IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 22-0292
(Monongalia County Circuit Court, Civil Action No. 16-C-219)

EUGENE F. BOYCE and
KIMBERLY D. BOYCE,

Petitioners,

v.

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

Respondents.

BRIEF OF RESPONDENTS, FRONTIER COMMUNICATIONS OF AMERICA INC., FRONTIER COMMUNICATIONS CORPORATE SERVICES INC., FRONTIER COMMUNICATIONS ONLINE AND LONG DISTANCE INC., AND FRONTIER COMMUNICATIONS ILEC HOLDINGS LLC

Respectfully submitted,

FRONTIER COMMUNICATIONS OF AMERICA INC.,
FRONTIER COMMUNICATIONS CORPORATE SERVICES INC.,
FRONTIER COMMUNICATIONS ONLINE AND LONG DISTANCE INC.,
FRONTIER COMMUNICATIONS ILEC HOLDINGS LLC,

By Counsel,

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Respondents, Frontier Communications of America Inc., Frontier Communications Corporate Services Inc., Frontier Communications Online and Long Distance Inc., Frontier Communications ILEC Holdings LLC, ("Frontier") by counsel Charles C. Wise III, hereby provides the Brief of Respondents, pursuant to the Scheduling Order entered on May 3, 2022.

ASSIGNMENT OF ERROR

The Circuit Court correctly found that the actions of Petitioner in climbing on top of his truck, applying shrink-wrap to the communications lines, and then intentionally grabbing an energized electrical line were the proximate cause, as well as an intervening and superseding cause, of Petitioner's injuries.

STATEMENT OF THE CASE

On or about April 11, 2014, Plaintiff Eugene F. Boyce was working as a delivery driver for Lowe's Home Improvement. Pet. App. at 00016. On the day in issue, Plaintiff was attempting a delivery on behalf of Lowe's, in a Lowe's delivery/boom truck to 191 Sand Springs Road in Monongalia County, West Virginia. *Id.* Upon entering the residential drive, Mr. Boyce encountered utility and/or communication lines. *Id.* When Mr. Boyce determined that the truck could not clear the communication lines, he stopped his truck, got out, and asked Mr. Tucker to help raise the lines with a board. Pet. App. at 00418. When that failed, Mr. Boyce, who was already on top of the truck, attempted to raise the lines with shrink wrap and secure them to what he believed to be a neutral power line. Pet. App. at 00418-420. Mr. Boyce testified that he had done this many times before. Pet. App. at 00420. The line Mr. Boyce contacted was energized by 7200

volts. Mr. Boyce received a severe electric shock and suffered severe burns to his right hand and left shoulder, which led to amputation of his right arm below the elbow. Pet. App. at 00419-420.

Petitioners admit that the communications lines of all Respondents are owned, operated, and maintained by Respondents. Pet. App. at 00014-23. They admit that Mr. Boyce first attempted to raise the Frontier and Atlantic Broadband lines with a board and the help of a customer. Petitioners further admit that Mr. Boyce then climbed onto the roof of the truck and wrapped the shrink wrap around the lower lines owned by Frontier and Atlantic Broadband and tried to attach them to the power line above. He admits he has done this before. Thus, Mr. Boyce's contact with the lines was not accidental or inadvertent. Mr. Boyce admits he had no formal training with power but assumed that the power line was not energized. Pet. App. at 00369.

Mr. Boyce does not deny that he intentionally contacted the energized line but contends that he thought the power line was a neutral. Pet. Br. at 28. He contends the power company negligently configured the lines. Thus, the undisputed facts relied on by the Circuit Court in its Order Granting Summary Judgment To All Respondents are that Mr. Boyce stopped his truck, first attempted to raise Respondents' utility lines with a board in order to obtain clearance, then climbed on top of his truck, applied shrink wrap to the communications lines, and intentionally grabbed a live electrical wire with his bare hand.

