IN THE CIRCUIT COURT OF ROANE COUNTY, WEST VIRGINIA

THE ESTATE OF CORY COLTON, KEITH CARPER, CHRISTOPHER K. CARPER and AMANDA J. CARPER, SANDRA K. CARPER, individually and as Administratrix of the Estate of Cory Colton Keith Carper, and SUSAN K. FORAKER, SUSAN ARMSTEAD, individually and with JOSHUA D. ARMSTEAD, as parents and next friends of ELIJAH J. ARMSTEAD, a minor,

Plaintiffs

v.

Civil Action No. 19-C-9
Hon. R. Craig Tatterson

MOUNTAINEER GAS COMPANY,

Defendant.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT[1]

On Wednesday, September 21, 2021, the Parties, by counsel, came before this Court for Hearing on the Motion for Summary Judgment filed by Defendant Mountaineer Gas Company, which was previously briefed by the parties prior to the Order of Reassignment entered in June, 2021. Having reviewed "Mountaineer Gas Company's Motion for Summary Judgment," "Mountaineer Gas Company's Memorandum in Support of its Motion for Summary Judgment," the Plaintiffs' "Response to Defendant's Motion for Summary Judgment," "Mountaineer Gas Company's Reply to Plaintiffs' Response to Mountaineer Gas Company's Motion for Summary Judgment," and having heard the arguments of counsel, the Court does hereby **DENY** Defendant

[1] The Plaintiffs submitted a proposed order denying the Motion pursuant to Trial Court Rule 24.01. Defendant filed three objections thereto, and the Plaintiffs responded to those objections. The Court incorporates its rulings on those objections herein, and notes and preserves the parties' objections to those rulings.

Mountaineer Gas Company's Motion for Summary Judgment as set forth herein with Findings of Fact and Conclusions of Law as requested by the Defendant pursuant to Syllabus Point 6 of *State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W.Va. 358, 363, 508 S.E.2d 75 (1998).

FINDINGS OF FACT

1. This matter arises out of a tragic incident that occurred on or about December 17, 2018 at the residence of Plaintiffs Christopher Carper and Amanda Carper located at 7 Natural Bridge Road, Looneyville, West Virginia.

2. On or about December 17, 2018, Plaintiffs Christopher Carper and Amanda Carper, as well as their 10-year-old son, Cory Carper, and his 10 year old best friend, Elijah Armstead, were overcome by carbon monoxide generated by a furnace inside the Carper residence, which caused the death of Cory Carper, and injuries to the other occupants.

3. Plaintiffs Sandra Carper and Susan Foraker are the grandmother and aunt of Cory Carper, respectively, and came to the Carper residence on the following day after no contact, finding Plaintiffs Christopher Carper, Amanda Carper and Cory Carper in the home, overcome by carbon monoxide.

4. Plaintiff Susan Armstead is the mother of Plaintiff Elijah Armstead and also came to the Carper residence on that following day after no contact, finding her minor son, Elijah Armstead, in the home, overcome by carbon monoxide.

5. The Estate of Cory Carper brings a claim against Defendant Mountaineer Gas Company for his Wrongful Death, by and through his duly appointed Administratrix, Grandmother Sandra K. Carper, under the legal theories of Negligence, Strict Liability, Failure to Warn, Breach of Warranty and Breach of Contract.

6. Plaintiffs Christopher Carper and Amanda Carper bring claims for their own personal

injuries under the same legal theories.

7. Plaintiff Elijah Armstead, a minor, brings a claim for personal injuries by and through his parents, Joshua Armstead and Susan Armstead.

8. Plaintiffs Sandra Carper, Susan Foraker and Susan Armstead bring claims for Negligent Infliction of Emotional Distress.

Mountaineer Gas Company's Facilities and Terms of Service

9. Defendant Mountaineer Gas Company is a regulated West Virginia public utility that provides natural gas service to its customers. Defendant Mountaineer Gas Company is a public utility and has filed a written Tariff with, and received approval from, the West Virginia Public Service Commission (PSC). It sells and delivers natural gas from its distribution system to the communities in its service territory listed in its tariff.

10. Mountaineer Gas Company's distribution system does not extend to the area of the Carpers' home in the unincorporated community of Looneyville, West Virginia.

11. The PSC recognizes the rural nature of West Virginia and has worked to facilitate access to efficient and inexpensive heat sources for its residents. As a result, through its tariff approval process. The PSC encourages utilities such as Mountaineer Gas Company to provide service to customers from any available third-party source.

12. Mountaineer Gas Company has no ability on its own to distribute natural gas in Looneyville. However, a natural gas pipeline passes through Looneyville that at the time of the incident was operated by Core Appalachia. The Core Appalachia pipeline transported unprocessed natural gas from wells and gathering lines and allowed residents living near its pipeline to apply for gas service directly from one its pipelines via a main line tap.

13. Mountaineer Gas Company's Operating Procedures refers to these taps as "Main Line

Taps." Once a customer's application is approved, the pipeline operator (Core Appalachia) installs the main line tap and connects that to Mountaineer Gas Company's meter assembly set. The meter assembly set is used to meter and delivery natural gas to homeowners.

14. At the time of the incident, the Carper residence was serviced with natural gas by Defendant Mountaineer Gas Company.

15. Under the terms of Mountaineer Gas Company's tariff, the Carpers are a "Mainline Consumer," which is defined as follows: "[T]hose retail consumers who are provided with service by the Company from pipeline or transmission facilities owned by third parties rather than directly from the distribution system of the Company."

16. Defendant Mountaineer Gas Company billed the Carpers monthly in exchange for providing the residence with natural gas from a third-party pipeline, which it routed through equipment that Mountaineer Gas Company solely owned, installed, serviced, and maintained. This equipment is also referred to as Mountaineer Gas Company "facilities" or "devices," and included its Meter, Regulator, Shut Off Valve, Piping and a Percolator ("Perk") Tank. Mountaineer Gas Company's Perk Tank contained ethelyne glycol, through which it routed the natural gas to the Carper residence and would require periodic refill and servicing by Mountaineer Gas Company with attendant recordkeeping. All of the Defendant's equipment is located "upstream" of the Carper residence, between the third-party pipeline and the Carper residence.

17. At the time of the incident, this main line tap from the pipeline provided gas to two customers, the Carpers and the Dyes.

