

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**Eugene F. Boyce and Kimberly
D. Boyce,
Plaintiffs Below, Petitioners,**

v.

**Monongalia Power Company, Frontier Communications
of America, Inc., Frontier Communications Online,
Frontier Communications Corporate Services, Inc.,
Long Distance, Inc., Frontier Communications ILEC
Holdings, LLC, Atlantic Broadband (Penn), LLC, and
Atlantic Broadband Finance, LLC,
Defendants Below, Respondents.**



CASE NO.: 22-0292

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PETITIONERS' BRIEF

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TABLE OF CONTENTS

Table of Authorities	iii
I. Assignments of Error	1
II. Statement of the Case	2
A. Factual Background	2
B. Procedural Background	7
III. Standard of Review	9
IV. Request for Oral Argument	10
V. Summary of the Argument	10
VI. Argument	13
A. The Circuit Court erred in finding that Respondents were not the proximate cause of Mr. Boyce's injuries because it has long been held by this Court that foreseeability and proximate cause are questions of fact that are to be determined by a jury.	13
B. The Circuit Court erred when it failed to find the Respondents negligent as a matter of law when the Respondent violated the NESC, which has been adopted by the West Virginia Public Safety Commission at W.Va. C.S.R. § 150-3-5.1.b.	17
C. The Circuit erred in relying upon <i>Maggard v. Appalachian Electric Power Co.</i> in its ruling because the facts are not "nearly identical" as the facts of this case, as stated by the Court, and in relying on <i>Maggard</i> , the Circuit Court misapplied the law of this State.	23
D. The Circuit Court erred in finding that it was undisputed that Mr. Boyce intentionally grabbed the primary wire because there is no evidence to that effect, and the evidence presented to that effect shows nearly the opposite.	26
E. The Circuit Court erred in relying on OSHA regulations because the OSHA regulations cited are wholly irrelevant to this case as	

Mr. Boyce was delivering construction materials in the boom truck, and the circumstances, therefore, fall under an exception noted in the OSHA regulations cited by the Circuit Court.	28
F. The Circuit Court erred in finding that Mr. Boyce’s actions were an intervening and superseding cause because his actions were a direct and foreseeable result of Respondents’ negligence, and it is a question of fact that is to be determined by a jury.	30
G. The Circuit Court erred in finding that James Orosz stated Mr. Boyce was a trespasser because Petitioners’ counsel objected to the question at the deposition of Mr. Orosz, an evidentiary hearing was not held, no ruling was given on the objection prior to the hearing on the Motion for Summary Judgment, and there was no admissible testimony that Mr. Boyce was a trespasser.	33
VII. Conclusion	35
Certificate of Service	37

TABLE OF AUTHORITIES

State Court Cases

Aetna Casualty & Surety Co. v. Federal Ins. of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963).	13
Aluise v. Nationwide Mut. Fire Ins. Co., 218 W.Va. 498, 625 S.E.2d 260 (2005).	33
Anderson v. Moulder, 183 W.Va. 77, 394 S.E.2d 61 (1990).	31
Andrick v. Town of Buckhannon, 187 W.Va. 706, 421 S.E.2d 247 (1992).	13
Bice v. Wheeling Elec. Co., 62 W.Va. 685, 59 S.E. 626 (1907).	21
Conrad v. ARA Szabo, 198 W.Va. 362, 480 S.E.2d 801 (1996)	33
Evans v. Farmer, 148 W.Va. 142, 133 S.E.2d 710 (1963).	31
Harbaugh v. Coffinbarger, 209 W.Va. 57, 543 S.E.2d 338 (2000).	30
Humphrey v. Westchester Ltd. Partnership, 2019 WL 2185972 (W.Va. May 21, 2019). . .	16
Johnson v. Monongahela Power Co., 146 W.Va. 900, 123 S.E.2d 81 (1961).	21
Lancaster v. Potomac Edison Co. of West Virginia, 156 W.Va. 218, 192 S.E.2d 234 (1972). . .	14
Maggard v. Appalachian Electric Power Co., 111 W.Va. 470, 163 S.E. 27 (1932).	23
Marcus v. Staubs, 230 W.Va. 127, 736 S.E.2d 360 (2012).	16
Matthews v. Cumberland & Allegheny Gas Co., 138 W.Va. 639, 77 S.E.2d 180 (1953). . .	16
Mayhorn v. Logan Med. Found., 193 W.Va. 42, 454 S.E. 87 (1994).	33
Painter v. Peavy, 192 W.Va. 189 (1994).	9
Sewell v. Gregory, 179 W.Va. 585, 371 S.E.2d 82 (1988).	14
Strahin v. Cleavenger, 216 W.Va. 175, 603 S.E.2d 197 (2004).	13
Webb v. Sesler, 135 W.Va. 341, 63 S.E.2d 56 (1950).	16

West Virginia Fire & Cas. Co. v. Mathews, 209 W.Va. 107 (2000)	10
Yampa Valley Elec. Ass’n, Inc., v. Telecky, 862 P.2d 252 (Colo. 1993).	19

Federal Regulations

29 C.F.R. §1926.1400.	29
29 C.F.R. § 1926.1410.	28
29 C.F.R. § 1926.1418	28

West Virginia Rules of Evidence

W. Va. R. Ev. Rule 702(a).	33
W. Va. R. Ev. Rule 703.	34

West Virginia Public Service Commission Rules

W. Va. C.S.R. § 150-3-5.1.b	21
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PETITIONERS EUGENE F. BOYCE AND KIMBERLY D. BOYCE'S BRIEF

I. ASSIGNMENTS OF ERROR

1. The Circuit Court erred in finding that Respondents were not the proximate cause of Mr. Boyce's injuries because it has long been held by this Court that foreseeability and proximate cause are questions of fact that are to be determined by a jury, and the facts of this case are not susceptible to only one inference.

2. The Circuit Court erred when it failed to find the Respondents negligent as a matter of law when the Respondent violated the NESC, which has been adopted by the West Virginia Public Safety Commission at W.Va. C.S.R. § 150-3-5.1.b.

3. The Circuit Court erred in relying upon *Maggard v. Appalachian Electric Power Co.* in its ruling because the facts of *Maggard* are not "nearly identical" to the facts of this case, as stated by the Court, and in relying on *Maggard*, the Circuit Court misapplied the law of this State.

4. The Circuit Court erred in finding that it was undisputed that Mr. Boyce intentionally grabbed the primary wire because there is no evidence to that effect, and the evidence presented to that issue shows nearly the opposite.

5. The Circuit Court erred in relying on OSHA regulations because the OSHA regulations cited are wholly irrelevant to this case as Mr. Boyce was delivering construction materials in the boom truck, and the circumstances, therefore, fall under an exception noted in the OSHA regulations cited by the Circuit Court.

6. The Circuit Court erred in finding that Mr. Boyce's actions were an intervening and superseding cause because his actions were a direct and foreseeable

result of Respondents' negligence, and it is a question of fact that is to be determined by a jury.