SUMMARY OF ARGUMENT

The Circuit Court primarily relied on *Harbaugh v. Coffinbarger*, 209 W.Va. 57, 543 S.E.2d 338 (2000), *Matthews v. Cumberland & Allegheny Gas Co.*, 138 W.Va. 639, 77 S.E.2d 180 (1953); *Maggard v. Appalachian Electric Power Co.*, 111 W.Va. 470 (1932); and *Lancaster v. Potomac Edison Co. of West Virginia*, 156 W.Va. 218, 192 S.E.2d 234 (1972), in concluding that none of the Respondents' alleged actions were the proximate cause of Mr. Boyce's injuries.

Petitioners contend that the Circuit Court committed clear error in its reliance on *Matthews*, but don't really explain why the Court's reliance was misplaced. Instead, Petitioners simply re-argue that all Respondents in the instant case were negligent. Under Rule 59(e), however, one can't simply re-argue the points made and rejected by the court. *Parsons*, *supra*.

Matthews teaches that proximate cause is the last negligent act contributing to the injury. The *Matthews* court held that the act of the plaintiff leaving the position where he was standing and running in front of a moving automobile, without exercising due care, broke any causal connection between the acts and omissions of defendant and the injury sustained by the plaintiff. The Circuit Court, citing *Matthews*, correctly found that the acts of Mr. Boyce, in stopping his truck, getting out, climbing on top of his truck with shrink wrap, wrapping it around the Frontier and Atlantic Broadband communications lines, and then intentionally grabbing the energized power line, broke any causal connection between the alleged negligence of Respondents and the injury sustained by Mr. Boyce. These facts were undisputed, and a reasonable jury could draw but one conclusion from them. Thus, the Circuit Court correctly granted summary judgment in favor of Respondents. *Harbaugh*, *supra* at 65.

Petitioners next take issue with the Circuit Court's reliance on *Maggard*, *supra*, but, again, the Circuit Court was correct. A careful reading of *Maggard* teaches that a power company can be liable if its wires are contacted inadvertently in "places where people have the right to go for work, for business or for pleasure . . . ." *Maggard*, *supra* at 29. Here, Mr. Boyce was in a place where he had no right to go, and he contacted the power line intentionally. His misplaced belief that he was contacting a neutral line does not make his act inadvertent or accidental, any more than the act of the decedent in *Harbaugh* playing Russian roulette, apparently believing that there was not a live round in the chamber. Reasonable minds cannot differ that Mr.

Boyce's actions were so hazardous and unexpected that Respondents could not reasonably anticipate them.

The Circuit Court also correctly relied on *Lancaster. Lancaster* involved an 18-year-old youth who accidently came in contact with an uninsulated power line while painting a house. The *Lancaster* court held that liability may attach if the victim was lawfully on the premises and the victim's contact was accidental or inadvertent. *Lancaster,* citing a number of cases, teaches that it's not foreseeable if a person is in a place he has no right to be and intentionally makes contact with a power line. *Lancaster, supra* at 239.

Significantly, the Circuit Court found that Mr. Boyce was a trespasser and, by definition, he was in a place he had no right to be. *See, Huffman v. Appalachian Power Co.*, 187 W.Va. 1, 415 S.E.2d 145 (1991). Even if the Circuit Court had not determined that Mr. Boyer's independent acts were the proximate cause of his injuries, an owner only owes a duty to a trespasser to refrain from willful or wanton injury. *Huffman*, supra.

The Circuit Court further found that Mr. Boyce's acts of first stopping his truck, getting out, climbing on top of a truck into imminent danger around utility lines, applying shrink wrap to raise the communication lines, and intentionally grabbing a live power line was an intervening and superseding cause under *Harbaugh, supra*; and *Yourtee v. Hubbard*, 196 W.Va. 690, 474 S.E.2d 620 (1996). Petitioners attempt to distinguish *Harbaugh* and *Yourtee*, claiming there was no violation of law and Mr. Boyce's acts were not willful or wanton. According to his own expert, James Orosz, Mr. Boyce, was in a place he was not supposed to be, and that no lay person should contact a power line. Pet. App. at 00443.