18. The point of delivery of the natural gas to the customer is the outlet of the gas meter where the customer's piping connects.

19. Defendant had no set schedule for servicing its Perk Tank, and the last time the Defendant

serviced the Perk Tank prior to the December 17, 2018 incident was on March 17, 2017.

20. On March 17, 2017, Defendant Mountaineer Gas Company's Service Technician, Randy Parker, visited the Defendant's gas facilities and noted that he "Serviced Perk Tank and Reg[ulator]. Tested and Restored."

21. Defendant Mountaineer Gas Company's Service Technician returned to the Carper residence approximately one year later, on March 3, 2018 to "Investigate a High Bill," but no service work was performed by Defendant Mountaineer Gas Company on its equipment. Defendant Mountaineer Gas Company recorded a note in its file saying that "cust[omer] not home – called no answer. Left knob card explaining usage and est[imated] reads." Defendant Mountaineer Gas Company's Technician noted that he found and left the gas supply active and noted "Atmospheric Corrosion" on the Defendant's equipment, with a notation that atmospheric corrosion was "Not Repaired."

The Carper Residence and Subject Furnace

22. In 2002 or 2003, Christopher and Amanda Carper moved onto the property at 7 Natural Bridge Road where, initially, they lived in a trailer. Around 2007, Christopher began building the present house. He reused the buried house pipeline from the prior building that was on the property and connected it to the new house. They did not have any problems with their gas service or appliances between 2002 and when they moved into the house at issue, in or about 2008.

23. The Carper residence was heated with a Rheem furnace which was purchased as new from Les Phares Electrical Heating & Cooling and installed by Arthur Wilson, a licensed HVAC Technician. The HVAC Technician also installed the duct work, but not the external or internal piping, which was already in place. At the conclusion of the installation, the Technician tested for leaks and cycled the furnace to confirm it was operating properly.

24. The subject Rheem furnace was equipped by the factory with two roll-out switches, which are safety devices inside the furnace designed to protect against overtemperature in the furnace's control compartment.

25. The purpose of a roll-out switch is to shut off the furnace when it is operating in an unsafe manner. Plaintiffs' expert, Natoli, testified that roll-out switches detect unsafe operating temperature, so "[w]hen you have heat rollout of any kind, they'll trip open and shut the furnace down."

26. When Mr. Wilson installed the furnace, the roll-out switches were installed and located in their proper positions.

27. Language in the Rheem Users Manual and on a sticker located on the Carper furnace stated, "if this switch should trip, a qualified installer, service agency or gas supplier should be called to check and/or correct for adequate combustion air supply."

28. At some point prior to the carbon monoxide poisoning on or about December 17, 2018, the roll-out switches had been unscrewed and removed from their mounting holes and were sitting above and away from the gas burners.

29. Both of Plaintiffs' experts, Davis and Natoli, agree that the removal of the roll-out switches from their factory installed position was an intentional act. Davis further stated that operating the furnace without the roll-out switches in place is dangerous, not consistent with the manufacturer's intended operation, and a misuse of the product. Natoli added that roll-out switches do not just fall off the furnace. No evidence was presented that the Plaintiffs themselves removed the roll-out switches or actually knew that they had been removed.

30. Plaintiff Christopher Carper testified that his brother, Daniel Carper, is a licensed HVAC technician, and performed annual inspections on the furnace, including in the Fall of 2018.

31. Daniel Carper testified that he did "maintenance and just changed the filters," performing the latter task every few months.

32. Plaintiff's Expert Witness, Davis testified that the fouling of the furnace would likely have been detectable in 2018, if there had been an annual inspection.

33. A neighbor, Elbert Myers, testified that prior to the accident, Christopher Carper told him that he was having issues with his furnace and needed someone to look at it.

34. Plaintiff Amanda Carper testified that she recalls a "short, fat, dark-haired man" looking at the furnace prior to the incident but did not know an identity or specific time frame.

35. During discovery, the parties conducted joint inspections of the subject furnace with and without the roll-out switches in their proper mounted locations. When the furnace was operated with the roll-out switches in their proper mounted locations, the furnace shut off after several minutes. When the furnace was operated with the roll-out switches unmounted, the furnace continued to run and created dangerous amounts of carbon monoxide.

36. Plaintiffs' experts, Davis and Natoli, agree that if the roll-out switches had been mounted properly on December 17th, then the roll-out switches would have operated within minutes and shut off the furnace. Davis opined that if the roll-out switches were in place, it would have prevented this incident.

The Incident

37. On or about December 17, 2018, carbon monoxide filled the Carper residence through the natural gas fired Rheem furnace, which escaped through a metal seam in an air exhaust vent that was "blown out" from an explosion of the natural gas.

PLAINTIFFS' THEORIES OF LIABILITY

38. Plaintiffs assert two (2) theories of liability against Mountaineer Gas Company: (1) it

allegedly sold natural gas to Plaintiffs that was dangerous; and (2) its alleged failure to properly inspect, service and maintain its equipment through which it supplied gas to them, specifically, the Perk Tank.

39. As to the former, Plaintiffs' Experts Bert Davis, Ph.D. and Ron Natoli, P.E., reviewed the analysis of the Gas Samples taken by the Defendant on December 19, 2018 – just two days after the event – and determined that excessive long-chain hydrocarbons rendered the gas both unreasonably dangerous and the cause of the fouling which led to the explosion.

40. As to the latter, Plaintiffs allege that Mountaineer Gas Company's Perk Tank require inspection, servicing ethylene glycol replacement and refill and attendant record-keeping. In undertaking these responsibilities in the distribution of natural gas to the Carper family, the Defendant affirmatively assumed a legal duty to carry them out with due care so that no foreseeable harm would result to the Customers using the gas downstream to heat their homes.

41. On the cause of furnace combustion products entering the Carper residence, Plaintiffs have provided expert testimony from Professional Engineer Ron Natoli, who testified:

> The presence of unburnt natural gas within the Carper furnace and venting system caused a delayed ignition, over-pressurization of the venting system, failure of the longitudinal seam of the 5 foot horizontal vent, and was the cause of furnace combustion products entering the Carper home.

Exhibit A to Plaintiffs' Response, p.19.

