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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**



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

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**v.**

**CASE NO.: 22-0292**

**Monongahela 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.**

**PETITIONERS' REPLY BRIEF**

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**PETITIONERS EUGENE F. BOYCE AND KIMBERLY D. BOYCE'S REPLY 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.

8. The Circuit Court did not find that Mr. Boyce assumed the risk and that his claims were therefore barred from recovery, but nonetheless, assumption of the risk is not applicable in this case, or the issue should have been left for a jury to determine.

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

## **III. REQUEST FOR ORAL ARGUMENT**

Petitioners hereby renew their 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.

#### IV. 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.**

In their response briefs, each Respondent claims that the Circuit Court correctly determined that Petitioner Eugene Boyce (hereinafter referred to as "Mr. Boyce"), was the proximate cause of his injuries. However, the facts of this case and applicable law in the State of West Virginia demand a different outcome.

Each of the Respondents argue that Mr. Boyce's conduct was not foreseeable, and therefore, neither were his injuries, thereby severing the causal chain to each of the Respondents. The applicable law of this State states the contrary:

"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. . . **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."

*Matthews v. Cumberland & Allegheny Gas. Co.*, 138 W.Va. 639, 652 - 54 (1953) (emphasis added).



The question is not whether Mr. Boyce's *actions* were foreseeable, but rather were Mr. Boyce's *injuries* foreseeable. Is it foreseeable that a person that encounters unlawfully low-hanging communication lines coupled with unlawfully mis-configured electrical wires will become injured? The simple answer is "Yes."

"[T]he National Electrical Safety Code (NESC) sets the ground rules and guidelines for practical safeguarding of utility workers and the public during the installation, operation, and maintenance of electric supply, communication lines and associated equipment. . . [it] offers the industry with the latest guidelines and best practices to help ensure the safety of utility, communications and the general public."

*Institute of Electrical and Electronic Engineers Standards Association*, <https://standards.ieee.org/products-programs/nesc> (Date accessed September 14, 2022).

The NESC guidelines are created for the purpose of safeguarding the public from instances such as what occurred with Mr. Boyce – encountering unlawful, low-hanging communications lines and unlawful, dangerous, and mis-configured electrical wires. The NESC was created to ensure safety, and violations of such guidelines, which have been mandated by West Virginia law via the Public Safety Commission as noted in Petitioners' Brief, will reasonably result in dangerous situations and likely result in injury in some form or fashion.

Furthermore, each Respondent argued that it was wholly unforeseeable that Mr. Boyce would attempt to raise the communications lines on his own. Nothing could be further from the truth. Respondent's own employee, Mr. Corbin, who is a linesman that regularly works around communication lines and electrical wires, stated in his



deposition that he has before seen lines and wires strung together by objects such as shoestrings or rope. PETAPP00617.

Respondents each make note that Petitioners argue that the Circuit Court relied upon *Matthews*, supra. in reasoning 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,” *Matthews*, 138 W.Va. at 655, but Petitioners do not argue how the Circuit Court erred in doing so. Respondents have consciously chosen to ignore the preceding four pages of Petitioners’ Brief.

Throughout Section IV, subsection A, Petitioner diligently argues that when there are multiple negligent actors in a case, the issue of concurrent negligence becomes a question of fact for a jury to determine. In this case, there is not one negligent act followed by a separate, unrelated negligent act. The negligence of each Respondent was simultaneous, and on-going to the other Respondents’ negligence.

The Circuit Court erred in determining that Respondents’ negligence was not the proximate cause of Petitioners’ injuries because the Circuit Court was only permitted to determine whether it was sufficiently likely that a person would be injured when encountering unlawfully low-hanging communication lines and unlawfully mis-configured electrical wires. By determining the conduct of Mr. Boyce was unforeseeable, the Circuit Court wrongfully usurped the role of the jury and determined questions of fact regarding foreseeability and proximate cause.

**B. The Circuit Court erred when it failed to find the Respondents negligent as a matter of law when the Respondents 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.**

Respondents Atlantic and Frontier's briefs on the issue of negligence as a matter of law pertains to foreseeability and whether Mr. Boyce's actions constituted an intervening and superseding act. Petitioners incorporate their arguments contained within their Brief, Section VI, subsections A., and F., and the Reply Brief, Section IV, subsections A., and F., to the extent necessary to reply and refute Respondents Atlantic and Frontier's assertions.