Here, Mr. Boyce stopped his truck, got out, and made a conscious decision to raise the communication lines himself, when he determined he couldn't drive underneath. It was his independent acts that caused his own injuries. He was in a place he had no right to be, without training or personal protective equipment, attempting to move utility lines owned and maintained by Respondents, when he intentionally contacted the live power line. The Circuit Court correctly found that Mr. Boyce's acts were not reasonably foreseeable, were negligent, and operated wholly independently of any of the Respondents' alleged negligent actions. Therefore, Mr. Boyce's actions were an intervening and superseding cause of his injuries, and summary judgment was proper.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary in this case because the law regarding the issues presented is well-settled, the facts and legal arguments are adequately presented in the briefs and record, and oral argument would not significantly aid the decisional process. If the Court determines that oral argument is necessary, then Respondents submit that argument under W. Va. R. App. P. 19 is appropriate because the appeal involves assignments of error in the application of settled law, and that the appeal is appropriate for disposition by memorandum decision under W. Va. R. App. P 21.

ARGUMENT

I. STANDARD OF REVIEW

Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is proper where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. See *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995); *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). Rule 56 is "designed

to 'effect a prompt disposition of controversies on their merits without resort to a lengthy trial' if there essentially 'is no real dispute as to salient facts' or if it only involves a question of law." *Precision Coil*, 194 W. Va. at 58, 459 S.E.2d at 335.

Summary judgment is not a remedy to be exercised at the circuit court's option; it must be granted when there is no genuine dispute over a material fact. See *Payne v. Weston*, 195 W. Va. 502, 506, 466 S.E.2d 161, 165 (1995). Therefore, summary judgment is mandated when a party fails to make a sufficient showing on an essential element of its case. See *St. Peter v. AmPak-Division of Gatewood Products, Inc.*, 199 W. Va. 365, 368, 484 S.E.2d 481, 484 (1997); Syl. Pt. 2, *McGraw v. St. Joseph's Hospital*, 200 W. Va. 114, 488 S.E.2d 389 (1997).

A losing party can seek "reconsideration" of a summary judgment order under Rule 59(e). *See, e.g., Law v. Mon. Power Co.*, 558 S.E.2d 349 (W. Va. 2001). However, Rule 59(e) is not a mechanism to raise new arguments or new evidence that the plaintiff could have raised the first time around. *See Parsons v. Herbert J. Thomas Mem. Hosp. Assoc.*, 2017 WL 5513620 (W. Va. 2017).

A Rule 59(e) motion should only be granted in these circumstances: (1) there is an intervening change in controlling law; (2) new evidence not previously available comes to light; (3) it becomes necessary to remedy a clear error of law or (4) to prevent obvious injustice. *See* Syl. Pt. 2, *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W. Va. 48 (2011).

Despite Petitioners' arguments, the Order Granting Defendants' Motions For Summary Judgment does not rise to the level of "clear legal error" or "obvious injustice" under *Parsons*. Petitioners do not dispute that Mr. Boyce stopped, climbed on top of his delivery truck into an area he had no right to be, wrapped shrink wrap around communications lines owned and

maintained by Respondents, and then intentionally grabbed a live power line to raise the lines. The Circuit Court correctly found that such acts were the proximate cause, and also constituted an intervening cause, of Mr. Boyce's injuries and did not rise to the level of "clear legal error" or "obvious injustice".

II. THE CIRCUIT COURT CORRECTLY FOUND THAT PETITIONER'S ACTIONS, IN STOPPING, CLIMBING ON TOP OF HIS TRUCK, APPLYING SHRINK WRAP TO COMMUNICATION LINES, AND INTENTIONALLY GRABBING AN ENERGIZED LINE, WERE THE PROXIMATE CAUSE AND INTERVENING AND SUPERSEDING CAUSE OF HIS INJURIES

A. The Circuit Court Gave Proper Weight to the Opinion of Petitioner's Expert James Orosz in Concluding That Mr. Boyce Was A Trespasser

James Orosz, Plaintiffs' expert, conceded in his deposition that anyone not authorized who touched power lines was a trespasser, and that it was never okay for a lay person to touch communications lines. Pet. App. at 00443.

> Q: Did you ever take the position when you were with the power companies that anyone that touched the lines was a trespasser?
>
> A: Yes.
>
> Q: Is it ever okay for a lay person to touch a communications line?
>
> A: "depending on where it is, there is points of where the utility owns the equipment versus the customer owns the equipment. But for utility-owned equipment, no."