42. Further, Plaintiffs have provided expert testimony that the cause of the explosion which blew out the metal seam was an accumulation of soot and carbon build-up from incomplete combustion of Defendant's gas:

> Accumulation of soot and carbon build-up from incomplete combustion was the cause of the high production of CO; the presence of unburnt natural gas within the Carper furnace and venting system; the delayed ignition, over-pressurization and resulting failure of the vent; and the CO poisoning and resulting injuries to Corey [sic] Carper and the other occupants of the Carper home.

Id. at p. 25.

43. Defendant Mountaineer Gas Company took natural gas samples for analysis the day after the incident, which showed the gas had a heat value of 1363-1386 BTU's.

44. Plaintiffs' Experts Bert Davis, Ph.D. and Ron Natoli, P.E. reviewed the analysis of the natural gas samples taken by the Defendant on December 19, 2018, and opined that excessive long-chain hydrocarbons rendered the gas both unreasonably dangerous and the cause of the fouling which lead to the explosion:

> As discussed by Bert Davis, Ph.D., P.E., the 'high BTU and wet gas supply would cause unexpected fouling of the burner and heat exchanger system. The fouling process would occur non-linearly, i.e., it would occur at a faster rate over time as the fouling built-up on the burner and furnace surfaces.
>
> . . .
>
> The unprocessed and unrefined natural gas supplied to the Carper home by Mountaineer Gas Company was the cause of the inefficient and incomplete combustion and the resulting heavy fouling and carbon deposits of their furnace.
>
> The unprocessed and unrefined natural gas supplied to the Carper home by Mountaineer Gas Company was the cause of the unburnt natural gas within the Carper furnace and venting system; the delayed ignition, over-pressurization and resulting failure of the vent; and the CO poisoning and resulting injuries to Corey [sic] Carper and the other occupants of the Carper home.
>
> The unprocessed and unrefined natural gas supplied to the Carper home by Mountaineer Gas Company prevented full combustion within the Carper furnace, which generated excess CO, and was the cause of the carbon monoxide poisoning and the injuries to Corey [sic] Carper and the other occupants of the Carper home.
>
> The unprocessed and unrefined natural gas supplied to the Carper home by Mountaineer Gas Company created a dangerous condition and was the cause of the carbon monoxide poisoning and the injuries to Corey [sic] Carper and the other occupants of the Carper home.

Id. at p. 25; *see also Exhibit B to Plaintiffs' Response*, pp. 7-8.

45. Plaintiffs allege and have provided expert testimony that the high BTU gas was a cause of the fouling and incomplete combustion in the Carper furnace.

46. Plaintiffs have also alleged and provided expert testimony that the Defendant's acts or omissions in the maintenance and servicing of its gas equipment was improper and caused the dangerous condition that led to the carbon monoxide incident:

> Mountaineer Gas knew or should have known that proper service, including the replacement and renewal of glycol, of their perc tanks is required to ensure a dangerous condition does not occur;
>
> Mountaineer Gas Company failed to service the Carper's perc tank for at least 10 months prior to the CO poisoning incident and created a dangerous condition;
>
> Improper maintenance of the perc tank by Mountaineer Gas Company resulted in moisture in the Mountaineer Gas Company gas supplied to the Carper residence which caused incomplete combustion, the accumulation of combustion by-products excessive corrosion, and accumulation of corrosion product in the Carper furnace.
>
> Improper maintenance of the perc tank by Mountaineer Gas Company was a cause of the CO poisoning and resulting injuries to Corey [sic] Carper and the other occupants of the Carper home.

Id. at p. 25-26.

MOUNTAINEER GAS COMPANY'S POSITION

47. Mountaineer Gas Company asserts two separate arguments as bases for its Motion for Summary Judgment: (1) its alleged negligence was not the proximate cause of the incident because someone intentionally disabled the furnace safety features that would have shut down the furnace and prevented the accident, which severs any causal chain that may have linked Mountaineer Gas Company to the incident; and (2) specific provisions in Mountaineer Gas Company's tariff preclude certain theories of liability.

48. As to the latter argument, Mountaineer Gas Company argues that its tariff bars (a) any claims resulting from the condition or character of the customer's equipment; (b) any claims arising from the quality of the gas delivered to the Carpers' home, which includes the theory that the natural gas was not merchantable and/or defective; and (c) all non-negligence theories of

liability. As to the latter category, this includes Counts for failure to warn (a strict products liability theory), breach of warranty, and breach of contract.

49. Defendant concedes that its Tariff does not provide complete immunity. Plaintiffs have a path for recovery through a negligence action, provided that they meet their burden of proof. For example, in this case Plaintiffs assert that Defendant negligently maintained its equipment. Defendant do not claim that its Tariff bars such a theory of negligence, although Defendant disputes that it was negligent in this case.

50. In support of its tariff-based arguments, Mountaineer Gas Company relies on the following provisions in its tariff:

> Notwithstanding any provision to the contrary within these Rules and Regulations it is expressly understood that for Mainline Consumers the Company has no control over the quality and quantity of natural gas to be delivered to the Mainline Consumer by the third party pipeline and the Company makes absolutely no warranty, express or implied, that the natural gas will be of pipeline quality or suitable for use by the Mainline Consumer

Mountaineer Tariff § 2.6.

> The Company does not guarantee or undertake, beyond the exercise of due diligence and its duty as a utility, to furnish a sufficient supply of gas at all times and shall not be liable for failure to do so, beyond its available supply; *nor shall it be liable for any injury to person or property from any cause arising inside the Customer's property line not the result of the negligence of the Company; nor shall it be liable for any injury to person or property arising from the use of gas by, or the supply of gas to, the Customer which is not the result of negligence on the part of the Company.*

Mountaineer Tariff § 3.1 (emphasis added).

> The Company will not be liable for damages to or injuries sustained by Customers or others, or by the equipment of the Customer or others by reason of the condition or character of the Customer's facilities and equipment of others on Customer's premises. The Company will not be responsible for the use, care or handling of the gas service delivered to Customer after same passes beyond the point of the delivery.

Mountaineer Tariff § 3.3 (Company's Liability).

51. Mountaineer Gas Company argues that it is relying on its tariff for narrow purposes: (1) to protect it from claims by a specific class of customer who use a gas supply that it cannot and does not control; and (2) to protect it from liability for a customer-owned appliance that was indisputably malfunctioning but nevertheless was manipulated so that it would not shut off as it should have; and (3) to limit causes of action to negligence.