As to Respondent Mon Power, it argues that there is no evidence to suggest that Respondent Mon Power was negligent as a matter of law by violating the NESC, and in arguing such, it states that Respondent Mon Power's electrical lines met the NESC clearance requirements. However, as pointed out by Respondent Mon Power's Brief, Petitioners' contention is not that Respondent Mon Power violated the clearance requirements of the NESC, but rather that Respondent Mon Power violated the configuration requirements of the NESC. Respondent Mon Power broadly argues that there is no evidence that Respondent Mon Power violated the configuration requirements of the NESC, but again, nothing could be further from the truth.

At his deposition, Mr. Orosz testified as follows:

Q: You would agree with me that the energized phase wire measured 20 feet 6 inches above the driveway?

A: Yes.

Q: You agree with me that the neutral line measured 23 feet and 7 inches above the driveway?

A: Yes.

Q: You agree with me that both of those heights meet all NESC clearance requirements for that location?

A: That's correct.

Q: In Exhibit 5, the expert disclosure which you reviewed and approved and again confirmed that you're onboard with, the following sentence is present, "Mr. Orosz is expected to testify that the configuration of the subject 'hot' or 'live' electrical line and the subject 'neutral' line violated the applicable customs, practices, and standards of care." Did I read that correctly?

A: Yes.

Q: And you agree with that statement?

A: Yes.

Q: What customs does that violate?

A: Well, the 1977 National Electrical Safety Code Section 22 stipulates the relations between various classes of lines. 220, relative levels, states that there is, A, a standardization of levels, and it states that the levels at which different classes of conductors are to be located should be standardized by agreement of the utilities concerned.

When I visited the site, the configuration was not standard. There was a change in the configuration approximately two poles away where the lines were stitched from having the energized line on the upper portion to it being on the lower portion with the neutral above.

The code, again, in Section 220C, part 2: On structures used only by supply conductors 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 circuits of each utility may be grouped together and one group of circuits may be placed above the other group provided that the circuits on each group are located so that those of the higher voltage are at the higher levels and any of the following conditions is met.

PETAPP00434.

To state that there is no evidence to suggest that Respondent Mon Power was negligent as a matter of law is wholly contrary to Mr. Orosz's testimony above. Mr. Orosz further testified that the required, standard configuration – placing the primary electrical wire atop the neutral electrical wire – is required for safety concerns for those that may encounter the electrical wires, as stated above by the NESC. PETAPP00434.

Mr. Orosz conceded that the configuration used by Respondent Mon Power *may* be acceptable in certain circumstances, but at the location where Mr. Boyce was injured, he did not see a reason for this configuration. PETAPP00434.

The Circuit Court should have found as a matter of law that Respondent Mon Power was negligent. However, even if the Circuit Court did not find as such, the Circuit Court should have allowed the jury to determine whether Respondent Mon Power violated the NESC at the location Mr. Boyce was injured.

Even if the Circuit Court or the jury (which should have made the ultimate determination) refused to find that Respondent Mon Power was negligent as a matter of law, the jury should have been able to determine if any additional steps above and beyond the requirements of the NESC were necessary.

To that effect, Petitioners rely on *Yampa Valley Elec. Ass'n, Inc., v. Telecky*, 862 P.2d 252 (Colo. 1993); *Bice v. Wheeling Elec. Co.*, 62 W.Va. 685 (1907); and *Johnson v. Monongahela Power Co.*, 146 W.Va. 900 (1961). Respondent Mon Power points out that *Telecky* is not controlling law in the state of West Virginia. However, it certainly is persuasive in this case, and it is in direct conjunction with the holdings of *Bice* and *Johnson*.

“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.

Despite Respondent Mon Power’s arguments regarding the authority or persuasiveness of *Telecky*, the fact is *Telecky* supports Petitioners’ contentions that align directly and perfectly with standing West Virginia law in *Bice* and *Johnson*.

The Circuit Court erred in not finding that Respondents were negligent as a matter of law. Even if Respondent Mon Power was not found to be negligent as a matter of law, questions of fact remained to be determined by the jury, such as whether any additional actions were required to be taken by Respondent Mon Power in order to safeguard Mr. Boyce and other individuals from harm.

**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.**

Respondents argue that the Circuit Court’s reliance on *Maggard v. Appalachian Electric Power Co.*, 111 W.Va. 470 (1932) was proper based on the facts of this case and the facts of the case in *Maggard*. Respondents note that this Court in *Maggard* held that a utility is not negligent “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.” *Id.* However, Respondents ignore the reasoning behind the Court’s finding that the defendant in *Maggard* could not foresee the injuries to the plaintiff.

