IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

EUGENE F. BOYCE and KIMBERLY D. BOYCE,

Petitioners,

v. **CASE NO.: 22-0292**

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

Respondents.

RESPONDENTS ATLANTIC BROADBAND (PENN), LLC AND ATLANTIC BROADBAND FINANCE, LLC.'S BRIEF

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I. STATEMENT OF THE CASE

The facts of the case are simple and not in dispute. Petitioner Eugene Boyce was employed as a boom truck operator for Lowe's. *PetApp00016.* At the time of the accident he was delivering materials to the residence of Brandon Tucker. *PetApp00016.* When Boyce arrived at Tucker's home, he found wires crossing Tucker's driveway that were hanging too low for him to drive his truck under. *PetApp00016.*

Two Frontier lines installed in or about 1978 were the lowest two lines on the pole. The Atlantic Broadband cable line was the next higher up and then above it was the Monongahela Power electrical line. *PetApp00041.* Atlantic Broadband did not receive any complaints or notifications of any issues concerning its line at the Tucker residence. *PetApp00038.*

Mr. Boyce climbed his boom truck and attempted to wrap the Frontier and Atlantic lines to the Monongahela Power line with plastic wrap so they would be moved out of the way of his truck. *PetApp00419-420.* When he did so, Boyce experienced a severe electrical shock from the Monongahela Power electrical line. *PetApp00420.*

Boyce filed suit against the owner of all of the lines –Frontier, Atlantic Broadband and Monongahela Power. All three companies moved for summary judgment which was granted by the trial court. Boyce filed a Rule 59 motion seeking reconsideration, but it was also denied.

II. SUMMARY OF ARGUMENT

The Court should deny the Petitioners' request for appeal. The facts are undisputed as to how the accident happened and the facts show that it is the Petitioner, Eugene Boyce, who is solely responsible for the injuries he sustained in this case. When confronted with low hanging wires, no reasonable minded person would climb atop their vehicle with the intention of wrapping the

lower hanging wires to an electrical power line with plastic wrap. Boyce is not a utility line worker. He was a delivery truck driver for Lowe's. It was not reasonably foreseeable that Boyce would do what he did.

The communication lines owned by Respondents Atlantic and Frontier did not injure anyone. Thus, they did not proximately cause this accident. The proximate cause of the accident was Boyce grabbing the power line with his hand. None of the Respondents proximately caused Boyce's injuries.

Petitioner claims that one or more of the communication lines was lower than what is required by regulation. Regardless of whether that is true or not, it is undeniable that Boyce was not injured by low hanging wires. If one were to assume the lines were too low, Boyce's actions amount to an intervening and superseding cause relieving the Respondents of all liability. Additionally, Boyce's actions give rise to an Assumption of the Risk Defense, one which requires a finding that Boyce was at least 51%, if not more, at fault for his injuries.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Respondent does not believe the facts or legal issues presented are sufficiently complex to warrant oral argument.

IV. ARGUMENT

A. The Circuit Court DID NOT err in finding Respondents were not the proximate cause of Boyce's injuries because in this case, foreseeability and proximate cause were not questions of fact for a jury.

The Petitioners mischaracterize the law and Supreme Court precedent on the issue of foreseeability and proximate cause so as to argue summary judgment was wrongfully entered against them. The Petitioners argue that a trial court can never issue summary judgment when the question turns upon proximate cause or foreseeability because those matters are always jury

questions. But that is not what this Court has said and it is not supported by the case law in West Virginia.

Perhaps the most in depth and exhaustive West Virginia Supreme Court case on the issue of negligence, proximate cause, and foreseeability is Matthews v. Cumberland & Allegheny Gas Co., 138 W.Va. 639, 77 S.E.2d 180 (1953). In that case, the Court made the following significant findings:

- Negligence to be actionable must be the proximate cause of the injury complained of and must be such as might have been reasonably expected to produce an injury.
- Actionable negligence necessarily includes the element of reasonable anticipation that some injury might result from the act of which complaint is made.
- Where a 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.[1]
- A person is not liable for damages which result from an event which was not expected and could not have been anticipated by an ordinarily prudent person.
- If an occurrence is one that could not reasonably have been expected the defendant is not liable.
- Foreseeable injury is a requisite of proximate cause.