7. The Circuit Court erred in finding that James Orosz stated Mr. Boyce was a trespasser because Petitioners' counsel objected to the question at the deposition of Mr. Orosz, an evidentiary hearing was not held, no ruling was given on the objection prior to the hearing on the Motions for Summary Judgment, and there was no admissible testimony that Mr. Boyce was a trespasser.

II. STATEMENT OF THE CASE

A. Factual Background

On April 11, 2014, Petitioner Eugene F. Boyce ("Mr. Boyce") was working as a boom truck operator for Lowes, Inc. PETAPP00016. He was tasked with the delivery of building materials to the home of a customer, Brandon Tucker ("Mr. Tucker"), located at 191 Sand Springs Road in Cheat Lake, Monongalia County, West Virginia.

PETAPP00016. When Mr. Boyce arrived at the home of Mr. Tucker, he discovered that the communication lines ("the lines") installed were too low for him to drive his boom truck underneath, preventing him from driving up Mr. Tucker's driveway and completing the delivery of the building materials. PETAPP00016. The communication lines were installed by Respondents Frontier Communications of America, Inc., ("Respondent Frontier") and Atlantic Broadband, LLC, ("Respondent Atlantic").

Upon discovery that he was unable to drive underneath the lines, Mr. Boyce and Mr. Tucker attempted to raise the communication lines using a board from the materials Mr. Boyce was delivering to Mr. Tucker. PETAPP00418 – 19. However, when that

proved unsuccessful, Mr. Boyce, as he had done multiple times before, climbed to the top of his boom truck in order to wrap the lines in cellophane or plastic wrap, thereby raising the lines above his boom truck. PETAPP00419 – 20. Based on his prior experiences, Mr. Boyce knew that the lowest lines on the poles holding the lines were supposed to be communication lines, and that the wire carrying an electrical current (“the hot wire” or “the primary wire”) was to be installed above the neutral wire (collectively “the power lines”). PETAPP00352. However, unbeknownst to Mr. Boyce, the primary wire and the neutral wire at this particular location had been switched, so the primary wire was below the neutral wire. PETAPP00399. The power lines were owned and maintained by Respondent Monongahela Power Company (“Respondent Mon Power”).

In raising the communication lines, Mr. Boyce unintentionally made contact with the primary wire, causing a severe electric shock. PETAPP00420. Mr. Boyce fell onto the boom truck where he was standing, and Mr. Tucker dialed emergency services. PETAPP0000421. Upon the arrival of emergency services, other individuals also appeared, such as Ms. Durr, a claims representative for Respondent Mon Power; a lines supervisor for Respondent Mon Power, Mr. Dean; two linesmen for Respondent Mon Power, Mr. Corbin and Mr. Corder; an engineer for Respondent Mon Power, Mr. Wilson; two Lowes, Inc. representatives; and Mr. Tucker’s father-in-law, Mr. Hall.

Mr. Boyce was lowered from the boom truck, placed in an ambulance and taken away from the scene of the incident. It was quickly decided that Mr. Boyce needed to be life-flighted, so a helicopter arrived at the location of the ambulance, and Mr. Boyce was

taken to the University of Pittsburgh Medical Center ("UPMC") in Pittsburgh, Pennsylvania to receive treatment.

Petitioner Kimberly D. Boyce ("Ms. Boyce") was notified of Mr. Boyce's condition and location as he was being taken to UPMC.

At UPMC, Mr. Boyce was treated for extensive injuries and underwent several surgeries, including the amputation of his right hand beginning at or near the elbow, which was determined could not be saved, Mr. Boyce also suffers from memory loss surrounding the day of his injury and his time receiving treatment at UPMC, confusion, and other mental issues and disorders stemming from the electrical contact injury.

As a result of his injuries, Mr. Boyce is permanently and totally disabled. He is unable to work, unable to complete many household tasks, and perform husbandly duties. He also suffers from confusion spells, and anger issues, which have taken a vast toll on his marriage. Following his return to his home, Mr. and Ms. Boyce (collectively "Petitioners") filed the instant suit for damages.

Through discovery, it was determined that the poles on which the communication and power lines were installed were owned and maintained by Respondent Mon Power. It was also discovered that the installation of the communications lines was controlled by joint use agreements between Respondent Mon Power and Respondent Frontier and Respondent Mon Power and Respondent Atlantic. PETAPP00126; PETAPP00135 – 89.

The joint use agreement with Respondent Frontier states that each party, Respondent Mon Power and Respondent Frontier, shall maintain its own "Facilities" in

a safe and serviceable condition and in accordance with the standard and specifications setout in the agreement. PETAPP00167. It further states that each party has the right to inspect the other party's facilities and notify the other party that it is not in conformity with said standards and/or specifications. PETAPP00165 – 66. Finally, the agreement between Respondent Mon Power and Respondent Frontier states that the standards and specifications that each party shall conform to are "good industry practice" and within the National Electrical Safety Code, the rules of the Public Service Commission of West Virginia, and any other applicable rules or standards. PETAPP00167.

The joint use agreement with Respondent Atlantic states that Respondent Mon Power has the right to inspect any facilities of Respondent Atlantic and shall have the right to remove, replace, or make necessary repairs to Respondent Atlantic's lines should Respondent Atlantic fail to make its lines conform to standards. PETAPP00137. The joint use agreement between Respondents Atlantic and Mon Power further states that all attachments must be maintained with minimum clearance and other requirements of the National Electric Safety Code, and if Respondent Atlantic's attachments fail to meet those standards, Respondent Mon Power has the right to correct or remove the attachments in order to correct the failures of Respondent Atlantic. PETAPP00137 – 38.

James Orosz, P.E. ("Mr. Orosz") is an electrical engineer who was retained by Petitioners as an expert witness in electrical engineering, specifically, the standard of care required in the installation and maintenance of communication lines and primary or hot wires. During his deposition, In Mr. Orosz concluded that, in his professional,

expert opinion, each Respondent failed to adhere to the standards set in the National Electric Safety Code ("NESC"), specifically Table 232-1, titled "Vertical Clearance of Wires, Conductors, and Cables Above Ground, Roadway, Rail, or Water Surfaces." See PETAPP00426 - 46, generally. With respect to Respondent Frontier, Mr. Orosz stated its communication lines should have been installed with clearance of at least eighteen feet in accordance with the standard set by NESC Table 232-1. PETAPP00439. Mr. Orosz testified that Respondent Frontier failed to install its communication lines above that standard because after Mr. Boyce's injuries and with the cellophane still wrapped around the communication lines presumably raising Respondent Frontier's line, Respondent Frontier's lines still only measured at fourteen feet, four inches. PETAPP00430 - 31.

Mr. Orosz further testified that Respondent Atlantic had a duty to either move Respondent Frontier's lines up to Code, or inform Respondent Frontier that its lines were not up to Code, allowing Respondent Frontier to make the necessary changes/repairs. PETAPP00439. Mr. Orosz testified that Respondent Atlantic's lines should have measured with a clearance of at least fifteen feet, six inches according to the version of the NESC that was applicable at the time of Respondent Atlantic's installation of its lines. PETAPP00439.