In *Maggard*, the plaintiff’s employer had previously requested that the electrical lines be raised due to the presence of workers. *Id.* The electric company complied, and it raised the electrical lines to higher than 30 feet above the work and workers. *Id.* At no time after the electric company raised the wires did the plaintiff or the plaintiff’s employer voice any additional concerns regarding the height or safety around the electrical lines. *Id.* The electrical company did not violate, and the plaintiff did not allege

that the electrical company violated, any existing standards regarding clearance requirements and/or configuration requirements. *Id.*

In this case, the Respondents violated existing standards set by the NESC regarding clearance (as to Respondents Atlantic and Frontier) and regarding configuration (as to Respondent Mon Power). It is well within the realm of foreseeability that a person may be injured when encountering unlawfully low-hanging communication lines and unlawfully mis-configured electrical wires, as discussed in subsections A., and F., of this Reply and Petitioners' Brief.

At no time did the Respondents take any precautionary steps to ensure the safety of Mr. Boyce or any other individual that may have encountered the location Mr. Boyce was injured. The *Maggard* Court found that there was no foreseeability in *Maggard* because of the additional precautionary steps taken by the defendant in that case.

The Circuit Court, in determining that Mr. Boyce was the sole negligent party, expanded *Maggard* to state that electrical and other utility companies can never be found liable for their negligent actions should the lines and/or wires be at some arbitrary height that typical persons would not be. In doing so, the Circuit Court erred.

**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.**

Respondents each argue that the facts of this case are undisputed and not capable of more than one inference. Each Respondent states an inordinate number of times in their respective Briefs that Mr. Boyce "intentionally" grabbed a live electrical



wire. Respondent Atlantic goes so far as to claim that Petitioners do not contend that Mr. Boyce did not grab the electrical wire intentionally. Again, nothing can be further from the truth.

In Mr. Tucker's deposition, Mr. Tucker states – in unequivocal terms – that he does not believe Mr. Boyce “intentionally” grabbed the live electrical wire. Mr. Tucker's testimony is vague as to what he truly believes occurred, but only one inference can be made from Mr. Tucker's testimony that the contact was not by “intentionally” grabbing the live electrical wire – that the contact with the live electrical wire was inadvertent and **NOT** intentional.

Respondents argue that Petitioners have argued that it is Mr. Boyce's knowledge of whether the wire he made contact with is of importance. That is not what Petitioners argue.

Petitioners argue that the contact was not made intentionally, and the only eyewitness to the incident, Mr. Tucker, has stated as such in clear and simple terms: **“He didn't do that. . .”** PETAPP00422 (emphasis added).

In finding that Mr. Boyce intentionally grabbed the live electrical wire, that the facts were undisputed, and that the facts are susceptible to only one inference, the Circuit Court erred. Because the facts are not undisputed and are susceptible to more than one inference, the Circuit Court erred in granting Respondents' Motions for Summary Judgment.

- 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.**

Respondent Frontier argues that 29 CFR 1910.331(a) applies to the facts of this case and that 29 CFR 1910.333(c)(3) prohibits Mr. Boyce from working near overhead lines unless the lines are de-energized or grounded, and that Mr. Boyce was prohibited from coming closer than 10 feet to the energized lines.

Respondents Atlantic and Mon Power argue that any reference to OSHA regulations contained within the Circuit Court's Order was "not germane" or "played absolutely no role" in determining that summary judgment should be granted to Respondents at the Circuit Court level.

Respondent Mon Power further argues that the Paragraph relating to OSHA regulations contained within the Order does not pertain to Respondent Mon Power as Respondent Mon Power did not offer any argument regarding OSHA regulations in its Motion or Argument before the Court. Notably, it was Respondent Mon Power's counsel that drafted the Order which was provided for the Court's entry at the direction of the Circuit Court after the Circuit Court made zero on-the-record findings of fact or law during the hearing that took place on February 18, 2020. PETAPP00450 – PETAPP00470.

Respondent Frontier argues that OSHA regulation 29 CFR 1910.333 applies to this case. However, Respondent Frontier has ignored the most glaring issue with that argument – Mr. Boyce was not performing any work on the communication lines

and/or the electrical wires. The sections cited by Respondent Frontier apply to those individuals “working on, near, or with the following installations,” (1) premises wiring; (2) wiring for connection to supply; (3) other wiring; and (4) optical fiber cable. 29 CFR 1910.331(a)(1) – (4).