Matthews at 652-655, 188-189 (internal citations omitted). In Matthews, a road crew accidentally punctured a gas pipeline. The crew repaired the line but prior to restoring gas service, it needed to purge the line of any debris and water. While in the course of purging the line, a connection broke and a rubber hose broke free rising as high as fifteen feet in the air. Matthews was working

[1] Even if the violation of a statute is a factor in the case, both Pitzer v. M.D. Tomkies & Sons, 136 W.Va. 268, 67 S.E.2d 437 (1951) and Gillingham v. Stephenson, 209 W.Va. 741, 748-749, 551 S.E.2d 663, 670-671 (2001) held that foreseeability is still needed if the defendant is to be held liable.

on the scene and when he saw this, he ran for cover. In doing so, Matthews ran into traffic and was struck by a car.

Contrary to the Petitioners' arguments, the Matthews Court did indeed rule that the issue of whether or not the defendant was guilty of actionable negligence was a question of law for the trial court to decide, not a jury. Matthews at 660, 192. In concluding that a question of law existed for the trial court to rule upon, the Matthews court explained:

> the evidence of the acts and the omissions of the defendant in conducting its operation to purge its pipe line and the act of the plaintiff in coming in contact with the automobile is without substantial conflict. When the material facts are undisputed and reasonable men can draw only one conclusion from them, the question of negligence is a question of law for the court.

Matthews at 655, 189 (internal citations omitted). Thus, the Supreme Court ruled it was reversible error when the trial court failed to direct a verdict in favor of the defendant. Matthews at 656, 190.

The exact same situation exists here. There is absolutely no dispute whatsoever as to how this accident took place. Upon discovering that his truck would not pass underneath the wires that stretched across his path, Boyce climbed on top of his truck, grabbed the phone and cable wires, and tried to affix them with plastic wrap to the electrical line above. As a result, Boyce received a significant electrical shock. Thus, the trial court was correct when it concluded that the issue of proximate cause was a question of law and properly ruled upon it.

Curiously, the Petitioner argues only that the trial court usurped the role of the jury in entering summary judgment and not that the trial court improperly concluded that defendants did not proximately cause Boyce's injuries or that the undisputed evidence is susceptible of more than one inference as Harbaugh v. Coffinbarger, 209 W.Va. 57, 543 S.E.2d 338 (2000) would put it. Nonetheless, for sake of completeness, this Respondent will continue the argument to show that the trial court properly evaluated the issue.

In concluding that the defendants did not proximately cause Matthews' injuries, the Court explained that even thought the pipe connections failed resulting in the hose rising up into the air, Matthews was not injured by the hose. Matthews at 651, 188. The Court believed it was unreasonable to believe that the defendant could have reasonably foreseen that these events would cause Matthews to run out into traffic and get hit by a car. Matthews at 652, 188. The Court found that it was Matthews' actions in leaving the position in which he was standing and running out into traffic which "...was the last act which caused or contributed to his injury and broke any causal connection between the acts and the omissions of the defendant..." Matthews at 655, 189. The Court found it was Matthews, not the defendants, who "was guilty of [the] negligence which proximately caused his injury." Matthews at 656, 190.

Similarly, Boyce was not injured because of a low hanging telephone or cable lines. He did not drive his truck into the lines nor did any equipment get tangled up in the lines. Further, neither the telephone nor cable lines delivered any electrical shock to Boyce. Thus, the acts or omissions of Atlantic or Frontier did not proximately cause Boyce's injuries.

Like Matthews' decision to run out into traffic, it was Boyce's decision to mount his truck and try to affix the cable and telephone wires to an electrical line with plastic wrap that caused Boyce to receive an electrical shock. If Boyce had never climbed his truck and attempted to plastic wrap the communications lines to the electrical line, Boyce would not have suffered any electrical injury. It was only when he engaged in these outrageous acts that Boyce got hurt.

Mr. Boyce's actions were the sole proximate cause of his injuries. The Supreme Court has opined numerous times 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 at 655 *citing* Webb v. Sessler, 135 W.Va. 341, 63 S.E.2d 65, Estep v. Price, 93 W.Va. 81, 115 S.E. 861, Schwartz v.