Rule 103 of the West Virginia Rules of Evidence governs generally the admissibility of evidence before a jury. When asked the question, whether he had ever taken the position that anyone not authorized who touched power lines was a trespasser, Mr. Orosz responded "yes." The question didn't seek a legal conclusion, but merely asked if Orosz had taken a certain position. He clearly was qualified to answer that question, whether as an electrical expert or as a layman.

Moreover, West Virginia Pattern Jury Instruction § 1001. Trespassers, states: "A trespasser is a person who goes upon or enters the property or premises of another without invitation, express or implied, and does so out of curiosity or for [his/her] own purpose(s) or convenience, and not in the performance of any duty to the owner." W.Va. P.J.I. § 1001.

No one is suggesting that Mr. Boyce be prosecuted criminally. The point of the questioning was to establish that Mr. Boyce was not authorized to touch power lines and was in a place he had no right to be. If you read the entire opinion of the Circuit Court, that was her conclusion, that Petitioner was in a place he had no right to be and intentionally made contact with a live electrical wire.

It is not disputed that all the utility lines are owned by the Respondents. Mr. Boyce was not applying shrink-wrap to the lines at the invitation of the Respondents and he was not acting in the performance of any duty to the Respondents. Mr. Orosz was not asked about his opinion, but whether he had ever taken that position, which is a fact. He said yes, and the Circuit Court considered his concession. If this was error, it was harmless. "To warrant reversal, error and injury to the party appealing must be shown. Error is harmless when it is trivial, formal, or merely academic, and not prejudiced to the substantial rights of the party assigning it, and where it in no way affects the outcome of the trial." *Reed v. Wimmer*, 195 W.Va. 199, 465 S.E.2d 199, 1995 W.Va. LEXIS 193 (1995). Here, the Circuit Court correctly concluded that Mr. Boyce was a trespasser.

B. The Circuit Court Correctly Found That the Actions of Petitioner, Climbing on Top of His Truck, Applying Shrink-Wrap to the Communications Lines, and Grabbing an Energized Electrical Line, Was the Proximate Cause of His Injuries

The Circuit Court quoted extensively from *Matthews v. Cumberland & Allegheny Gas. Co.*, 138 W.Va. 639, 77 S.E.2d 180 (1953), in finding that Mr. Boyces' own actions in stopping his truck, climbing up, applying shrink wrap to the communications lines, and then grabbing the energized power line were the proximate cause of his injuries.

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

Id. at 652 – 654.

The Matthews Court further explained:

> The proximate cause of an injury is the last negligent act contributing to the injury and without which the injury would not

> have resulted. The proximately cause of an event is that cause which in actual sequence, unbroken by any independent cause, produces the event and without which the event would not have occurred.

Id. at 654 – 655.

In *Lancaster v. Potomac Edison Co. of W. Virginia*, 156 W. Va. 218, 220, 192 S.E.2d 234 (1972), the issue at trial was whether the power company's line should have been insulated. The decedent, an 18-year-old youth, was painting the roof of a home. *Id.* at 237. The power company's line was strung near the eave of the roof. While completing the paint job, he turned around to access the paint bucket, which was attached to a rope located about six or eight feet down from the top of the ladder, when he came in contact with uninsulated wires owned by the defendant. *Id.* The wires carried 12,000 volts of electricity and were located behind the decedent. It was disputed whether the decedent was warned by his employer about the wire. *Id.* at 238.

The lower court submitted the case to the jury, which considered the issues of the primary negligence of the defendant, and the contributory negligence and assumption of risk by the decedent. *Id.* A verdict was entered in favor of plaintiff, defendant appealed, and such verdict was affirmed by the Supreme Court of Appeals of West Virginia. A review of *Lancaster* and cases cited therein, teaches that liability may attach if the victim is lawfully on the premises, and the victim's contact was accidental or inadvertent.