As to Respondent Mon Power, Mr. Orosz stated that Respondent Mon Power violated the NESC Section 220C, Part 2, which states that:

"where supply conductors of different voltage classifications are on the same structures, relative levels should be as follows: A, where all circuits are owned by one utility the conductors of higher voltages should be placed above those of

lower voltage; and, B, where different circuits are owned by separate utilities, the circuit of each utility may be grouped together and one group and circuits may be placed above the other group, provided that the circuits on each group are located so that those levels of the higher voltage are at the higher levels and any of the following conditions is met.”

PETAPP00434.

In Mr. Orosz’s opinion, it was a violation of the NESC and standard of care when Respondent Mon Power configured the primary wire below the neutral wire.

PETAPP00435. Mr. Orosz further stated that while the configuration used by Respondent Mon Power was not uncommon, it was unnecessary at this location, making it a violation of the standards set. PETAPP00435.

Respondent Mon Power produced multiple witnesses stating that the configuration at this location was due to the foliage of the area. See PETAPP00383 – 412; PETAPP00613 – 17, generally. The witnesses stated, and Mr. Orosz agreed, that when there may be a problem with the right-of-way through the trees, in order to prevent damage to the wires and to prevent interruptions of service from falling branches, power companies, such as Respondent Mon Power, may use this configuration with a reinforced neutral wire to shield the primary wire. Nevertheless, Mr. Orosz stated adamantly that this configuration was unnecessary at this location. PETAPP00435.

B. Procedural Background

At the close of discovery, Respondents each filed its own Motion for Summary Judgment. Petitioners filed timely responses to each individual Motion, and Respondents filed replies.

Respondent Frontier argued in its Motion that (1) Mr. Boyce's actions constituted an intervening and superseding cause; and (2) because Mr. Boyce's act of contacting the power line is undisputed, the question of proximate cause is a matter of law. See PETAPP00536 - 46, generally.

Respondent Atlantic argued in its Motion that (1) Atlantic was not the proximate cause of Mr. Boyce's injuries because Mr. Boyce committed the last negligent act; (2) Mr. Boyce was a superseding and intervening cause; and (3) Mr. Boyce assumed the risk. See PETAPP00576 - 88, generally.

Respondent Mon Power argued in its Motion that (1) Mon Power did not violate the NESC; (2) it did not owe a duty to Mr. Boyce as his actions were not reasonably anticipated; (3) Mr. Boyce's actions constituted contributory negligence, barring his recovery; and (4) Mr. Boyce proximately caused his own injuries, and he was a superseding and intervening cause. See PETAPP00494 - 511, generally.

In their responses to the various motions, Petitioners argued that (1) they had established through credible evidence by the testimony of Mr. Orosz that each Respondent had committed negligence; (2) a reasonable jury could conclude that Respondents were the proximate cause of Petitioners' injuries because they had created the dangerous condition; (3) that proximate cause, concurrent negligence, and contributory negligence were questions of fact to be determined by the jury; and (4) assumption of the risk is an area of law related to contributory negligence and is similarly a question of fact for the jury. See PETAPP00512 - 27; PETAPP00547 - 60; and PETAPP00589 - 606, generally.

A hearing was held on February 18, 2020, wherein the Circuit Court granted all Respondents' Motions. PETAPP00450 – 70. By Order dated March 9, 2020, the Circuit Court ultimately concluded that Mr. Boyce's actions were the proximate cause of his injuries because his actions were not reasonably foreseeable to the Respondents. PETAPP00003 – 13. The Circuit Court further concluded that Mr. Boyce's actions were an intervening and superseding cause, severing the proximate cause of all Respondents. PETAPP00003 – 13.

Petitioners filed a Motion to Reconsider the March 9, 2020 Order granting Summary Judgment to Respondents on May 15, 2020.¹ PETAPP00618 – 42. Respondents filed their own respective responses on December 11, 2021. See PETAPP00643 – 80, generally. A hearing was held on Petitioners' Motion to Reconsider on December 15, 2021, wherein the Circuit Court "[stood] by [its] ruling." See PETAPP00471 – 93; and PETAPP00001 – 2.

III. STANDARD OF REVIEW

Each of Petitioners' assignments of error are to be reviewed *de novo* as the issue in this case is the Circuit Court's grant of Summary Judgment to all Respondents and its denial of Petitioner's Motion to Alter Judgment. "A circuit court's entry of summary judgment is reviewed *de novo*." *Painter v. Peavy*, 192 W.Va. 189, 192 (1994) (citing *Drewitt v. Pratt*, 999 F.2d 774 (4th Cir. 1993)). "De novo standard of review applied to denial of

¹ Petitioners filed the Motion to Reconsider on this date based upon the various Orders of this Court suspending all civil cases in the State of West Virginia following the onset and rapid spread of the COVID-19 Pandemic.

motion to alter or amend a summary judgment. . .” Headnote 1, *West Virginia Fire & Cas. Co. v. Mathews*, 209 W.Va. 107 (2000).

IV. REQUEST FOR ORAL ARGUMENT

Petitioners hereby request that they be permitted to present Oral Argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure due to the issues presented and assignments of error relating to facts, circumstances, and the law that may be expanded upon through oral argument.

V. SUMMARY OF THE ARGUMENT

Petitioners established through credible evidence by the testimony of Mr. Orosz that each Respondent had committed negligence by not adhering to the NESC and violated the applicable standard of care. Respondents should have reasonably foreseen that their failure to abide by the professional standards set forth in the NESC would cause harm to persons. Petitioner’s injuries were the natural and probable result of the acts of negligence of the Respondents.

Foreseeability and proximate cause are questions of fact to be determined by a jury and not by a Motion for Summary Judgment. The Circuit Court overstepped its boundaries when it determined that Mr. Boyce’s actions were unforeseeable. The Circuit Court should have ended its inquiry into foreseeability after it had determined whether or not it was foreseeable that a person may be injured when the communication lines were not in compliance with the standards set by the NESC. Additionally, West Virginia has adopted the NESC as its law and noncompliance that results in injury is negligence as a matter of law regardless of foreseeability.

The Circuit Court's reliance on *Maggard v. Appalachian Electric Power Co.* is misdirected. In relying upon *Maggard*, the Circuit Court has erroneously expanded this Court's rulings in that case and suggested that electrical companies cannot be held liable for any injuries that come about as a result of their equipment if the wires are at or above a certain, undetermined height. Further, the Petitioner in *Maggard* did not allege that the electrical company failed to adhere to any standards. Petitioners in this case allege just that. The Circuit Court ignored the fact that Respondents failed to adhere to certain standards contained within the NESC, specifically that the communication wires were below the required clearance set by the NESC, and the primary wire is required to be located above the neutral wire in this circumstance.

The Circuit Court also misstates the facts of this case when it states the facts in *Maggard* and this case are nearly identical. The facts in *Maggard* show that the electrical company had no reason to believe any person may be in danger because it had already repositioned the primary wire both further from the work site and higher on the pole at the request of *Maggard*'s employer. In this case, the Respondents should have known of the potential for injury because the communication wires were placed below the required height, and the primary wire was positioned below the neutral, in violation of NESC standards.