Shull, 45 W.Va. 405, 31 S.E. 914. There can be no dispute in this case that absent Mr. Boyce climbing atop his boom truck and grabbing hold of the live wire, this accident would not have happened.

Boyce's actions in this case truly were outrageous. None of the Respondents in this case could have reasonably foreseen that a person would climb atop a truck and try to plastic wrap the communications lines to an electrical line as Boyce did here. Boyce was a deliveryman for Lowe's. He was not an electrical worker and was not present on site for the purpose of performing any work on any of the lines whether they be communications lines or power lines.

B. The Circuit Court DID NOT err when it failed to find Respondents negligent as a matter of law when Respondents violated the NESC.

Essentially, the Petitioners are arguing that strict liability is to be imposed on any defendant who violates a statute or regulation. This is not the law in West Virginia. Indeed, as far back as 1910 in Norman v. Coal Co., 68 W.Va. 405, 69 S.E. 857 the Supreme Court had a syllabus point which read "The violation of the statute is rightly considered the proximate cause of any injury ***which is a natural, probable, and anticipated consequence of the nonobservance***." (emphasis added). This position was reaffirmed in Syllabus Point 3 of Pitzer v. M.D. Tomkies & Sons, 136 W.Va. 268, 67 S.E.2d 437 (1951) which reads "[a] failure to obey the mandate of a lawfully enacted statute will be treated as the proximate cause of an injury ***which is a natural, probable and anticipated consequence of the non-observance.***" (emphasis added). In 2001, the Supreme Court in Gillingham v. Stephenson, 209 W.Va. 741, 749, 551 S.E.2d 663, 671 (2001) explained "[o]bviously Pitzer's "anticipated consequence" is merely another way of saying "foreseeable consequence."

Accordingly, the Petitioners' argument for strict liability must be denied as it runs counter to over one hundred years of precedent. Thus, only if the electrical shock experienced by Boyce

was "a natural, probable and anticipated consequence" of a violation of the NESC can Boyce prevail. For the reasons set forth above, the alleged NESC violation did not proximately cause Boyce's injuries as Boyce's actions were not "a natural, probable and anticipated consequence."

C. The Circuit Court DID NOT err in relying upon Maggard v Appalachian Electric Power Co. as it is factually similar to the relevant aspects of this case.

In arguing against the application of Maggard v. Appalachian Electric Power Co., 111 W.Va. 470, 163 S.E. 27 (1932), the Petitioner completely overlooks the point of the case. The essential relevant facts of the case are simplistic. A construction company that was aware of power lines near the area where work was to be done asked the power company to move the lines. Unfortunately, even after the wires where moved out of the work space, the negligent placement of a steam shovel boom allowed Maggard to come into contact with the electrical wires suffering significant injury. As a result, Maggard sued Appalachian Power for failing to maintain the wires such that they would not come into contact with the boom, failing to warn Maggard of the high level of electricity flowing through the wires, and failing to insulate the wires.

As is readily apparent, Appalachian Power's response to Maggard's claims was much like the Respondents' responses in this action. At all times, both Maggard and Boyce were fully aware of the presence of the electrical lines when each undertook their course of action. Of course it should not go without noting that at least in the Maggard case, rather than trying to move the lines themselves, the contractor alerted the power company and asked that it do so. In the end, the Maggard Court found that Appalachian Power "could not reasonably anticipate the injury to plaintiff" and therefore was not liable. Again, here is another example of a The West Virginia Supreme Court ruling as a matter of law on the issue of foreseeability.

D. The Circuit Court DID NOT err in finding it was undisputed that Boyce intentionally grabbed the primary wire.

At this point, the Petitioner is engaged in a battle of semantics. There is no dispute that Boyce intentionally tried to plastic wrap the communications lines to the electrical line and that the electrical line was charged making it the "primary wire." Petitioners' argument is that when grabbing the electrical wire, Boyce did not know it was electrified. Instead, he thought it was the neutral wire. Thus, Boyce should not be held accountable for his mistake.