In *Runyan v. Kanawha Water & Light Company*, 68 W.Va. 609, 71 S.E. 259 (1911), a case cited by *Lancaster*, the court found that "workmen engaged in the necessary work of painting a bridge have a right to be on any part of the bridge, and an electric light company which maintains wires on the bridge must keep them properly insulated in order that workmen coming accidentally in contact with the wires may not be injured." *Id.* at 239.

A similar case, *Musser v. Norfolk and Western Railway Company*, 122 W.Va. 365, 9 S.E.2d 524 (1940), held that a person in charge of or maintaining an instrumentality which is inherently dangerous is not liable to one who is injured thereby in a manner in which could not be reasonably anticipated. *Id.* In *Love v. Virginian Power Company*, 86 W.Va. 393, 103 S.E. 352, (1920), the court found that a power company which maintains electric lines of high or dangerous voltage in a place it knows or should anticipate others may lawfully resort for any reason, such as business, pleasure or curiosity, and in such manner as exposes them to danger of contact by accident or inadvertence, is bound to take precautions for their safety by insulation or other adequate means. *Id. See* also, *Thomas v. Electrical Company*, 54 W.Va. 395, 46 S.E. 217 (1903) (duty of electric companies to use very great care . . . where people have a right to go for work, business or pleasure).

These cases all teach the same principles: that it's reasonably foreseeable that people may accidentally or inadvertently contact power lines in places where they have a right to be, and a defendant must take proper precautions. A defendant is not liable, however, if a plaintiff is in a place he should not be and intentionally makes contact with a power line.

The *Harbaugh* Court further stated, "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 conclusion from them." *Harbaugh v. Coffinbarger*, 209 W. Va. 57, 65, 543 S.E.2d 338, 346 (2000) (quoting *Evans v. Farmer*, 148 W.Va. 142, 142 S.E.2d 711 (1963)). However, where all the evidence relied upon by a party is undisputed and susceptible of only one inference, the question of proximate cause becomes a question of law." *Harbaugh v. Coffinbarger*, 209 W. Va. 57, 65, 543 S.E.2d 338, 346 (2000).

Here, as in *Harbaugh*, the question of proximate cause becomes a question of law because the evidence is susceptible of only one inference – that Mr. Boyce's acts were intentional and willful and therefore an intervening cause. Under no set of facts could a jury find that Mr. Boyce's contact with the power line was inadvertent. Here Mr. Boyce made a conscious decision to stop, get out, climb onto his truck, shrink wrap the communications lines and attempt to secure them to the power line. The fact that the results were not anticipated does not create a causal link between Mr. Boyce's actions and Frontiers alleged liability.

C. The Circuit Court Correctly Found That the Actions of Petitioner Were Voluntary and Willful and Operated Independently of Any Alleged Negligent Acts of Respondents Concerning NESC Regulations

Petitioners fail to distinguish *Matthews, supra*, above, but then spend seven pages in their brief arguing that Respondents violated NESC regulations. Because Petitioner's actions were both the proximate cause of his injuries, as well as an intervening and superseding cause, the Circuit Court correctly concluded that "none of the alleged actions of Defendants proximately caused the incident and/or Plaintiffs' alleged damages". Despite Petitioners' assertions that Respondents, or some of them, were negligent as a matter of law concerning clearances and configuration, the Circuit Court correctly found that, because Petitioner actually knew the location and height of the lines, and then intentionally made contact with an energized power line, without proper equipment or training, the alleged negligence of the Respondents (which they deny) didn't cause Petitioners' damages. Therefore, the Circuit Court did not err in concluding that Respondents' alleged negligence was not the proximate cause of Petitioner's Damages.

D. The Circuit Court Correctly Found Maggard v. Appalachian Electric Power Co. Controlling Where Respondents Could Not Reasonably Anticipate That Petitioner Would Place Himself in a Position He Had No Right To Be and Then Intentionally Grab an Energized Power Line.