The OSHA regulations cited by Respondent Frontier in their Brief, again, are wholly irrelevant to this case, and any reliance thereto by the Circuit Court would be in error.

As to Respondents Mon Power and Atlantic’s arguments that the Circuit Court’s reliance on the OSHA regulations amounts to harmless error, Respondent Atlantic in its own Brief argues that the Circuit Court relied upon the OSHA regulations “as part of a section of its Order building up to the point that Boyce was in a place where he had no right to be at the time he was injured.” See Respondent Atlantic Brief, pg. 9.

However, as will be discussed further in subsection G., the Circuit Court relied on these OSHA regulations in conjunction with additional information which the Circuit Court should not have considered – Mr. Orosz’s testimony that Mr. Boyce was a trespasser – in order to determine that Mr. Boyce was not in a place he had a right to be. Whether Mr. Boyce had a right to be in that location is a factual question for the jury, and the Circuit Court erred in (1) determining Mr. Boyce was not in a place he had a right to be, and (2) relying on irrelevant law and inadmissible evidence to do so.

**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.**

Respondents Frontier and Atlantic rely heavily in their respective Briefs upon *Harbaugh v. Coffinbarger*, 209 W.Va. 57 (2000) to refute Petitioners' argument that Mr. Boyce did not constitute an intervening and superseding cause. Respondent Mon Power merely reiterates its position that it was not negligent in the first place and that its actions were not the proximate cause of Mr. Boyce's injuries.

In *Harbaugh*, this Court stated that an intervening and superseding 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. *Id.* at 64. Respondents Frontier and Atlantic advance arguments that because Mr. Boyce "intentionally" grabbed the live electrical wire, it was unforeseeable that he would be injured, severing the causal chain.

Again, Petitioners state that it is in dispute whether Mr. Boyce "intentionally" grabbed the live electrical line because Mr. Tucker stated, emphatically, that Mr. Boyce did not intentionally grab the live electrical line, but merely incidentally and inadvertently made contact with the live electrical line.

Respondents further miss the largest disparity between the facts and circumstances between this case and those in *Harbaugh* – it is not foreseeable that a person will play Russian Roulette two times with a gun pressed to his head when a gun

is presented at a party. However, it is foreseeable that a person may attach objects to communication lines and electrical wires in an attempt to raise them. Mr. Corbin, an employee of Respondent Mon Power at the time of Mr. Boyce's injuries, testified to that effect:

Q: Had you ever seen people, other individuals where they would wrap the wires with cellophane like that?

A: Not so much with cellophane, but I've actually seen where people has tied it up with like shoestrings or rope or something, yes.

PETAPP00617.

Furthermore, it cannot be said that Mr. Boyce's actions were independent of the actions of Respondents' actions. But for Respondent Frontier and Atlantic's negligent actions, Mr. Boyce would not have found himself in the impossible position of attempting to get underneath the unlawful low-hanging communication lines. But for Respondent Mon Power's negligent actions, Mr. Boyce would not have been injured by unlawfully mis-configured electrical wires.

By holding that Mr. Boyce was an intervening and superseding cause, the Circuit Court erred. It wrongfully determined that Mr. Boyce's actions were unforeseeable when Respondent Mon Power's own employee stated it was foreseeable. Mr. Boyce's actions were not independent of Respondents' negligence, but rather Mr. Boyce's actions were wholly dependent upon Respondents' negligence. The Circuit Court erred in granting summary judgment to the Respondents based on Mr. Boyce wrongfully being determined to be an intervening and superseding cause.

- 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.**

Respondents each argues that the Circuit Court was not in error to rely upon Mr. Orosz's testimony that Mr. Boyce was a trespasser, but if the Circuit Court had erred, it was harmless. That cannot be the case.

As stated by Respondent Atlantic in their Brief and noted above, the Circuit Court was "building up to the point that Boyce was in a place where he had no right to be at the time he was injured." See Respondent Atlantic Brief, pg. 9. In so "building up," the Circuit Court relied upon (1) irrelevant law in the form of OSHA regulations and (2) inadmissible evidence in the form of Mr. Orosz's testimony that Mr. Boyce was a trespasser in order to come to a conclusion that should have been left for the jury to determine.