It is significant to know that Boyce was a Lowe's delivery truck driver. He is not an electrician and was not present on site to perform work on any wires, electrical or communications. Electrical work is highly skilled work for which a worker must be trained given the obvious dangers associated with that type of work. No reasonably prudent person in Boyce's situation would ever have done what he did. Because his actions were unreasonable, they were not foreseeable. The fact that he did not understand what he was doing, made a mistake, or was operating under a mistaken belief that the wire was not energized is not an excuse for his actions.

Indeed, in the Harbaugh v. Coffinbarger, 209 W.Va. 57, 543 S.E.2d 338 (2000) case, one may presume that Benjamin Cool believed that the lone bullet in the gun was likely not in the barrel when he pulled the trigger during his game of Russian roulette. But that presumption played no role in the determination of fault. Here, Boyce believed the power line was not energized when he grabbed hold of it. Just as Cool intentionally pulled the trigger of the gun resulting in it firing, Boyce intentionally grabbed the power line resulting in his electrical shock.

E. The Circuit Court's reference to OSHA regulations does not amount to reversible error.

The Court's reliance on the referenced OSHA citations was not germane or necessary for the ruling and ultimate outcome in this matter. Specifically, 29 CFR 1926.1410 requires a

minimum distance of 10 feet when working around power lines, and 1926.1418(e) and (g) state that power lines are presumed to be energized. The Petitioners argue that these regulations are inapplicable to the work Boyce was doing at the time he was injured. The trial court included these OSHA references 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. However, the use of the OSHA regulations is superfluous because Boyce was a trespasser and had no legal right to carry out the actions which he intended as set forth below in response to the Petitioners' arguments concerning trespass.

In Syllabus Point 4 of Burns v. Goff, 164 W.Va. 301, 262 S.E.2d 772 (1980) the Supreme Court held "[a]n error which is not prejudicial to the complaining party is harmless and does not require reversal of the final judgment." Here there is no prejudice to the Petitioners in regards to the OSHA references. As set forth above, Boyce was in a location where he ought not to have been and committing an act that he ought not be doing. Under the law, he was a trespasser. Additionally, the reference is harmless error because of the rulings that were properly made in regards to the lack of foreseeability, proximate cause, superseding and intervening event, and the assumption of the risk.[2]

F. The Court DID NOT err in finding Boyce's actions were an intervening and superseding cause because his actions were NOT a direct and foreseeable result of Respondents' negligence.

This is another attempt to argue the same point as before on foreseeability. Over the years, the Supreme Court has had the opportunity to explain and define intervening and superseding

[2] In addition to this argument, this Respondent expressly adopts the arguments of the other Respondents.

causes. In Syllabus Point 3 of Wehner v. Weinstein, 191 W.Va. 149, 444 S.E.2d 27 (1994), the Court stated as follows:

> '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.' Syllabus Point 16, Lester v. Rose, 147 W.Va. 575, 130 S.E.2d 80 (1963) [modified on other grounds, State ex rel. Sutton v. Spillers, 181 W.Va. 376, 382 S.E.2d 570 (1989)]." Syllabus Point 1, Perry v. Melton, 171 W.Va. 397, 299 S.E.2d 8 (1982).

In Yourtee v. Hubbard, 196 W.Va. 683, 690, 474 S.E.2d 613, 620 (1996), the Court explained that "[g]enerally, a willful, malicious, or criminal act breaks the chain of causation." Id. at 690, 474 S.E.2d at 620.

The Court gave considerable time to evaluating intervening and superseding causes in Harbaugh v. Coffinbarger, 209 W.Va. 57, 543 S.E.2d 338 (2000). The factual scenario in that case, as it is here, was undisputed and simplistic. A party was held at the Wilkins' home when the parents were out of town. Christopher Coffinbarger attended the party and he brought a gun with him. Another guest, Benjamin Cool, asked Coffinbarger if he could see the gun. Coffinbarger complied. Cool unloaded the gun, but then put one bullet back. He spun the cylinder, put the gun against his head, and pulled the trigger. When nothing happened, he spun the cylinder again and pulled the trigger again. This time the gun went off and Cool was killed. The trial court found Cool's acts to be intervening and superseding and entered judgment in favor of all of the defendants named in the case.