52. Defendant Mountaineer Gas Company has asserted in its Answer the affirmative defense of Comparative Fault, answering that "[t]he proximate cause of Plaintiffs' injuries and damages, if any, was due to their own actions, and Plaintiffs' recovery should be barred or reduced by Plaintiffs' comparative negligence."

53. Defendant Mountaineer Gas Company has asserted in its Answer the affirmative defense of Intervening or Superseding Causation, answering that "plaintiffs' injuries and/or damages, if any, were caused by intervening and/or superseding causes that relieve Mountaineer Gas from any potential liability."

54. Defendant Mountaineer Gas Company has asserted in its Answer the affirmative defense that "[p]laintiffs' injuries and damages, if any were caused in whole or in part by the acts or omissions of Plaintiffs or others for whose conduct Mountaineer Gas is not responsible."

55. Defendant Mountaineer Gas Company has filed a Notice of Non-Parties Who May Be at Fault Pursuant to West Virginia Code section 55-7-13D and identified Daniel Carper and his company, Capital Maintenance, LLP as non-parties who may be wholly or partially at fault and considered by the trier of fact.

CONCLUSIONS OF LAW

56. West Virginia law provides that an award of summary judgment should be granted "only when it is clear that there is no genuine issue of material fact to be tried and inquiry concerning

the facts is not desirable to clarify the application of the law." *Aetna Cas. & Sur. Co. v. Federal Ins. Co.*, 133 S.E.2d 770 (W.Va. 1963). Indeed, a "genuine issue of material fact" exists if, in viewing the record and all reasonable inferences drawn therefrom in a light most favorable to the non-moving party, a reasonable fact-finder could return a verdict for the non-movant. *Painter v. Peavy*, 451 S.E.2d 755, 758 (W.Va. 1994).

57. The Supreme Court of Appeals of West Virginia lays out the function of the Trial Court when confronted with "competing evidence" by the parties in the context of Summary Judgment:

> According to *Williams v. Precision Coil, Inc.*, the function of the circuit court at the summary judgment stage "is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Williams v. Precision Coil, Inc.*, 459 S.E.2d at 336, *quoting, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986). *See* Syl. pt. 3, *Painter v. Peavy, supra*. In addition to drawing any permissible inference from the underlying facts in the light most favorable to the party opposing summary judgment, *Williams v. Precision Coil, Inc., id.*, also stated:
>
> > In assessing the factual record, we must grant the nonmoving party the benefit of inferences, as "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]" *Anderson*, 477 U.S. at 255, 106 S. Ct. at 2513, 91 L. Ed. 2d at 216. Summary judgment should be denied "even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." *Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir.), *cert. denied*, 342 U.S. 887, 72 S. Ct. 178, 96 L. Ed. 666 (1951).

McKenzie v. Cherry River Coal & Coke Co., 466 S.E.2d 810, 814 (W. Va. 1995).

Defendant's Causation Argument

58. Defendant's first argument is one of a causation, focusing on the legal effect of the roll-out switches not being in their proper placement. Defendant asserts that the incident would not have occurred but for the fact that someone intentionally unmounted the roll-out switches, which allowed the furnace to run when it otherwise would have turned off. As such, Defendant claims, the link in causation is broken by an Intervening Cause.

59. The Defendant concedes the general rule in West Virginia law that issues of causation are "usually reserve[d] for the jury." *Defendant's Motion for Summary Judgment*, p. 8. Indeed, our law holds:

> Questions of negligence, due care, proximate cause and concurrent negligence present issues of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions.

Syl. Pt. 17, *Anderson v. Moulder*, 394 S.E.2d 61 (1990)(*quoting* Syl. Pt. 1, *Ratlief v. Yokum*, 280 S.E.2d 584 (W.Va. 1981)). In *Long v. City of Weirton*, 214 S.E.2d 832 (W.Va. 1975), our Court cited with approval a "'classic' definition of causation" as follows:

> As a theory of causation, a conjecture is simply an explanation consistent with known factors or conditions, but not deductible from them as a reasonable inference. There may be two or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any one of them, they remain conjectures only. On the other hand, if there is evidence which points to any one theory of causation, indicating a logical sequence of cause and effect, then there is a juridicial basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.

Long, 214 S.E.2d at 848 (*quoting City of Bessemer v. Clowdus*, 64 So.2d 259, 263 (Ala. 1954)).

60. The Court concludes that Defendant's causation argument is not appropriate for an award of Summary Judgment, but instead appropriately handled under established doctrines where the Plaintiff has sufficient proof of causation for jury determination, but the Defendant argues that other actors are at fault, either wholly or partially. Here, Defendant Mountaineer Gas Company is arguing that some other person(s) is at fault for the moving of the roll-out switches, and that that conduct caused the incident. Our law properly handles situations where others are alleged to be at fault through concepts of concurrent negligence, comparative fault and intervening causation. All of these doctrines are individually implicated by the Defendant's argument herein and are properly applied to prevent Summary Judgment and to present questions for resolution by a fact finder, as

set forth herein.

61. Viewing the facts in the light most favorable to the non-moving Plaintiffs, the Defendant's causation argument presents a jury question of Concurrent Negligence, which properly addresses the role of alleged fault by another. In this regard, our Court has addressed multiple actors as follows:

> 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 or, in case death results therefrom, by his personal representative.

Syl. Pt. 14, *Anderson v. Moulder*, 394 S.E.2d 61 (1990)(*quoting* Syl. Pt. 1, *Reilley v. Byard*, 119 S.E.2d 650 (W.Va. 1961)). In quantifying the amount of fault necessary to implicate the Doctrine and invoke liability, the Court makes clear that the standard is "any":

> Moreover, we generally have held that liability may attach so long as the negligence of a tortfeasor contributes in any degree to the injury. As we stated in Syllabus point 2 of *Peak v. Ratliff*, 408 S.E.2d 300 (1991):
>
> > In a concurrent negligence case, the negligence of the defendant need not be the sole cause of the injury, it being sufficient that it was one of the efficient causes thereof, without which the injury would not have resulted; but it must appear that the negligence of the person sought to be charged was responsible for at least one of the causes resulting in the injury."

Wehner v. Weinstein, 444 S.E.2d 27 (W.Va. 1994) (citations omitted).