In "building up," the Circuit Court determined that Mr. Boyce did not have a right to be in the location he was. The Circuit Court then relied upon *Lancaster v. Potomac Edison Co. of West Virginia*, 156 W.Va. 218, 220 (1972) to determine that Mr. Boyce's claims of negligence were barred as he had no right to be in that location.

To consider the sole "evidence" used by the Circuit Court to be harmless error is ludicrous. The Circuit Court had no basis to rely on Mr. Orosz's testimony as it was inadmissible. In doing so, the Circuit Court erred. In so relying upon the inadmissible

testimony of Mr. Orosz, the Circuit Court incorrectly assumed the role of the jury to determine that Mr. Boyce's claims were barred.

**H. The Circuit Court did not find that Mr. Boyce assumed the risk and that his claims were therefore barred from recovery, but nonetheless, assumption of the risk is not applicable in this case, or the issue should have been left for a jury to determine.**

Respondent Atlantic argues in its Brief that regardless of the claims brought by Petitioners before this Court "Petitioners cannot overcome the Assumption of the Risk Defense." See Respondent Atlantic Brief, pg. 12.

"The doctrine of assumed or incurred risk is based upon the existence of a factual situation in which the act of the defendant alone creates the danger and causes the injury, and the plaintiff voluntarily exposes himself to the danger with full knowledge and appreciation of its existence." *Matthews v. Cumberland & Allegheny Gas Co.*, 138 W.Va. 639, 657 (1953) (emphasis added). "Under our law, the plaintiff can be guilty of assumption of risk and still be entitled to recover damages from the defendant[s] so long as the plaintiff's fault from assumption of risk does not equal or exceed the combined negligence of the other parties whose negligence contributed to the accident." Footnote 17, *King v. Kayak Mfg. Corp.*, 182 W.Va. 276 (1989).

"The predicate of assumption of risk is that the plaintiff has full knowledge and appreciation of the dangerous condition and voluntarily exposes himself to it. This is a high standard. . ." *King*, 182 W.Va. at 282. "[T]he defense of assumption of risk is available against a plaintiff in a [] case where it is shown that the plaintiff had actual knowledge of the defective or dangerous condition, fully appreciated the risks



involved, and continued. . . ." *Id.* at 283. "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 same must be true for contributory assumption of the risk.

Under the law of this state, for Mr. Boyce to have assumed the risk of injury, Mr. Boyce must have had "**full knowledge and appreciation of its existence**," meaning that Mr. Boyce must have had actual knowledge that the primary electrical wire was configured below the neutral electrical wire, and Mr. Boyce chose to attempt to raise the communication lines to the electrical wire with cellophane, regardless. However, Mr. Boyce was wholly unaware of the negligence of Respondent Mon Power at the time he was injured. Mr. Boyce had no knowledge or appreciation that the live electrical wire was below the neutral and that he was at risk of severe electrical shock.

Each Respondent argues, endlessly, that Mr. Boyce was an untrained individual and had no business or right to touch, alter, or move any of the lines that are the subject of this case. Respondent Atlantic argues that Mr. Boyce knew of the risks of danger and harm - essentially arguing that Mr. Boyce had the requisite knowledge to determine which of the electrical wires was the neutral and which of the electric wires was the "hot" or "primary" wire. Both cannot be the case.

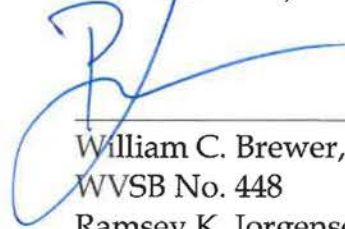
Respondent Atlantic's argument of assumption of the risk is unfounded and irrelevant to this case as Mr. Boyce did not have full knowledge and appreciation of the

dangers that existed. If it were found that Mr. Boyce did assume the risk, the issue of contributory assumption of risk should have been left for the jury to determine fault.

### V. CONCLUSION

Accordingly, as set forth within Petitioners' Brief and 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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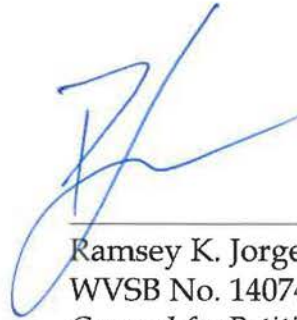
**CERTIFICATE OF SERVICE**

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 Reply Brief* on this 27th day of September, 2022, via United States mail, postage prepaid, upon the following:

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