The Circuit Court erred when it determined the facts of the case were undisputed. Specifically, the facts regarding Mr. Boyce's intentions when he made contact with the primary wire. Mr. Boyce testified in his deposition that he would never intentionally grab a power line that he knew had the ability to harm, kill,

dismember, or otherwise injure him. Mr. Tucker testified in his deposition that it did not appear to him that Mr. Boyce intentionally reached up to grab the primary wire. If a question of interpretation exists, then a question of fact remains to be determined by a jury. Nonetheless, the facts are either in dispute or susceptible to more than one interpretation, and they must be viewed in a light most favorable to the non-moving party.

The Circuit Court erred in relying upon OSHA regulations. The OSHA regulations cited by the Circuit Court are only applicable when the machinery is being used in a construction setting. While Mr. Boyce was driving a boom truck on the day he was injured, he was not operating the boom as part of a construction job or project. Furthermore, the regulations in the subsection cited by the Circuit Court does not apply when the boom truck is being used as a delivery vehicle, which is precisely what Mr. Boyce was doing.

Further, the Circuit Court erred when it determined Mr. Boyce's actions were an intervening act and superseding cause of his injuries. To be an intervening or superseding act, the actor must be acting *independently* of the originally negligent parties' actions. That simply is not the case here. Mr. Boyce was on top of the boom truck, attempting to fix the possible harms and dangerous situation created by Respondents Frontier and Atlantic's negligence. Mr. Boyce was injured because of the dangerous conditions created by the Respondents.

Finally, the Circuit Court erred when it relied upon Mr. Orosz's testimony that Mr. Boyce was a trespasser because Mr. Orosz's testimony regarding a legal conclusion is inadmissible at trial.

VI. ARGUMENT

- A. The Circuit Court erred in finding that Respondents were not the proximate cause of Mr. Boyce's injuries because it has long been held by this Court that foreseeability and proximate cause are questions of fact that are to be determined by a jury.**

The Circuit Court granted each of the Respondents' Motion for Summary Judgment on the ground that Respondents did not proximately cause the incident or Petitioners' injuries. PETAPP00003 – 11. In its ruling, the Circuit Court focused heavily on foreseeability.

"A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. pt. 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963). "The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter but is to determine whether this is a genuine issue for trial." Syl. pt. 3, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992).

"When 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 the law for the judge and one of fact for the jury." Syl. pt. 11, *Strahin v. Cleavenger*, 216 W.Va. 175, 603 S.E.2d 197 (2004). "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?" Syl. pt. 3, *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988).

"[A] court's overall purpose in its consideration of foreseeability in conjunction with the duty owed is to discern in general terms whether the type of conduct at issue is sufficiently likely to result in the harm experienced based on the evidence presented. . . ." *Strahin v. Cleavenger*, 216 W.Va. 175, 603 S.E.2d 197, 207 (2004) (emphasis added). "The jury has the more specific job of considering the likelihood or foreseeability of the injury sustained under the particular facts of the case in order to decide whether the defendant was negligent in that his or her conduct fell within the scope of the duty defined by the court." *Id.* at 185, 603 S.E.2d at 207. Courts are to make general determinations that the relevant disputed facts are sufficient such that a jury may "determine whether or not it was foreseeable that the conduct of the [defendant(s)] could have created an unreasonable risk of harm to the victim under the circumstances." *Id.* at 187, 603 S.E.2d at 209.

"In 29 C.J.S. Electricity Section 42, page 1073, it is stated that the law required one maintaining electric wires and poles to so place them as to guard against contact of any nature that [might] be anticipated." *Lancaster v. Potomac Edison Co. of West Virginia*, 156 W.Va. 218, 231, 192 S.E.2d 234, 242 (1972).

Here, the Circuit Court erred by going beyond its role in the foreseeability analysis when it determined that Mr. Boyce's actions were not foreseeable by the

Respondents. As noted above, the Circuit Court's role in this case was only to determine whether any reasonable jury, provided the facts of this case, could have determined that the injuries suffered by Mr. Boyce were foreseeable given the conduct of Respondents, i.e. Respondent Frontier's failure to install the communication lines at or above the standard set by the NESC; Respondent Atlantic failing to notify Respondent Frontier of its failure to install the lines properly; and Respondent Mon Power installing the hot wire below the neutral wire, against the standards set by the NESC. It is the role of the jury, not the court, to then decide whether it is foreseeable by the Respondents that Mr. Boyce would have taken the actions that he took in standing on top of the boom truck and attempting to raise the lines. However, the Circuit Court usurped the role of the jury and determined that Mr. Boyce's actions were unforeseeable, and Respondents could not have reasonably anticipated Mr. Boyce's injuries.

In fact, Respondent Mon Power's own employee, Mr. Corbin stated in his deposition that he has seen wires strung together by objects prior to this occasion. PETAPP00620.

It is generally known to Respondent Mon Power's employees that persons who may come across low-hanging wires may attempt to raise those wires themselves. Clearly, then, it is foreseeable that issues may arise when low hanging communication lines and electrical wires are present in areas where large trucks drive.

The NESC was created to prevent and safeguard against injuries to persons who may come near or encounter wires or lines. When there is a section of road, roadway,

driveway, or other area where a large vehicle may travel, it is entirely foreseeable by a utility company that low-lying wires may cause an injury. The Circuit Court should have ended its discussion and inquiry into foreseeability at this point. The Court should have overruled the Order granting Respondents Motion for Summary Judgment and allowed a jury to consider whether it is foreseeable that a person may have contact with low-lying wires including a hot wire that is incorrectly hanging below a neutral wire.

Proximate cause has been defined by this Court as “that cause which in actual sequence, unbroke by any independent cause, produced the wrong complained of, without which the wrong would not have occurred.” *Webb v. Sesler*, 135 W.Va. 341, 348, 63 S.E.2d 65, 68 (1950). Summary judgment on the issue of proximate cause imputes upon “the province of the fact-finder in determining whether . . . alleged actions were the proximate cause of the accident at issue.” *Marcus v. Staubs*, 230 W.Va. 127, 736 S.E.2d 360 (2012). “It is the role of the jury to evaluate the ‘time, place, manner [and] person,’ and ascertain, in its collective wisdom, whether proximate cause exists, and if so, the degree of fault.” Footnote 9, *Humphrey v. Westchester Limited Partnership*, 2019 WL 2185972 (W.Va. May 21, 2019).

The Circuit Court relied upon *Matthews v. Cumberland & Allegheny Gas Co.*, 138 W.Va. 639, 77 S.E.2d 180 (1953) when it determined the Respondents were not the proximate cause of the Petitioner’s injuries. The Court reasoned 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, S.E.2d at 189. However, the Circuit Court

completely ignored this Court's holdings in other cases regarding both proximate cause and yet more cases involving more than one negligent actor.

