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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

EUGENE F. BOYCE, and
KIMBERLY D. BOYCE,

Case No. 22-0292



Plaintiffs Below,
Petitioners,

v.

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

Defendants Below,
Respondents.

RESPONDENT MONONGAHELA POWER COMPANY'S BRIEF

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I. STATEMENT OF THE CASE

A. Factual Background

Petitioners Eugene Boyce and Kimberly Boyce (collectively “Petitioners”) claim entitlement to damages arising from an incident that occurred on the morning of April 11, 2014 in a driveway located at 191 Sand Springs Road, Morgantown, West Virginia (the “Property”) that resulted in Petitioner Eugene Boyce (“Boyce” or “Mr. Boyce”) sustaining significant injuries (hereinafter “Incident”). (See PETAPP00014-PETA00023 generally). On the date of the Incident, Mr. Boyce, while acting in the course and scope of his employment with Lowe’s as a boom operator, arrived on the Property and began driving his truck up the driveway to Brandon Tucker’s residence to deliver various materials. (PETAPP00017 at 16.7-16.19). Upon realizing that his truck would not clear overhead utility lines that ran above the driveway, Mr. Boyce stopped the truck and decided to attempt to move the lines, which consisted of two communications lines and two electrical lines. (PETAPP00417 at 17.14-17.21; PETAPP00418 at 18.18-19.2, 20.3-20.8; PETAPP419 at 24.6-24.14).

Mr. Boyce initially enlisted the help of Mr. Tucker to push on the bottom of the utility lines with wooden boards. (PETAPP00418 at 21.8-21.17). When this proved unsuccessful, Mr. Boyce climbed on top of his truck, wrapped shrink-wrap around the utility lines and grabbed the live electrical line with his bare hand, which resulted in Plaintiff sustaining serious injuries. (PETAPP00419 at 24.9-24.14, 25.2-25.19; PETAPP00420 at 26.1-27.11).

Despite engaging in the aforementioned conduct on the date of the Incident and on numerous prior occasions, Mr. Boyce was merely “self-taught” with respect to the moving of utility lines in order to obtain clearance for vehicles. (PETAPP00351 at 19.2-19.14, 48.5-48.11). Mr. Boyce never received any training regarding: electrical utility lines; the identification of

electrical utility lines versus other types of utility lines; the National Electrical Safety Code (“NESC”); and/or utility lines in general. (PETAPP00357 at 30.2-30.1). In fact, Mr. Boyce was not even generally familiar with the NESC and admittedly had no understanding as to whether it was acceptable to use shrink-wrap to move/wrap utility lines. (PETAPP00369 at 46.18-46.21).

In short, Petitioners are seeking to recover damages arising from an admittedly unfortunate Incident that occurred when Mr. Boyce, intentionally and without permission, attempted to manipulate utility lines owned by the Respondents in this matter. Not surprisingly, as the result of Boyce’s misguided conduct and undisputed lack of experience, training and/or knowledge in the electrical field, he unfortunately sustained significant injury.

B. Procedural Background

Petitioners subsequently filed the Complaint in the instant matter on April 18, 2016, therein advancing negligence claims against the Frontier Communications and Atlantic Broadband defendants, which allegedly owned/operated the subject communication lines, and Monongahela Power Company, which owned/operated the subject electrical lines. (See PETAPP0014-PETAPP00023 generally). Petitioners’ sole basis for the negligence claim against Monongahela Power Company is that the “neutral” electrical line was installed above the “live” electrical line, which Petitioners claim is a violation of unknown “customs, practices and standards of care.”

Discovery proceeded for nearly four (4) years, and the Circuit Court conducted a Pretrial Conference on February 18, 2020. At the Pretrial Conference, the Circuit Court entertained oral argument on multiple Motions for Summary Judgment, including a motion for summary judgment filed by Monongahela Power Company. Based upon the oral arguments and the record presented, the Circuit Court granted each of the Respondents’ Motions for Summary Judgment.

On March 9, 2020, this Court entered an Order Granting the Motions for Summary Judgment (See PETAPP00003-PETAPP00013). Petitioners filed a Motion to Alter Judgment on or about May 15, 2020. (See PETAPP00618-PETAPP00642). Monongahela Power Company filed its objection and Motion to Strike this Motion on May 19, 2020, which the Circuit Court granted, as required pursuant to Section 362 of the U.S. Bankruptcy Code, on May 21, 2020.