The Circuit Court correctly cited and relied on *Maggard v. Appalachian Electric Power Co.*, 111 W.Va. 470 163 S.E. 27 (1932), for the proposition 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 . . . ."163 S.E at 30. In *Maggard,* the construction company had contacted the power company, requested the power company to move its electrical lines, and the power company complied, apparently to the satisfaction of the construction company. Thus, the construction company had actual knowledge of the location and height of the electrical lines. The construction company then sent its employee up the boom to release the clamshell from the cable. The employee contacted a power line and was electrocuted. The Court held that there was no way the power company could anticipate that the construction company would act in such a grossly negligent manner. *Id.*

Here, there was no way that any of the Respondents could anticipate that Petitioner would act other than in a prudent and reasonable manner. Petitioner had actual knowledge of the location and height of the utility lines and not only placed himself in harms way, but intentionally contacted the energized line. There was no way any of the Respondents could reasonably anticipate that Petitioner would take such actions, and the Circuit Court correctly found that Respondents were entitled to summary judgment.

Other than argue that the Circuit Court erred in finding the facts in Petitioners' case were "nearly identical", Petitioners do not distinguish *Maggard* or tell this Court why *Maggard* should not be followed. Petitioners didn't suffer damages because he couldn't maneuver his truck.

The injuries occurred because Petitioner made an independent decision to get out, climb unto his truck, place himself in harm's way, and then attempt to raise communication lines with shrink wrap and attach them to an energized electrical line. Such actions were wholly independent of Respondents' alleged negligence, could not have been reasonably anticipated, and were the sole proximate cause of Petitioners' damages.

E. The Circuit Court Correctly Found That Petitioner Intentionally Grabbed an Energized Electrical Line.

Petitioners are now engaging in a game of semantics with this Court, by arguing that Mr. Boyce didn't intend to grab the "primary wire". No, as he succinctly states in Petitioner' Brief, at page 28, "Mr. Boyce was attempting to wrap the already shrink-wrapped communication lines around the wire he believed to be the neutral. In attempting to grab the communication lines again, he made contact with the wire thought to be the neutral, but in reality, he made contact with the primary wire, causing his injuries." Petitioners mistakenly believe this created an issue of fact to be decided by a jury. The Circuit Court correctly found that Petitioner intentionally grabbed a live electrical wire. Whether he believed it was a neutral, as he had admittingly done before, is immaterial when confronted with proximate cause and intervening and superseding cause. What is not disputed, and reasonable minds cannot differ, is that Mr. Boyce, when he encountered communication lines over a residential, rural driveway, stopped, exited his vehicle, climbed on top of his truck, and placed himself in grave danger. These acts could not have been reasonably anticipated by Respondents, and the Circuit Court so found.

F. The Circuit Court Correctly Found That Petitioner Violated Numerous OSHA Regulations When He Placed Himself Within 10 feet of and Made Contact With the Energized Line Without Proper Training or Personal Protective Equipment.

Even if this Court were to find that Petitioner is entitled to an exception under OSHA Construction Industry Regulations 29 CFR 1926 (which Respondents dispute), Petitioners' own statements show that he violated OSHA General Industry Regulations & Standards, 29 CFR 1910. In Petitioners' own Brief, they state: "Mr. Boyce was on top of the boom truck, attempting to fix the possible harms and dangerous situation created by Respondents Frontier and Atlantic's negligence." Pet. Br. at 12.

Section 1910.331(a) applies to qualified and unqualified persons. Petitioner testified that he had no formal training concerning electrical hazards. Thus, he was an unqualified person under OSHA. Section 1910.333(c)(2) specifically excludes unqualified persons from working near overhead lines unless the lines are deenergized and grounded. OSHA regulation § 1910.333(c)(3). Moreover, when an unqualified person is working near overhead lines, he is prohibited from coming closer than 10 feet to the energized line. OSHA regulation § 1910.333(c)(3)(i)[A]. If the vehicle is in transit with the structure lowered, the clearance may be reduced to 4 feet. OSHA regulation §1910.333(c)(3)(iii)[A][1]. Therefore, Petitioners' own statement, that he was attempting to "fix" the lines, brings him squarely within OSHA General Industry regulations. The Circuit Court correctly found that Petitioner violated OSHA regulations when he climbed on top of his truck, applied shrink-wrap to the communications lines, and then grabbed an energized line, regardless of which specific regulation the Circuit Court cited.