The Circuit Court erred when it decided multiple issues of fact. The Circuit Court concluded that Respondents were not the proximate cause of the injuries Mr. Boyce sustained and found that it was unforeseeable that Mr. Boyce would be injured when he had contact with negligently installed lines and wires.

B. The Circuit Court erred when it failed to find the Respondents negligent as a matter of law when the Respondent violated the NESC, which has been adopted by the West Virginia Public Safety Commission at W.Va. C.S.R. § 150-3-5.1.b.

"The NESC's purpose is to provide basic rules for safeguarding persons from hazards arising from the installation, operation or maintenance of conductors and equipment in electric supply stations, and both overhead and underground electric supply and communication lines." <https://www.ecmag.com/section/codes-standards/other-electrical-code-whats-so-different-about-nesc>. Date accessed March 11, 2022. The hazards the NESC seeks to safeguard against includes the situation Mr. Boyce found himself in on the date he was injured: low hanging lines and a large truck unable to fit underneath.

Respondents argued, and the Circuit Court agreed, that it was entirely unforeseeable to the Respondents that Mr. Boyce would take the actions he took. In response, Petitioners pointed out key sections of Mr. Orosz's testimony detailing Respondent Frontier's violation of the law:

Q: Okay. Now, how high do you believe the 1997 NESC Code required Frontier or its predecessor to place its line in 1978?

A: As I answered before, it would be 18 feet in the NESC Code.

Q: Okay. Where do you find 18 feet in the NESC Code?

A: It's Table 232-1 and it's titled the minimum vertical clearance of wires, conductors, and cables above ground rails or water, and in that table there is the communication conductors and cables, which would be the communications lines, it's the first column.

And since this, as I stated before, this driveway would be subject to truck traffic, the residential driveway row would not apply and it would be the roads, streets, alleys, parking lots subject to truck traffic, which is number 2 and that is 18 feet.

PETAPP00439.

Regarding Respondent Atlantic's duty, Mr. Orosz testified as follows:

Q: I believe in your disclosure you said that the line should have been at least 15 and a half feet.

A: Correct. And the key there is at least. So there is the telephone line and then later installed cable lines. The line should have been in 1977 installed at 18 feet. The cable line comes in is installed sometime around 1990. At that point in time the defense of the cable company is saying, well, we just put it in above the telephone line because we thought it was in compliance at that point in time because of the grandfather clause in the National Electrical Safety Code which states that it is in compliance with an earlier code, then it's okay.

At that point in time the clearance over the roadway was 15 foot 6. So that's where I'm coming in there saying that they should have at least at that time noticed that the line was too low and brought both the telephone and the cable lines up to safety standards at that time, which was 15 foot 6. If they didn't do it themselves, they should have notified Frontier to raise their lines.

PETAPP00439.

Mr. Orosz further testified that the configuration of Respondent Mon Power's electrical lines was not in compliance with the NESC standards because the high voltage wire was above the neutral wire:

Q: Is it the entirety of the custom, practices and standards of care that you believe this configuration violated or are there others?

A: That, and given my experience in the standards of the industry is that the reasoning for this is the – and this is a joint use configuration where you have communication lines, as well as supply or electrical lines, it protects those communication workers who are working in the communication space below those lines by a standard configuration that the lower voltage is at the lower level.

It also ensures that they comply with the minimum approach distance to higher voltages. So it is the standard in the industry to configure the electrical lines in this manner for safety.

A: I saw absolutely no reason why in this configuration in this – at the incident location that the primary line should have been below the neutral line.

PETAPP00434.

Furthermore, in *Yampa Valley Elec. Ass'n, Inc., v. Telecky*, 862 P.2d 252, (Colo. 1993), the Supreme Court of Colorado addressed the negligence standard of care and whether a utility company is liable to an injured party if it did not violate the NESC. "Evidence of a defendant's compliance with applicable industry standards in a tort case is both relevant and admissible for purposes of determining whether the defendant either breached, or satisfied, the duty of care it owed to an injured plaintiff. Even though evidence of compliance with industry standards is admissible, such evidence is not conclusive on the issue of due care." *Id.* at 257. (internal citations omitted and emphasis added). In *Yampa Valley*, Marvin Telecky was electrocuted and died as a result of his injuries when he came in contact with an uninsulated 7,200-volt high tension electric power line while performing maintenance on his home. *Id.* at 253-54. Marvin's

wife filed a wrongful death suit against Yampa Valley Electric Association, Inc. ("Yampa Valley"), alleging that Yampa Valley failed to "(1) warn Marvin of the danger of the power line; (2) bury the power line below ground; (3) insulate the power line; (4) provide adequate clearance around the power line; (5) reduce the voltage in the power line before running it across the Telecky property; and (6) place the uninsulated wire at a greater distance from the residence, all of which would have reduced Marvin Telecky's risk of death by electrocution." *Id.* at 254.

The Court in *Yampa Valley* held that "electricity is one example of an instrumentality requiring an enhanced degree of care by those supplying it to others for domestic or commercial use. Therefore, the negligence standard of care to which Yampa Valley is to be held in this case is that of the highest degree of care which skill and foresight can attain consistent with the practical conduct of its business under the known methods and the present state of the particular art." *Id.* at 254 (internal citations omitted).

At issue on appeal in *Yampa Valley* was the use of a jury instruction that ultimately was found to have implied to the jury that compliance with the NESC was compliant with "the highest degree of care." *Id.* The Supreme Court of Colorado held that compliance with the NESC standards satisfies the minimum safety requirements of the electric standard, but it is not "equivalent or co-dependent" to the highest care requirement. *Id.* at 257-58.

This Court has previously held the same regarding electrical companies in West Virginia: "Electrical companies are required to exercise the highest degree of care in

reference to the condition, maintenance, and inspection of their wires and appliances.” Headnote 11, *Bice v. Wheeling Elec. Co.*, 62 W.Va. 685, 59 S.E. 626 (1907). “[I]n cases involving the employment of such a dangerous agent as electricity, reasonable care means the highest degree of care which skill and forethought can attain.” *Id.* at 685, 59 S.E. at 629.

“Valid rules and regulations of public service commission incorporating and adopting minimum requirements of the National Safety Code as to external installation of electrical equipment have force of statutory law, and violation thereof constitutes prima facie negligence.” Headnote 1, *Johnson v. Monongahela Power Co.*, 146 W.Va. 900, 123 S.E.2d 81 (1961). “Compliance with valid rules and regulations of public service commission incorporating and adopting minimum requirements of National Safety Code as to external installation of electrical equipment would meet required standard of care and duty, unless other circumstances requiring additional care in order to comply with requirements to use ordinary care in attendant circumstances.” *Id.* at Headnote 2. “This is a question usually to be determined by the jury under proper instructions by the court with the facts and circumstances applicable thereto contained in such instructions.” *Id.* at 919, 123 S.E.2d at 93. “It is true that if the defendant did not comply with said Code it would be guilty of prima facie negligence.” *Id.* at 919, 123 S.E.2d at 93.