When reviewing the case, the Supreme Court relied upon a Tennessee case stating that suicide can be an unforeseeable intervening and superseding cause if it was a willful, calculated

and deliberate act. However, the Supreme Court concluded that it was unclear whether or not Cool was actually trying to commit suicide as opposed to playing a Russian Roulette game hoping to win. So, the Court concluded it was inappropriate to label Cool's behavior as an intentional act of suicide. However, the Court noted that there was no dispute that Cool placed the gun to his head, pulled the trigger, spun the cylinder and pulled the trigger again. Harbaugh at 64, 345. These actions were the proximate cause of Cool's death.

Here, Boyce climbed his truck and grabbed three wires with the intent of plastic wrapping them to the power line hanging above. No one, least of all any of the Respondents, suggested or encouraged Boyce to do so. This was not an accident but a deliberate act. As such Boyce;s action proximately caused his injuries.

G. The Court DID NOT err in finding Plaintiff's expert, James Orosz, conceded in his deposition Boyce was a trespasser without first having a hearing on the evidentiary objection raised during the deposition.

While such a hearing might ordinarily be held, in this unique circumstance, the failure to do so was harmless. That is because in this specific case, there is no dispute as to what Boyce was doing at the time he was injured and because a person's legal status as a trespasser is a matter of law. Individuals who come into contact with a power line without the right to do so are trespassers as a matter of law. *See e.g.* Huffman v. Appalachian Power Co., 187 W.Va. 1, 415 S.E.2d 145 (1991), Miller v. Monongahela Power Co., 184 W.Va. 663, 403 S.E.2d 406 (1991). Accordingly, when Plaintiff's expert, James Orosz, conceded in his deposition that anyone not authorized who touched power lines was a trespasser, Orosz is accurately acknowledging the existence of a rule of law.

Further, the objection lodged in the deposition and argued in the brief have nothing to do with the outcome of the case. Boyce argues that the question was improper as it called for Orosz to render a legal opinion, something that was beyond the scope of his designation as an expert. While the trial court might have excluded this testimony in front of a jury, a jury instruction on trespass would have been proper and likely given. Nonetheless, it is an accurate statement of law that Boyce was a trespasser when it came to him coming into physical contact with both the communications lines and the power line. Thus it was not error for the trial court to note it in its Order.

H. Petitioners cannot overcome the Assumption of the Risk Defense.

This Respondent also argued that the Petitioner assumed the risk when he chose to climb his truck and try to plastic wrap the communication lines to the power line. "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 at 657, 190, (internal citations omitted.) Boyce's actions are undisputed. He recognized that his truck could not pass underneath the lines. He proceeded to take it upon himself to move the lines and in doing so assumed the risk that he may suffer injury as a result of his efforts. Further still, Boyce identified the power line and selected it as the line to which he would try to plastic wrap to the communications lines. While he may have believed the power line was de-energized, he assumed the risk when he reached out to grab it with his hands.

While assumption of the risk is to be assessed under the comparative fault analysis as opposed to the strict contributory negligence standard, the outcome is no different. No rational

trier of fact in this scenario and under these facts could find that Boyce was less than 51% at fault for this accident.

V. Conclusion

To be certain, this was a horrible accident involving a serious injury suffered by Mr. Boyce. However, that alone is insufficient to establish liability against other parties. In this case, the evidence is clear that liability for the accident does not rest with any of the Respondents because none of them proximately caused the accident. Regardless of whether Eugene Boyce's outrageous actions are labeled as "unforeseeable" "intervening and superseding," "assumption of risk," or "the last negligent act contributing to the injury and without which the injury would not have occurred," the bottom line is that Boyce's actions were the sole proximate cause of his injuries. Because there is no actual dispute as to how the accident took place, the trial court properly granted summary judgment to the Respondents. Therefore, this Court should deny this appeal and preserve the underlying Order in favor of the Respondents.

Respectfully Submitted by,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 7th day of September, 2022 a true and correct copy of the "***RESPONDENTS ATLANTIC BROADBAND (PENN), LLC AND ATLANTIC BROADBAND FINANCE, LLC.'S BRIEF***" was provided to the parties, either individually or through their counsel, via First Class US Mail as listed below:

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