As such, the Doctrine of Concurrent Negligence would properly apply if Defendant Mountaineer Gas Company's negligence contributed *in any degree* to Plaintiffs' injury. Otherwise stated, assuming *arguendo* that the moving of the roll-out switches was determined by a jury to be *a cause* of the injury, that finding alone would not exonerate Defendant if its negligence is also found to be one of the efficient causes, such as set forth in Plaintiffs' Experts' Opinions, *supra*. The Court also notes the admonishment in *Anderson v. Moulder, infra*, that that these are clearly issues of fact for jury determination.

62. Additionally, rather than to eliminate Plaintiffs' claims by dispositive motion practice, to the extent that the Defendant is arguing fault by one or more of the Plaintiffs or other actors, Defendant's causation argument is properly handled under West Virginia's doctrine of Modified Comparative Fault. This system of comparing the fault of multiple actors has governed since its adoption in 1979 by *Bradley v. Appalachian Power Company*, 256 S.E.2d 879 and later codified in W. Va. Code section 55-7-13a in 2015. Essentially, "comparative fault" is defined as the degree to which the fault of a person was a proximate cause of an injury, expressed as a percentage. The jury is then required to apply principles of comparative fault and assess the liability of each person, including plaintiffs, defendants and nonparties to equal either zero percent or one hundred percent. *W.Va. Code* § 55-7-13a (2015).

Regarding the roll-out switches, the Defendant has alleged fault by the Plaintiffs as well as non-parties through the appropriate filing of a Notice of Non-Party Fault. Here, if a jury determines that Defendant bears fault which proximately caused injury to the Plaintiffs and so did another actor -- whether the Plaintiff homeowners or the HVAC Technician and his Company identified in the Notice of Non-Party Fault, or even the "short, fat, dark haired" serviceman – then percentages of fault are properly to be determined under principles of Comparative Fault. That determination by the jury is the appropriate method for handling Defendant's arguments about the roll-out switches, rather than by dispositive motion.

63. Thirdly, Defendant's Causation Argument is a proper Jury Question under the doctrine of Intervening Causation. West Virginia law lays out a clear standard for the necessary predicate of when the conduct of another can sufficiently "intervene" in order break the chain of causation, holding:

> 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*, 394 S.E.2d 61 (1990). Further, the Court has explained:

> '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.'

Syl. Pt. 8, *Wal-Mart Stores E., L.P. v. Ankrom*, No. 19-0666, 2020 WL 7223361, at *2 (W. Va. Nov. 18, 2020) (citations omitted).

Here, assuming *arguendo* that unmounting the roll-out switches is considered to be a separate cause, it must be *the only proximate cause* of the injury in order for the Defendant to avoid liability. The Defendant's Motion for Summary Judgment characterizes the act of unmounting the roll-out switches as "intentional" and "deliberate" to differentiate a claim of negligence. This is done to argue a difference from the concurrent negligence and comparative fault analyses above and to implicate the only two (2) extraordinary Intervening Cause cases in which no jury questions were found, as cited by the Defendant. However, the effect of the roll-out switches, by whomever and whenever ultimately decided, is much more akin to the many scenarios where the Supreme Court of Appeals found the question properly submitted to the jury for determination.

In *Perry v. Melton*, 299 S.E.2d 8 (W.Va. 1982), for instance, the Court addressed a defendant driver of a motor vehicle with a .19 BAC who decided to pass a tractor-trailer going about 55 miles per hour in a lane designated for emergency parking only. These acts by the impaired driver defendant were arguably both "intentional" and "deliberate" acts. In doing so, the impaired driver struck a second, disabled tractor trailer parked in that emergency parking lane, causing a crash which took the life of both occupants in the car. *Id.* Litigation ensued from the Estate of the car's deceased passenger against both the impaired driver of the car and the operator of the disabled tractor trailer into which the car crashed. *Id.* The question was whether the

"deliberate" and "intentional" decisions of the impaired driver of the car – to drive drunk, speed past one tractor trailer and to drive in an emergency parking lane – were an intervening cause(s) of the accident, breaking the chain of causation from the alleged negligence of the operator of the disabled tractor trailer in leaving the truck without warning flares. *Id.*

While the "deliberate" and "intentional" conduct of the drunken, speeding driver passing in an emergency parking lane was ultimately determined to be the sole proximate cause of the accident, it is of utmost importance that *it was the jury who properly made that determination.* The *Perry* Court held:

> The jury was presented with a classic factual question of whether the truck driver's negligence was a contributing cause of the accident, or whether the proven negligent conduct of the Bailey [drunken driver] was an intervening or superseding cause of the accident relieving the truck driver of liability. The facts were such that reasonable minds could differ on the issue of proximate cause. On the evidence, the jury could reasonably have found that the negligent acts [drunken driver] were the only proximate cause of the accident.

Perry, 299 S.E.2d at 10-11. The *Perry* Court's finding of a jury question under those facts would certainly support that finding in the present case.

Defendant Mountaineer Gas Company cites two (2) cases in which narrowly applied exceptions to the general rule of jury determinations are appropriate for questions of causation -- West Virginia's "Russian Roulette" fact pattern in *Harbaugh v. Coffinbarger*. 543 S.E.2d 338 (2000) and "Stolen Car" fact pattern in *Yourtree v. Hubbard*, 474 S.E.2d 613 (1996). Those cases respectively involve distinguishable fact patterns of a homeowners' liability for a partygoer who placed a handgun to his head and deliberately pulled the trigger in *Harbaugh*, and a car owner's liability for teenagers stealing his car and wrecking into a wall while on a drunken joyride in *Yourtree*.

The Court finds those cases factually distinguishable and that the present case is much

more akin to the well-known tragic case of *Wehner v. Weinstein*, 444 S.E.2d 27 (W.Va. 1994), in which WVU fraternity members "intentionally" and "deliberately" disabled a safety feature on a pizza delivery car parked on a steep hill -- a set parking brake -- and placed the car in neutral, causing it to roll down High Street and kill and maim young students walking below. There was no question that the disengagement of the parking brake was done on purpose, i.e. an act that could be characterized as both "intentional" and "deliberate." Clearly, the very intention of disabling the safety brake was to allow the car to be moved from in front of a driveway, although not necessarily to cause the ultimate harm to the victims. The *Wehner* Court agreed, holding:

> "Where an act or omission is negligent, it is not necessary to render it the proximate cause of injury that the person committing it could or might have foreseen the particular consequence or precise form of the injury, or the particular manner in which it occurred, or that it would occur to a particular person."