As it pertains to this case, the evidence is uncontroverted that Respondent Frontier violated the NESC, which has been adopted by the State of West Virginia Public Service Commission at W.Va. C.S.R. § 150-3-5.1.b, and Respondent Atlantic violated the standard of care when they failed to change or adjust Respondent

Frontier's communication lines to be compliant with the NESC and/or failed to notify Respondent Frontier of its noncompliance. To this issue, there is no evidence or testimony by any competing expert stating that Respondents Frontier and Atlantic did not violate the NESC or the standard of care.

Additionally, Respondent Atlantic had a duty to either move Respondent Frontier's lines up to the required height set in the Code, or a duty to inform Respondent Frontier that its lines fell short of the height requirement. Again, there is no evidence or testimony by any competing expert stating that Respondent Atlantic did not violate any standards of care in failing to inform Respondent Frontier of the vertical clearance of its lines or in failing to adjust or move Respondent Frontier's lines itself.

While Respondent Mon Power argued that it is not liable because it did not violate the NESC and the Circuit Court held that Mr. Boyce's injuries were not foreseeable, the standard applied in this case should be "the highest degree of care which skill and foresight can attain. . ." Petitioners' expert witness and Respondent Mon Power's expert witness obviously contradict each other regarding Respondent Mon Power's negligence in installing and maintaining its wires. Regardless of whether one expert correctly or incorrectly interpreted the applicable standards, Respondent Mon Power cannot win on the theory that it did not violate the NESC or W.Va. C.S.R. § 150-3-5.1.b. The NESC is the minimum safety required, and Petitioners have clearly established that Respondent Mon Power had a duty to adhere to the standard of "the highest degree of care."

The Circuit Court erred in failing to overturn its Order granting the Respondents Motions for Summary Judgment as a reasonable juror could find that the Respondents failed to satisfy the highest degree of care when (1) Respondent Frontier installed its communication lines below the NESC standard; (2) Respondent Atlantic failed to raise Respondent Frontier's lines or inform Respondent Frontier that its lines were too low; and (3) Respondent Mon Power changed the configuration of its power lines so the neutral wire was above the primary, regardless of whether it violated the NESC.

C. The Circuit Court erred in relying upon *Maggard v. Appalachian Electric Power Co.* in its ruling because the facts are not "nearly identical" to the facts of this case, as stated by the Circuit Court, and in relying on *Maggard*, the Circuit Court misapplied the law of this State.

In its Order granting Summary Judgment to Respondents, the Circuit Court relied on *Maggard v. Appalachian Electric Power Co.*, 111 W.Va. 470, 163 S.E. 27 (1932), stating that the fact pattern was nearly identical. However, this is a gross misstatement of the facts in this case and those in *Maggard*.

In *Maggard*, Maggard was injured while working for a construction company when Maggard was asked to climb the boom in order to give a cable slack. He made contact with a live electrical wire that was near the site where Maggard worked. *Id.*, 163 S.E. at 27-28. Prior to the incident, the construction company who employed Maggard had requested that the power company move the wires that were near the construction site. *Id.*, 163 S.E. at 28. The power company complied with the request, and it moved the wires approximately six feet farther from the construction and raised the wires to

approximately 34 feet above the ground. *Id.*, 163 S.E. at 28. At the time, the law required that the wires have a vertical clearance of at least 22 feet. *Id.*, 163 S.E. at 28.

In this case, Respondent Frontier's communication lines were installed lower than required, Respondent Atlantic had a duty to either move Respondent Frontier's lines or inform Respondent Frontier of the lines' non-compliance, and Respondent Mon Power negligently installed its electric wires so the neutral was above the primary wire. See PETAPP00426 – 46, generally.

The facts in *Maggard* did not include any allegations regarding negligence committed by any party pertaining to the insufficient height of the wires. Additionally, the facts did not include any allegations regarding negligence on the part of any party that had a duty to move another company's lines or inform the other company of the shortcoming. Finally, the facts did not include any allegations that the primary wire was negligently installed below the neutral wire. Furthermore, *Maggard* was in the process of constructing a road that was to run beneath the wires; Mr. Boyce was attempting to travel on a road/driveway that already existed.

Specifically, *Maggard* alleged:

"(1) [t]hat defendant was required to use such care and prudence as would prevent injury to him because he had a right to be on the end of the boom in the prosecution of his work; that it was defendant's duty to insulate the wires while the road construction was in progress; that because its lines were there before the road work began, and because the road authorities had not acquired right of way over defendant's easement, does not relieve defendant from insulating its wires and using care and prudence to prevent injury to the road workmen; (2) that it was not contributory negligence in plaintiff to come in contact with the wires, unless defendant shows, which it has not done, that plaintiff knew the wires were dangerously charged with electricity and not insulated, the burden being on defendant to show that fact."

Id., 163 S.E. at 29.

The Circuit Court relied on *Maggard* to refute Petitioners' argument that Respondents should have foreseen that a person may be injured by the hazardous conditions created. See PETAPP00003 – 13, generally.

“The question of liability is, as above stated, should the owner of this deadly and silent agency anticipate that others in lawful pursuit of business, work, or pleasure would be injured by its electrically charged wires? Here, defendant in compliance with the request of the contractor of the construction had raised the wires to an unusual height and no further complaint was voiced. The request to move the wires out of the way of the construction was done to the apparent satisfaction of the construction company. The contractor was apparently satisfied that danger was obviated, and defendant could not anticipate that the construction company would grossly neglect reasonable precautions for the safety of its employees. *There was ample space for the safe operation of the steam shovel and its boom in the 32 feet of space between the ground and the wires; and there was no necessity in elevating the boom to the wires in order to release the clamshell from the cable.*”

Maggard., 163 S.E. at 29-30 (emphasis added). The Court in *Maggard* found that it was unforeseeable to the electric company that harm may result because the electric company had already moved its wires in order to prevent injury, and it did not receive any other complaints regarding safety around the wires. In the instant case, Mr. Boyce did not have ample space to maneuver his truck because utility wires were below the NESC standards. Mr. Boyce's truck clearance was restricted, due solely to the negligent placement of the low-lying wires. The Circuit Court's Order expands the holding in *Maggard* to state that when wires are at a certain height, electrical contact injuries become completely unforeseeable.

The Circuit Court, in its order, misstates the applicable law and broadens it further than this Court intended the law to be, completely shielding electrical

companies from liability if they simply abide by the codes and regulations. This Court, however, has held that even if the wires are compliant with codes and regulations, the owner of the wires may still be found negligent if there was some other action that the owner needed to do in order to protect the public from injury. See Headnote 2, *Johnson v. Monongahela Power Co.*, 146 W.Va. 900, 123 S.E.2d 81 (1961).

In doing so, the Circuit Court has erred. In relying upon *Maggard*, the Circuit Court has both misstated the facts and the applicable law.

- D. The Circuit Court erred in finding that it was undisputed that Mr. Boyce intentionally grabbed the primary wire because there is no evidence to that effect, and the evidence presented to that effect shows nearly the opposite.**

The Circuit Court found that it was an undisputed fact that Mr. Boyce made intentional contact with the primary wire. However, there is no evidence to suggest that Mr. Boyce *intentionally grabbed* the primary wire, as argued by Respondents and found by the Court.