On or about May 7, 2021, Co-Respondent Frontier emerged from bankruptcy and notified the Circuit Court shortly thereafter. The Circuit Court subsequently scheduled a December 15, 2021 hearing to address Plaintiffs' Motion to Alter Judgment, and Monongahela Power Company filed its Response in Opposition in advance of the hearing (See PETAPP00643-PETAPP00662). At the December 15, 2021 hearing, the Circuit Court denied Petitioners' Motion to Alter Judgment, and Petitioners thereafter filed the instant appeal to this Honorable Court. (See PETAPP00001-PETAPP00002).

II. SUMMARY OF ARGUMENT

The Circuit Court correctly concluded, based upon its examination and analysis of the undisputed record evidence, that Monongahela Power Company did not proximately cause the Incident because Mr. Boyce's actions constituted a superseding and/or intervening cause that were wholly independent of any actions of Monongahela Power Company. Furthermore, Mr. Boyce's actions, which consisted of climbing on top of a truck to shrink-wrap multiple utilities wires before intentionally grabbing said wires with his bare hand, were not foreseeable so as to create a genuine issue of material fact as to alleged negligence. In reaching its decision, the Circuit Court's partial reliance on *Maggard v. Appalachian Power Co.*, 111 W.Va. 470 (1992) was appropriate.

Notwithstanding the glaring lack of causation evidence, there is no record evidence that Monongahela Power Company violated the National Electrical Safety Code ("NESC") and/or was

otherwise negligent in any way, as evidenced by the undisputed deposition testimony of Petitioners' expert liability witness.

Petitioners' contention that the Circuit Court cited and/or partially relied upon OSHA regulations that are inapplicable operates as nothing more than a red herring and an attempt to divert this Honorable Court's attention from the undisputed fact that Mr. Boyce, a delivery truck driver for Lowe's who had no training, certification, experience, or qualifications in the electrical field and was delivering items to a private homeowner, did not have Monongahela Power Company's (or any other respondents') permission and/or the legal right to intentionally manipulate, handle and alter Monongahela Power Company's facilities that were located numerous feet above the ground and above Mr. Boyce's truck.

The Court accurately noted that Petitioners' expert liability witness testified that Mr. Boyce was a trespasser with respect to Respondents' overhead lines at the time of the Incident. Even if it is determined that the Circuit Court should not have included this information in its Order granting Summary Judgment to Respondents, which Monongahela Power Company denies, this issue has no bearing on the aforementioned issues/elements of negligence that the Circuit Court correctly determined do not exist, thus warranting the grant of summary judgment and denial of Petitioners' Motion to Alter Judgment.

In sum, Petitioners' assignments of errors are misguided and unsupported by the testimony and other evidence in this matter. As follows, affirmation of the Circuit Court's denial of Petitioners' Motion to Alter Judgment, which was based upon the Circuit Court's granting of summary judgment to Respondents, is appropriate.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Monongahela Power Company respectfully requests that it be permitted to present oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate procedure regarding the issues and arguments initially raised in Petitioners' Brief and Monongahela Power Company's response thereto as addressed in the within Brief.

IV. ARGUMENT

A. The Circuit Court Correctly Concluded that Respondents Were Not the Proximate Cause of Mr. Boyce's Injuries and/or the Subject Incident.

Petitioners' contention that the Circuit Court erred in concluding that Respondents were not the proximate cause of the Incident and Mr. Boyce's injuries is misguided and willfully blind to the undisputed evidence that contradicts Petitioners' preferred narrative. Monongahela Power Company does not dispute that, pursuant to *Strahin v. Cleavenger*, 216 W.Va. 175, 603 S.E.2d 197, 207 (2004), "a court's overall purpose in its consideration of foreseeability in conjunction with the duty owed is to discern in general terms whether they type of conduct at issue is sufficiently likely to result in the harm experienced based on the evidence presented" Contrary to Petitioners' assertions, the Circuit Court did just that in considering the undisputed record evidence and determining that that the type of conduct at issue with respect to Monongahela Power Company (i.e. the mere configuration of its overhead lines at issue) is not sufficiently likely to result in the subject Incident and/or Mr. Boyce's injuries.