Syl. Pt. 4, *Wehner*, 444 S.E.2d 27 (1994).

Like the present case, a Defendant in *Wehner* argued that the acts of another (the Student Defendants) in disabling a safety device (the parking brake) constituted an "Intervening Cause" that broke the chain of causation from the original actor in improperly parking the car. Rather than to exonerate the original actor from its liability, the *Wehner* Court found it necessary that the case proceed for jury determination:

> With these facts in mind, we believe it was for the jury to determine whether it was reasonably foreseeable under the circumstances that some person would attempt to move the vehicle to gain access to the driveway. The jurors could realize from their common knowledge the impetuous nature of college students and their tendency to act without mature consideration. This situation is no more extreme than the employer we found to be liable under proximate cause principles in *Robertson v. LeMaster*, 301 S.E.2d 563 (1983). There, an employee who made several requests to leave finally was permitted to do so after he had worked some twenty-seven hours. While driving home, he fell asleep and ran into another vehicle injuring the plaintiffs. Suit was brought against the employer. We held it was reasonably foreseeable that such an event could occur under all the circumstances.

Wehner, 444 S.E.2d at 32.

The *Wehner* Court also cited *Reese v. Lowry*, 86 S.E.2d 381 (1955), *overruled on other grounds by Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (1979), as another example in support of its decision to allow the matter to proceed to Trial. Notably, *Reese* involved a furnace manufacturer arguing that any products liability claims against it for a house fire were cut off by the Intervening Causation of the homeowner putting too much coal (i.e., "intentionally and deliberately") in the furnace with actual knowledge that the furnace was not operating properly. Noting the precedent of *Reese* which found a proper jury question, the *Wehner* Court noted:

> In [*Reese*], the defendants asserted a proximate cause argument contending that any defect in the furnace they installed did not cause the fire destroying the plaintiffs' house. Rather, the defendants contend the direct proximate cause was the owner's negligence in placing too much coal in the furnace knowing that the thermostat and furnace drafts were not working. We declined to hold as a matter of law that proximate cause did not exist and concluded it was a jury question.

Wehner, 444 S.E.2d at 32 (citations omitted).

Here, the resolution of the question of the role of the roll-out switches is not for properly decided by dispositive motion, but instead properly submitted as a jury question. Akin to the fraternity members deliberately disengaging the parking brake in *Wehner*, or the homeowners intentionally placing too much coal in a furnace they knew was not operating properly in *Reese*, this causation issue is properly for jury determination, not dismissal as a matter of law.

The heart of the Defendant's causation argument, as well as the linchpin of tort liability, is foreseeability. In framing this inquiry, the Supreme Court of Appeals has stated:

> 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 kind of harm experienced based on the evidence presented. If the court determines that disputed facts related to foreseeability, viewed in the light most favorable to the plaintiff, are sufficient to support foreseeability, resolution of the disputed facts is a jury question.

Syl. Pt. 12, *Strahin v. Cleavenger*, 603 S.E.2d 197 (W.Va. 2004). This causes this Court to ask the simple question of whether it is reasonably foreseeable, viewed in the light most favorable to the Plaintiffs, that a Defendant distributing a third-party owned, unprocessed gas and/or failing to properly maintain and service its equipment could cause damage to the downstream customers. If for no other reason, the Plaintiffs have alleged, with sufficient factual predicate and expert testimony, that the Defendant knew or should have known that proper maintenance and servicing of its equipment is required to ensure a dangerous condition does not occur due to said negligence, and that failure was a cause of damage to the Plaintiffs. Accordingly, the Court believes it is foreseeable and should proceed for jury determination.

Defendant's Tariff Argument

64. Defendant argues that its Tariff filed with the West Virginia Public Service Commission bars Plaintiffs' claims to the extent that they assert (a) any claims resulting from the condition or character of the customer's equipment; (b) any claims arising from the quality of the gas delivered to the Carpers' home, which includes the theory that the natural gas was not merchantable and/or defective; and (c) all non-negligence theories of liability. As to the latter category, this includes Counts for failure to warn (a strict products liability theory), breach of warranty, and breach of contract.

65. It is undisputed that the Defendant's Tariff was filed with and approved by West Virginia's Public Service Commission, which is an agency created wholly by statute and is delegated only certain, limited powers by the Legislature. *See W.Va. Code 24-2-1, et seq.* Its limited statutory authority is recognized:

> The public service commission is a creature of statute. It has no jurisdiction and no power or authority except as conferred by statute. *City of Bluefield v. Public Service Commission*, 94 W.Va. 334, pt. 1 syl., 118 S.E. 542. It has no inherent jurisdiction, power or authority. *City of Norfolk v. Virginia Electric and Power Co.*, 197 Va. 505, 514, 90 S.E.2d 140, 146;

> *Clifton Forge-Waynesburg Telephone Co. v. Commonwealth*, 165 Va. 38, 43, 181 S.E. 439, 441; 73 C.J.S. *Public Utilities* § 38, page 1064. A public service commission has, however, no inherent power; all its power and jurisdiction, and the nature and extent of the same, must be found within the statutory or constitutional provisions creating it.' 43 Am.Jur., *Public Utilities and Services*, Section 193, page 701.

Eureka Pipe Line Co. v. Public Service Comm'n, 137 S.E.2d 200 (W.Va. 1964). The Legislature has directed the Commission "to require [public utilities] to conform to the laws of this state and to all rules, regulations and order of the commission not contrary to law." *W.Va. Code* § 24-2-2 (2018). Further, the Legislature specifically provides that claims for damages caused by public utilities may be brought in any circuit court having jurisdiction. *W.Va. Code* § 24-4-7 (2018).

66. Under its delegated statutory authority, the Public Service Commission must require Defendant Mountaineer Gas Company, as a public utility, to conform to the "laws of this state," which includes West Virginia's statutory, regulatory, and common law. This Court must then review the basis in West Virginia law for the legal responsibilities alleged by the Plaintiffs to be breached by the Defendant -- both as to the Defendant's alleged failure to properly maintain and service its equipment and the quality of the natural gas it sold to the Plaintiffs. Regarding Defendant Mountaineer Gas Company's statutory duties, the Code requires:

> Every public utility subject to this chapter shall establish and maintain adequate and suitable facilities, safety appliances or other suitable devices, and shall perform such service in respect thereto as shall be reasonable, safe and sufficient for the security and convenience of the public, and the safety and comfort of its employees, and in all respects just and fair, and without any unjust discrimination or preference.