In his deposition, Mr. Boyce plainly stated that he would never knowingly grab a primary wire that had potential to shock, injure, dismember, or kill him. PETAPP00369 – 70. But Mr. Boyce, as a result of his injuries, does not have any recollection of the events that took place on the day that he was injured. The only eyewitness testimony of a witness present when Mr. Boyce was injured comes from Brandon Tucker, the homeowner that was expecting the building materials to be delivered by Mr. Boyce.

In his deposition, Mr. Tucker states:

- Q: That's fair. What I'm asking you, Brandon, particularly the third paragraph down where it says I spoke to Brandon Tucker. I'm just trying

to understand if what she reports that you said is correct, or if there's something in there that you disagree with as you sit here today.

A: (Witness reviews document.) Besides the fact that it says whenever I said that he was wrapping wires, as in more than one, around each other, I just told you I wasn't sure if it was one or a couple. Other than that, everything else seems pretty clear.

Q: As I read that originally, as I was getting ready to come talk to you today, I read that as you saying that he put some shrink wrap around one wire and then he was reaching up to get a second wire to pull it down to further wrap.

A: Right.

Q: That was how I interpreted this.

A: Yeah. He didn't do that and wasn't pulling down any wires to attach it. He wrapped the plastic wrap around, and was grabbing to push it up. So I don't know. . .

Q: So you think he was trying to push the wires up?

A: I thought he was pushing them up to the next wires up in the air. I don't know what he was trying to do, honestly. I don't know. He said he did it before, so I figured that he knew what the heck he was doing.

Q: So if this says you said that he was trying to reach another wire to pull it up to, that is not what you remember or you don't know that is what he was doing?

A: Like I said, he wrapped the wires and he was pushing them up toward another wire. He didn't grab those wires and reach up to pull them down and do none of that.

Q: Did it appear he was pushing up to the other wire, though, in order to try to somehow fasten this to the higher wire?

A: Yes, sir.

Q: So when he was pushing these up, it was to get them closer to the next wire in order to have those hold up the lower wires?

A: Correct.

As this Court can clearly see from Mr. Tucker's deposition, it was not an intentional act by Mr. Boyce to grab the primary wire. Mr. Boyce was attempting to wrap the already shrink-wrapped communication lines around the wire he believed to be the neutral. In attempting to grab the communication lines again, he made contact with the wire thought to be the neutral, but in reality, he made contact with the primary wire, causing his injuries. As the non-moving parties, Petitioners should have been afforded the privilege of the facts being viewed in a light most favorable to Petitioners. The issues presented by Mr. Tucker's testimony *alone* creates a question of fact that can only be determined by the jury.

Respondents and the Court have grossly misstated the facts as testified to by Mr. Tucker. Respondents argued and the Court found that Mr. Boyce had intentionally grabbed ahold of the primary wire, but the only witness who may testify to the actual actions of Mr. Boyce has stated the opposite.

- E. The Circuit Court erred in relying on OSHA regulations because the OSHA regulations cited are wholly irrelevant to this case as Mr. Boyce was delivering construction materials in the boom truck, and the circumstances, therefore, fall under an exception noted in the OSHA regulations cited by the Circuit Court.**

The Circuit Court relies upon two OSHA regulations in its Order granting Summary Judgment to Respondents: 29 C.F.R. § 1926.1410 and 29 C.F.R. § 1926.1418. PETAPP00009. The Circuit Court notes that § 1926.1410 requires a minimum clearance of 10 feet when working around power lines. PETAPP00009. It further noted that under § 1926.1418 (e) and (g), power lines are presumed to be energized. PETAPP00009.

However, these regulations are irrelevant to this case. The subpart cited by the Circuit Court is limited to the use of power-operated equipment in construction settings. "This standard applies to power-operated equipment, *when used in construction* that can hoist, lower and horizontally move a suspended load." 29 C.F.R. §1926.1400 (emphasis added). Mr. Boyce was using the boom-truck he was driving that day as a delivery vehicle, not for use in a construction job. Mr. Boyce was not operating the boom on the truck when he was injured, so this subpart is wholly irrelevant.

Furthermore, an exclusion applies to Mr. Boyce and his use of the boom truck in this setting.

"(c) Exclusions. This subpart does not cover: (17) Material Delivery (i) Articulating/knuckle-boom truck cranes that deliver material to a construction site when used to transfer materials from the truck crane to the ground, without arranging the materials in a particular sequence for hoisting. (ii) Articulating/knuckle-boom cranes that deliver material to a construction site when the crane is used to transfer building supply sheet goods or building supply packaged materials from the truck crane onto a structure, using a fork/cradle at the end of the boom, but only when the truck crane is equipped with a properly functioning automatic overload prevention device. Such sheet goods or packaged materials include, but are not limited to: Sheets of sheet rock, sheets of plywood, bags of cement, sheets or packages of roofing shingles, and rolls of roofing felt."

29 C.F.R. § 1400(c)(17). The section goes on to state a number of instances where the material delivery exclusion does not apply, such as: the crane is used to hold, support or stabilize the material to facilitate the construction activity; the material being handled is a pre-fabricated component such as floor panels, wall panels, roof structures, or similar items; the material is a structure steel member or a component of a systems-

engineered metal building; or the activity is not excluded under (i) or (ii). 29 C.F.R. §1400(c)(17)(iii).

However, those scenarios are not applicable to this case. Mr. Boyce was in the process of delivering building materials to Mr. Tucker's residence. Those materials were wood, drywall, and drywall mud. He was not using the boom to hold or stabilize any materials. In fact, he was not using the boom in any capacity whatsoever at the time of the injury. If this Court were to conclude that the regulations cited by the Circuit Court were relevant and could have some effect on this case, the exclusion contained in § 1400 of the same subpart applies, and the regulations cited by the Circuit Court are irrelevant and cannot be used by the Circuit Court to divert fault to Mr. Boyce from the Respondents.

F. The Circuit Court erred in finding that Mr. Boyce's actions were an intervening and superseding cause because his actions were a direct and foreseeable result of Respondents' negligence, and it is a question of fact that is to be determined by a jury.

In its ruling, the Circuit Court found that Mr. Boyce was an intervening and superseding cause, and that he acted independently of Respondents negligence, if any, which the Circuit Court noted it did not find. PETAPP00010 - 12. "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) (emphasis added).

This Court's holdings on the issues regarding multiple acts of negligence do not eliminate Respondents' liability in this case. "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) (the issue of foreseeability is discussed above). "Where two or more persons are guilty of separate acts of negligence which in point of time and place concur, and together proximately cause injury to another, they are guilty of concurrent negligence for which they may be held jointly and severally liable in an action by the injured person . . ." Syl. pt. 14, *Id.* "[T]he original negligence continues and operates contemporaneously with an intervening act which might reasonably have been anticipated so that the negligence can be regarded as a concurrent cause of the injury inflicted." *Id.* at 89, 394 S.E.2d at 73.