G. The Circuit Court Correctly Found That Petitioner's Actions Were An Intervening and Superseding Cause When He Willfully and Intentionally Placed Himself in a Place He Had No Right To Be and Grabbed an Energized Line.

An intervening cause, in order to relieve a person charged with negligence in connection with an injury, must be a negligent act, or omission, which constitutes a new effective cause and operates independently of any other act, making it and it only, the proximate cause of the injury. *Harbaugh v. Coffinbarger*, 209 W. Va. 57, 64, 543 S.E.2d 338, 345 (2000) (quoting Syl. pt. 16, *Lester v. Rose,* 147 W.Va. 575, 130 S.E.2d 80 (1963)).

In *Harbaugh*, the defendant hosted a dinner party attended by the decedent. Another guest brought a .38 caliber revolver to the party. The decedent, eighteen years old, asked for the gun, unloaded it, and then re-loaded it with one bullet. He then spun the cylinder, placed the gun to his head, and pulled the trigger. When the gun failed to discharge, the decedent spun the cylinder again, pulled the trigger again, killing himself. As the *Harbaugh* Court affirmed the lower court, it stated "The lower court further stated that 'the action taken by the adult decedent . . . is of such obvious consequence that it supersedes any other possible effect of another's negligence'". *Id.* The *Harbaugh* Court granted summary judgment in favor of the defendant, stating "if one assumes the absence of intent to kill, the fact remains that the decedent placed a loaded gun to his head and pulled the trigger, spun the cylinder, and pulled the trigger again." *Harbaugh v. Coffinbarger*, 209 W. Va. 57, 64, 543 S.E.2d 338, 345 (2000); See also *Koger v. Mutual of Omaha Insurance Co.*, 152 W.Va. 274, 163 S.E.2d 672 (1968).

In *Yourtee v. Hubbard,* the Supreme Court of Appeals of West Virginia again addressed the function of an intervening cause as severing the causal connection between the original improper action and the damages. The *Yourtee* court noted that "[g]enerally, a willful, malicious, or criminal act breaks the chain of causation." *Harbaugh v. Coffinbarger*, 209 W. Va.

57, 64, 543 S.E.2d 338, 345 (2000) (quoting *Yourtee v. Hubbard,* 196 W.Va. 690, 474 S.E.2d 620 (1996)).

Here, there is no genuine issue of material fact as to whether Mr. Boyce willfully contacted the power line. That he may have believed it to be a neutral line and lacked intent to electrocute himself is irrelevant. Just as the decedent in *Harbaugh* intentionally placed the gun to his head, Mr. Boyce intentionally and willfully placed his hand on the line. The intentional acts of Mr. Boyce were an intervening and superseding cause of the accident. Frontier could not have reasonably anticipated or foreseen that Mr. Boyce would climb on his delivery/boom truck, shrink wrap the communication line, and intentionally contact a power line. Because Mr. Boyce's willful and intentional actions were the sole cause of his injury, no causal connection between his injury and Respondent's communication lines exist.

CONCLUSION

Petitioners' Motion is not applicable under Rule 60(b). Moreover, the Circuit Court correctly found that Mr. Boyce's independent acts were the proximate cause of his injuries and were also an intervening and superseding cause, breaking the causal chain of any alleged acts by Respondents. Because the Circuit Court's Order Granting Summary Judgment in favor of all Respondents was not clear error of law or amount to obvious injustice, Petitioners' appeal should be denied.

Respectfully submitted,

FRONTIER COMMUNICATIONS
OF AMERICA INC.,
FRONTIER COMMUNICATIONS
CORPORATE SERVICES INC.,
FRONTIER COMMUNICATIONS ONLINE
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CERTIFICATE OF SERVICE

I, Charles C. Wise III, counsel for Frontier West Virginia Inc., do hereby certify that I have served a true and correct copy of the foregoing *Brief of Respondents, Frontier Communications of America Inc., Frontier Communications Corporate Services Inc. Frontier Communications Online and Long Distance Inc., and Frontier Communications ILEC Holdings LLC*, this 8th day of September, 2022, upon counsel of record by placing a true copy of same in the United States mail, postage pre-paid and addressed as follows:

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Charles C. Wise III (WVSB # 4616)