W. Va. Code § 24-3-1 (2018); *cf State v. Blair*, 438 S.E.2d 605 (W.Va. 1993) (held as too vague to allow a *criminal prosecution*). This statute was referenced in *Reed v. Smith Lumber Co.*, 268 S.E.2d 70 (W.Va. 1980), in which the Court also pronounced a common law duty on utilities:

> The gas company, as a distributor of a dangerous substance, has a duty to the public to exercise care and diligence proportionate to any danger, which is known or should be known to the utility. This duty includes "inspection, oversight and superintendence."

Reed, 268 S.E.2d at 71 (*citing Groff v. Charleston-Dunbar Nat'l Gas Co.*, 156 S.E. 881 (1931)).

67. Defendant Mountaineer Gas Company's alleged violation of a statutory duty has the effect of making a case of *prima facie* negligence, a firmly established rule in West Virginia. Our Court has held:

> When a statute imposes a duty on a person for the protection of others, it is a public safety statute and a violation of such a statute is prima facie evidence of negligence unless the statute says otherwise. A member of a class protected by a public safety statute has a claim against anyone who violates such a statute when the violation is a proximate cause of injury to the claimant.

Syl. Pt. 7, *Shaffer v. Acme Limestone Co., Inc.*, 206 W.Va. 333, 524 S.E.2d 688 (1999)(*see also W.Va. Code* § *55-7-9* (1994) (stating "[a]ny person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages.")). Finally, under *Reed v. Phillips*, 452 S.E.2d 708, 712 (1994), "the determination as to whether there was in fact a violation and whether the violation was the proximate cause of the injury is within the province of the jury."

68. There is over a century of precedent affirming use of this rule, as set forth in footnote 8 of *Hersh v. E-T Enterprises, L.P., et al.*, No. 12-1016, 2013 W.Va. Lexis 1271 (Nov. 12, 2013)(*See, e.g.*, Syl. Pt. 1, *Norman v. Virginia-Pocahontas Coal Co.*, 69 S.E. 857 (1910) ("A violation of the statute inhibiting the employment of boys under fourteen years of age in coal mines constitutes actionable negligence whenever that violation is the natural and proximate cause of an injury."); Syl. Pt. 5, *Tarr v. Keller Lumber & Const. Co.*, 144 S.E. 881 (1928) ("Disregard of a statutory requirement is prima facie negligence when it is the natural and proximate cause of an injury."); Syl. Pt. 3, *Oldfield v. Woodall*, 166 S.E. 691 (1932) ("Disregard of a requirement of a statute or an ordinance is prima facie negligence when it is the natural and proximate cause of an injury."); Syl. Pt. 3, *Meyn v. Dulaney-Miller Auto Co.*, 191 S.E. 558 (1937) ("A pedestrian crossing a street between street crossings in violation of an ordinance is not necessarily precluded from

recovery. His violation of the ordinance is prima facie negligence, but to preclude recovery it must naturally and proximately result in his injury. This latter question is clearly within the province of the jury to solve."); *Somerville v. Dellosa*, 56 S.E.2d 756, 759 (1949) ("It is an established principle in this jurisdiction that the violation of a statute alone is sufficient to make the violator prima facie guilty of negligence."); Syl. Pt. 1, *Spurlin v. Nardo*, 114 S.E.2d 913 (1960) ("A violation of the statute dealing with adequate brakes on a motor vehicle constitutes prima facie negligence.").

69. Another source of the Defendant's requirement to "conform to the laws of this State" is the Code of State Rules. There is found an affirmative duty on public utilities such as the Defendant to take an active role in monitoring the character of the natural gas it provides to customers. Specifically, under section 4.10, the Rules place an affirmative regulatory duty on utilities to monitor gas composition, pressure "or other conditions" which would affect the efficiency of operation or adjustment of appliances":

> 4.10. Change in character of service – In case any substantial change is made by a utility in the composition of the gas, the pressure, or other conditions which would affect the efficiency of operation or adjustment of appliances, the appliances of all customers in the district affected shall be inspected and shall be readjusted, if necessary, by the utility for the new conditions without charge.

150 *W.Va.C.S.R.* § 4.10 (2018).

70. No action of the PSC, including a Tariff, can relieve the public utility from its duties under the law, as explicitly recognized W.Va. C.S.R. § 150-4-2.1.4, which provides "[t]hese rules shall not relieve in any way a utility from any of its duties under the laws of this State."

70. Another duty imposed by the State Rules is found in Title 150, section 7.2.1, which provides a clear statement as to the reasonable degree of gas purity for all West Virginians, without any exception made for "mainline customers":

> 7.2.1 All natural gas distributed in this State shall be free from dangerous or objectionable quantities of impurities such as hydrogen sulphide, nitrogen or other combustible or noncombustible, noxious, or toxic gases, or other impurities. A gas shall be considered free from undesirable impurities when the quantity of any impurity present is within the

limits recognized as allowable in good practice.

150 *W.Va. C.S.R.* § 7.2.1 (2018). Contrary to Defendant's proposed construction of the Tariff, Title 150, section 7.2.1 of the Code of State Rules, on its face, applies to "all natural gas distributed in this State." "[A]ll" is not qualified in the Rule, with a plain reading that it applies to "all natural gas distributed in this State." In this regard, Plaintiffs have alleged that the natural gas distributed by Defendant was not free from dangerous or objectionable quantities of impurities," which proximately caused them damages. West Virginia law is clear in providing that a violation of a State Rule also constitutes prima facie negligence. *See* fn. 9, *Hersh*, No. 12-1016, 2013 W.Va. Lexis 1271 (Nov. 12, 2013); Syl. Pt. 1, in part, *Johnson v. Monongahela Power Co.*, 123 S.E.2d 81, 83 (1961) ("Valid rules and regulations of the Public Service Commission of West Virginia, which incorporate and adopt certain minimum requirements of the National Safety Code with regard to the external installation of electrical equipment, have the force of statutory law and the failure to comply therewith would constitute prima facie negligence. . . ."); Syl. Pt. 1, in part, *Miller v. Warren*, 390 S.E.2d 207 (1990) ("Failure to comply with a fire code or similar set of regulations constitutes prima facie negligence, if an injury proximately flows from the non-compliance and the injury is of the sort the regulation was intended to prevent; . . .").