While quoting the law correctly on the issue of intervening and superseding acts and the severance of proximate cause should there be an intervening and superseding act, the Circuit Court came to the incorrect conclusion, a conclusion that should have been made by a jury. "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 from them." Syl. pt. 2, *Evans v. Farmer*, 148 W.Va. 142, 133 S.E.2d 710 (1963).

The Circuit Court failed to address whether the actions of Mr. Boyce were independent of the negligence and dangerous conditions created by Respondents. In order for Mr. Boyce's actions to be independent of the negligence of Respondents, it would have to be that Mr. Boyce got on top of the truck in order to move the wires and lines regardless of the negligent installation of the wires. That is simply not the case.

Mr. Boyce only got on top of the boom truck because of the negligent installation of the communication lines. Had the communication lines been installed and maintained at the correct height, Mr. Boyce would not have been on top of the boom truck. Additionally, if the primary wire owned by Respondent Mon Power had been the highest wire on the poles, Mr. Boyce would not have been injured. Mr. Boyce's actions and injuries are a result of negligent acts of the Respondents'.

Furthermore, any alleged negligence on the part of Mr. Boyce, which Petitioners do not concede, creates an issue of comparative or concurrent negligence. When an issue of comparative or concurrent negligence arises and the facts are susceptible to more than one inference or the facts are disputed, summary judgment is improper. The Circuit Court should have found that Mr. Boyce's actions were not independent of the negligence of Respondents, and that based upon Respondent's allegations of comparative negligence, the issue should have been allowed to proceed to a jury to determine whether Respondents were negligent in their installation and maintenance of the lines and/or wires or whether Mr. Boyce acted negligently and independently of Respondents negligence. The apportionment of fault should be determined by a jury.

- G. The Circuit Court erred in finding that James Orosz stated Mr. Boyce was a trespasser because Petitioners' counsel objected to the question at the deposition of Mr. Orosz, an evidentiary hearing was not held, no ruling was given on the objection prior to the hearing on the Motion for Summary Judgment, and there was no admissible testimony that Mr. Boyce was a trespasser.**

"[I]n deciding a motion for summary judgment, a court may rely only on material that would be admissible at trial." *Aluise v. Nationwide Mut. Fire Ins. Co.*, 218 W.Va. 498, 504, 625 S.E.2d 260, 266 (2005) (quoting *Rubens v. Mason*, 387 F.3d 183, 188 (2nd Cir. 2004)). "[T]he function of the circuit court on a summary judgment motion is to determine whether the proffered admissible evidence shows circumstances that would be sufficient to permit a rational finder of fact to infer" the result requested. Syl. pt. 1, *Conrad v. ARA Szabo*, 198 W.Va. 362, 480 S.E.2d 801 (1996) (quoting Syl. pt. 4, *Hanlon v. Chambers*, 195 W.Va. 99, 464 S.E.2d 741 (1995)).

"Rule 702 of the West Virginia Rules of Evidence is the paramount authority for determining whether or not an expert is qualified to give an opinion." Syl. pt. 6, in part, *Mayhorn v. Logan Med. Found.*, 193 W.Va. 42, 454 S.E. 87 (1994). "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." W. Va. R. Ev. Rule 702(a). "If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to

determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” W. Va. R. Ev. Rule 703.

Mr. Orosz was retained during the pendency of this case to serve as an expert in electrical engineering, specifically, the standard of care required in the installation and maintenance of communication lines and primary or hot wires. During his deposition, Mr. Orosz testified in detail regarding his professional experiences and background, none of which involve the law or legal conclusions regarding whether a person may or may not be deemed a trespasser, and which are noted on his curriculum vitae.

PETAPP00447 – 49.

When asked the question whether Mr. Orosz believed Mr. Boyce to be a trespasser during the events that gave rise to the initial case in the Circuit Court of Monongalia County, Mr. Orosz was testifying outside the scope of his professional experience, and therefore, Mr. Orosz was testifying as a lay witness. PETAPP00443. The question posed to Mr. Orosz requires a legal background to sufficiently answer, or it required Mr. Orosz to be a juror in a criminal case in which Mr. Boyce was charged with trespassing, neither of which is the case here.

As such, Petitioners’ Counsel objected to the question on the grounds that it called for a legal conclusion, one that Mr. Orosz does not have sufficient training, experience, or specialized knowledge to answer. PETAPP00443.

The Circuit Court uses Mr. Orosz’s testimony on the issue of Mr. Boyce’s status as a trespasser as evidence that Mr. Boyce was not in a place he had a right to be. PETAPP00008. The Circuit Court based its conclusion that Mr. Boyce was the proximate

cause of his injuries on Mr. Orosz's testimony to this point and its reading of *Lancaster v. Potomac Edison Co. of West Virginia*, 156 W.Va. 218, 192 S.E.2d 234 (1972).

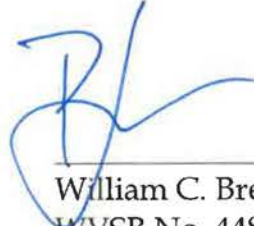
In order to determine whether it was admissible as evidence, the Circuit Court was required to find that Mr. Orosz's opinion regarding whether Mr. Boyce was a trespasser was (1) rationally based on his own perceptions; (2) helpful to understand Mr. Orosz's testimony; and (3) was not based on technical, scientific, or other specialized knowledge. W.Va. R. Ev. Rule 703. However, Mr. Orosz's testimony regarding Mr. Boyce's alleged trespassing was neither admissible nor relevant. Mr. Orosz's testimony was relevant regarding the Respondents' failure in meeting the standard of care. The issue whether Mr. Boyce was a trespasser is a legal conclusion, one which requires specialized knowledge to form.

As such, Mr. Orosz's statement that Mr. Boyce was trespassing is of no relevance or significance. The Circuit Court relied on Mr. Orosz's statement even though it was not deemed, and never could have been deemed, admissible, and in doing so, the Circuit Court erred.

VII. CONCLUSION

Accordingly, as set forth herein, the Circuit Court erred when it granted Summary Judgment to Respondents as there are multiple questions of fact that remain to be determined by the jury in this case. This Court should reverse the Circuit Court's denial of Petitioners' Motion to Alter Judgment, which upheld its grant of Summary Judgment, and remand the case back to the Circuit Court for trial.

RESPECTFULLY SUBMITTED:
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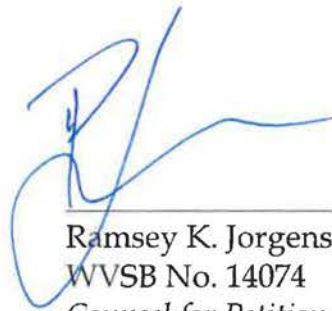
CERTIFICATE OF SERVICE

The undersigned does hereby certify that he served a true and accurate copy of the within *Petitioners Eugene F. Boyce and Kimberly D. Boyce's Brief* and a copy of the *Petitioners' Appendix*, on this 22nd day of July, 2022, via United State mail, postage prepaid, upon the following:

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