29. Mr. Boyce's actions were negligent and serve as the only proximate cause of the Incident as his actions, unlike Defendants' alleged actions, were reasonably expected to produce an injury and the specific type of incident that unfortunately occurred.

30. Accordingly, the Court concludes that none of the alleged actions of Defendants proximately caused the Incident and/or Plaintiffs' alleged damages.

B. Plaintiff's Actions Were the Only Proximate Cause of the Alleged Injuries and Constitute an Intervening and Superseding Cause.

31. Even if this Court determined that a genuine issue of material fact existed as to whether these Defendants were negligent, which it has not done, Plaintiff Eugene Boyce's actions constitute an intervening and superseding cause of the Incident and alleged injuries.

32. "An 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." *Harbaugh v. Coffinbarger*, 209 W.Va. 57, 64, 543 S.E.2d 338, 345 (2000).

33. In *Harbaugh*, the defendant hosted a dinner party attended by the decedent. Another guest brought a .38 caliber revolver to the party. The decedent, eighteen years old, asked for the gun, unloaded it, and then re-loaded it with one bullet. He then spun the cylinder, placed the gun to his head, and pulled the trigger. When the gun failed to discharge, the decedent spun the cylinder again and pulled the trigger, killing himself.

34. The *Harbaugh* Court granted summary judgment in favor of the defendant, stating "if one assumes the absence of intent to kill, the fact remains that the decedent placed a loaded gun to his head and pulled the trigger, spun the cylinder and pulled the trigger again. *Id.* at 345.

35. In *Yourtee v. Hubbard*, the Supreme Court of Appeals of West Virginia again addressed the function of an intervening cause as severing the causal connection between the

original improper action and the damages. The *Yourtee* Court noted that “[g]enerally, a willful, malicious, or criminal act breaks the chain of causation.” *Id.*, citing *Harbaugh, supra*, at 64.

36. Here, Mr. Boyce’s actions consisted of climbing on top of a truck into imminent danger with contact from utility wires, applying shrink-wrap around the communications lines, and grabbing a live electrical line with his bare hand.

37. There is no genuine issue of material fact as to whether Mr. Boyce willfully contacted the communications lines and power line.

38. The fact that Mr. Boyce may have believed that the power line was a neutral line and that he may have lacked intent to electrocute himself is irrelevant.

39. Just as the decedent in *Harbaugh* intentionally placed the gun to his head, Mr. Boyce intentionally and willfully put himself in a place he had no right to be and placed his hand on the power line.

40. Like *Harbaugh*, in which the Court stated that “it is an inescapable fact that the decedent voluntarily shot himself,” it is an inescapable fact that Mr. Boyce intentionally contacted a power line approximately 20 feet above the ground, standing on his truck, after wrapping shrink-wrap around communications lines.

41. Mr. Boyce’s acts were voluntary and operate wholly independently of any of the Defendants’ actions.

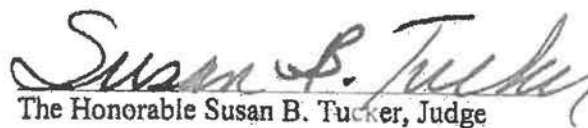
42. Mr. Boyce’s acts break the causal chain and relieve Defendants of any liability in this matter.

WHEREFORE, based upon all of the foregoing reasons, the Court GRANTS Summary Judgment to all Defendants.

The Clerk is hereby ordered to provide certified copies of this Order to counsel of record.

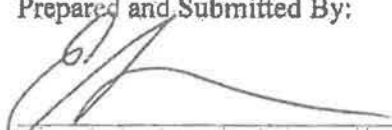
MAR 09 2020

ENTERED this _____ day of _____, 2020.

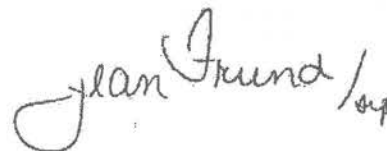

The Honorable Susan B. Tucker, Judge

ENTERED March 9, 2020
DOCKET LINE 173, Jean Friend, Clerk

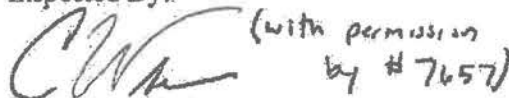
Prepared and Submitted By:



Edward A. Smallwood, Esq. WV ID. No. 7657
LITCHFIELD CAVO, LLP
Two Gateway Center, Ste. 600
603 Stanwix Street
Pittsburgh, PA 15222
(412)291.8243
(412)586.4512 Facsimile
smallwood@litchfieldcavo.com
Counsel for Defendant,
Monongahela Power Company



Inspected By:

 (with permission
by #7657)

Charles C. Wise, III, Esquire
BOWLES RICE, LLP
University Town Centre
125 Granville Square, Suite 400
Morgantown, WV 26501
Counsel for Defendants, Frontier Communications
of America, Inc., Frontier Communications
Corporate Services, Inc., Frontier
Communications Online and Long Distance Inc.,

Frontier Communications ILEC Holdings LLC

 (with permission
by #7057)

Bradley K. Shafer, Esquire, WV I.D. No. 7794
MINTZER, SAROWITZ, ZERIS, LEDVA & MEYERS, LLP
West Virginia Office,
48 Fourteenth Street
Suite 200
Wheeling, WV 26003
*Counsel for Defendants, Atlantic Broadband (PENN),
LLC, and Atlantic Broadband Finance, LLC*

William C. Brewer, Esquire
BREWER & GIGGENBACH, PLLC
P.O. Box 4206
Morgantown, WV 26504
Counsel for Plaintiffs

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

**EUGENE F. BOYCE, and
KIMBERLY D. BOYCE,**

Plaintiffs,

v.

**CIVIL ACTION NO. 16-C-219
JUDGE SUSAN B. TUCKER**

**MONONGAHELA POWER COMPANY,
FRONTIER COMMUNICATIONS OF
AMERICA, INC., FRONTIER
COMMUNICATIONS CORPORATE SERVICES
INC., FRONTIER COMMUNICATIONS ONLINE
AND LONG DISTANCE INC., FRONTIER
COMMUNICATIONS ILEC HOLDINGS LLC,
ATLANTIC BROADBAND (PENN), LLC, and
ATLANTIC BROADBAND FINANCE, LLC,**

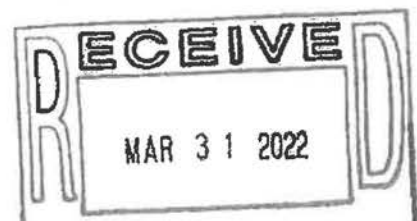
Defendants.

ORDER DENYING PLAINTIFFS' MOTION TO ALTER JUDGMENT

On December 15, 2021, the Parties appeared by counsel for argument on Plaintiff's Motion to Alter Judgment ("Motion"). After considering the written memoranda, applicable law, record evidence and arguments of counsel, after full and adequate consideration, the Court denies Plaintiff's Motion.

The Court finds that its extension granted to Plaintiffs' counsel on March 27, 2020 providing Plaintiffs with an extension to submit a Rule 59(e) motion until March 30, 2020 was proper because the Plaintiffs' request for an extension was based upon reasons relating to the COVID-19 pandemic.

For a Rule 59(e) motion to be successful, the Plaintiffs are required to make a showing that (1) there is an intervening change in controlling law; (2) new evidence not previously available came to light; (3) this Court's ruling was a clear error of law;



or (4) an obvious injustice has taken place that must be cured. See Syl. Pt. 2, Mey v. Pep Boys-Manny, Moe, & Jack, 228 W.Va. 48 (2011). Plaintiff's brief presented no change of law and now new evidence and Plaintiff's counsel conceded such during argument. Moreover, and having heard argument of counsel, this Court finds that the order entered March 9, 2020 presents no clear error of law, nor evidence of an obvious injustice.

Accordingly, this Court **ORDERS** that Plaintiff's Motion to Alter Judgement is hereby **DENIED**.

All objections of counsel to this Order are expressly noted and preserved.

The Clerk of this Court shall provide a copy of this Order to all counsel of record.

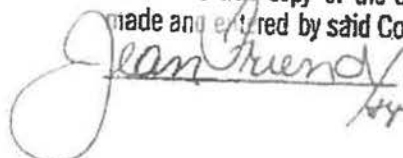
It is so **ORDERED** this 25th day of March 2022.


SUSAN B. TUCKER, JUDGE

ENTERED March 25, 2022
DOCKET LINE 200, Jean Friend, Clerk

STATE OF WEST VIRGINIA SS:

I, Jean Friend, Clerk of the Circuit Court and Family Court of Monongalia County State aforesaid do hereby certify that the attached Order is a true copy of the original Order made and entered by said Court.

 Circuit Clerk