71 Finally, Defendant cannot properly use its Tariff to escape liability for violating the"laws of this State" which are established by the Common Law. In addition to the statutory and regulatory requirements above, the Common Law obligates one who affirmatively undertakes a duty to carry it out with due care:

> '[o]ne who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created an unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm.'

Syl. Pt. 1, *Overbaugh v. McCutcheon,* 183 W.Va. 386, 396 S.E.2d 153 (1990)(citations omitted).

Regardless of the source of the natural gas sold to the Plaintiffs, Defendant Mountaineer

Gas Company affirmatively undertook to actively participate in the process of gas distribution to the Plaintiffs by designing, installing, maintaining and servicing its gas equipment, which require its active management. Once choosing to do so, the Defendant also has a common law duty to carry out its affirmative conduct with reasonable care. Plaintiffs have produced evidence, including expert testimony, that the Defendant failed to properly carry out these affirmative duties – statutory, regulatory and common law -- and that such failures were a cause of the incident. As such, it would violate both law and public policy to permit Defendant to avoid liability for violations of those duties, if proven, by construction of the Tariff.

72. The Defendant's position would be unreasonable in light of the requirements of West Virginia law outside of the Public Service Commission's limited powers as permitted by statute. Nowhere in the statutory delegation of powers to the Public Service Commission does the Legislature permit the Public Service Commission to relieve public utilities from statutory, regulatory or common law duties, nor to immunize public utilities from liability for violations of those duties. Other Courts have looked on attempts at limitation with disfavor:

> The Kansas Supreme Court has been consistent in its treatment of exculpatory provisions in cases regarding public utilities. Reading *Shawnee Milling Co.* and *McNally* together, it is apparent that, when a public utility tariff is involved, it does not matter whether the limiting language appears in the contract or in the tariff – in either case the analysis is the same. Both cases apply a rule of reasonableness, and both cases look with disfavor on contractual or tariff provisions which purport to absolve public utilities from liability for negligence. Clearly the case at bar involves just such a tariff provision. KCP & L does not cite, and this court has not found, any statutory provision authorizing KCP&L's limitation of its liability. Consequently, the reasonableness of the tariff provision purporting to limit KCP&L's liability is a matter for judicial determination.

Forte Hotels. v. Kansas City Power & Light Co., 913 S.W.2d 803 (Kan. 1995)(citations omitted).

In *Southwestern Public Service Co. v. Artesia Alfalfa Growers Ass'n*, 353 P.2d 62 (N.M. 1960), the New Mexico Court addressed an Indiana decision which held:

> In *Indianapolis Water Co. v. Schoenemann*, 20 N.E.2d 671, 677, it was held that the Public

Service Commission had no authority to relieve a utility from liability under the laws of negligence. The court said:

> The Public Service Commission of Indiana is purely an administrative board, created by State and by legislation and is given only administrative and ministerial powers; and is without legislative authority. . . .
>
> The authority of the Public Service Commission is sufficiently broad to empower it to establish rules and regulations for the government of the utility in the prosecution of its business, but such Public Service Commission cannot relieve a utility from liability under the law of negligence as it exists in Indiana, by any rule it may adopt. If the utility owes a duty to the public under the law, certainly that duty cannot be abrogated or set aside by any regulatory order adopted by the Commission

Southwestern Public Service Company, 353 P.2d 62.

In *Adams v. Northern Illinois Gas Co.*, 211 Ill.2d 32 (2004), the Supreme Court of Illinois held that a tariff which provided that a gas company had no duty with respect to a customer's gas pipes and fittings did not immunize it from common law liability regarding a gas leak of which it had notice. The Superior Court of Connecticut, Judicial District of Hartford, applied this striking a similar defense as that advanced herein, holding:

> Here there is no precedent cited by CL&P in Connecticut which recognizes the authority of PURA to approve tariffs which include a limitation on the liability of a public utility for even simple negligence yet alone wanton and willful misconduct, all of which is covered by the language of the tariff cited by CL&P, and, as this court has found, the applicable statutes do not support such authority. Therefore, this court finds that CL&P has not proven that the liability limitation in its tariff is a valid defense to the plaintiff's claims in this case.

O'Neill v. Connecticut Light and Power Co., Not reported in Atl. Rptr., 2020 WL 1889124.

Constitutional Issues

73. Plaintiffs also responded to the Defendant's Motion for Summary Judgment with Constitutional Challenges.

74. "When it is not necessary in the decision of a case to determine a constitutional question, this Court will not consider or determine such question." Syl. Pt. 5, *In re Tax Assessments Against*

Pocahontas Land Corp., 158 W. Va. 229, 210 S.E.2d 641 (1974). *See also, Cogar v. Sommerville,* 180 W. Va. 714, 717, 379 S.E.2d 764, 767 (1989) (same); *State v. Griffith*, 168 W. Va. 718, 724, 285 S.E.2d 469, 473 (1981) ("It is a well settled principle that courts do not generally pass on the constitutionality of challenged statutes unless that question is necessary to the decision of the case."); *Kolvek v. Napple*, 158 W. Va. 568, 574, 212 S.E.2d 614, 618 (1975) ("Courts will not pass on the constitutionality of a statute unless it is absolutely necessary for the determination of the case"). *Davis v. Mound View Health Care, Inc.*, 220 W. Va. 28, 29 n.2, 640 S.E.2d 91, 92 (2006).

75. With respect to Defendant's causation argument, the Court concludes that questions of material fact exist concerning foreseeability.

76. With respect to Defendant's Tariff argument, the Court concludes that its Tariff does not preclude Plaintiffs' claims for the reasons stated herein.

77. The Court finds that it is not necessary to reach Plaintiffs' Constitutional in order to decide the issues raised by Defendant's Motion for Summary Judgment. In accordance with settled principles, this Court declines to do so.

Having determined that there are multiple questions of fact that require jury determination and that the Defendant's Tariff defenses do not entitle it to judgment as a matter of law, the Court hereby **DENIES** the Defendant's Motion for Summary Judgment.

The Clerk of this Court shall sent attested copies of this Order to all counsel of record via the Courtplus efiling system.

/s/R. Craig Tatterson
Judge R. Craig Tatterson

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