Petitioners refer to *Lancaster v. Potomac Edison Co. of West Virginia*, 156 W. Va. 218, 231, 192 S.E.2d 234, 242 (1972) in an attempt to support their argument that a genuine issue of material fact exists as to foreseeability. However, as addressed at length in Monongahela Power Company's Reply to Petitioners Response in Opposition to Monongahela Power Company's Motion for Summary Judgment, *Lancaster* is easily distinguishable from the instant matter. In *Lancaster*, the Supreme Court of West Virginia opined that a power company "is bound to take

precautions for [people's] safety by insulation or other adequate means" when electric lines of high or dangerous voltage are located in a place where the power company knows or should anticipate others may lawfully resort. However, Petitioners fail to mention that *Lancaster*, unlike the instant matter, involved power lines that were located extremely close to the eaves of a roof on a residential home. Here, the subject power lines were located high above the ground and nowhere near any surface upon which a person could walk/stand unless he/she engaged in active and illogical conduct to come into close proximity to the power lines. Furthermore, unlike *Lancaster*, Petitioners do not even contend that Monongahela Power Company was negligent by not insulating its lines and solely assert negligence on the basis of the configuration of the lines.

Petitioners proceed to summarily criticize the Circuit Court's citation of *Matthews v. Cumberland & Allegheny Gas Co.*, 138 W.Va. 639, 77 S.E.2d 180 (1953) and the specific reasoning that "the last negligent act contributing to the injury and without which the injury would not have occurred is the proximate cause of the injury" without identifying how or why this reasoning was allegedly erroneous. Instead, Petitioners merely contend, in summary fashion yet again, that the Circuit Court "ignored" unspecified appellate holdings in prior cases that purportedly addressed proximate cause and "yet more cases involving more than one negligent actor." (See Petitioners' Brief at pp. 16-17). The former contention is unsupported by any specific citation or quotation of mandatory legal authority, while the latter contention is wholly misguided as "cases involving more than one negligent actor" are inapplicable to Monongahela Power Company as there is no record evidence that Monongahela Power Company was negligent. Therefore, Petitioners' first assignment of error is unsubstantiated.

B. The Circuit Court Correctly Concluded that Monongahela Power Company Was Not Negligent as a Matter of Law as there was No Evidence that Monongahela Power Company Violated the NESC.

Petitioners erroneously insist that Monongahela Power Company was negligent and violated the NESC. Petitioners unsuccessfully advanced this contention on multiple occasions with the Circuit Court and are now again advancing the same misguided argument. “It is the general and widely accepted rule that in order to prove actionable negligence there must be shown a duty on the part of the person charged with negligence and a breach of such duty.” *Atkinson v. Harman*, 151 W.Va. 1025, 1031, 158 S.E.2d 169 (1967). “A plaintiff must also prove that such negligence was the proximate cause of the injury of which the plaintiff complains.” *Id.*

“[L]iability attaches to a wrongdoer, not because of a breach of a contractual relationship, but because of a breach of duty which results in an injury to others.” *Eastern Steel Constructors, Inc. v. City of Salem*, 209 W.Va. 392, 396, 549 S.E.2d 266 (2001). “The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?” *Id.*

The National Electrical Safety Code (“NESC”) establishes practice and safety standards relating to electric supply systems for private and public utilities. (*See* Institute of Electrical and Electronic Engineers Standards Association, <https://standards.ieee.org/products-services/nesc/products.html>). The Code “sets the ground rules for practice safeguarding of persons during the installation, operation and maintenance of power . . . systems. It also includes work rules for the construction, maintenance, and operation of electrical supply and communication lines and equipment.” *Id.* The Institute of Electrical and Electronic Engineers (“IEEE”) revises the NESC every five years in order to ensure that the Code remains current with relevant changes in the industry and technology. *Id.*

Petitioners' expert witness, James Orosz, testified that Defendant's electrical lines satisfied NESC clearance requirements:

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

A: Yes.

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

A: Yes.

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

A: That's correct.

(PETAPP00434 at 53.20-54.6).

There is no evidence that Monongahela Power Company violated any other provision of the NESC, and the sole basis for Petitioners' claim against Monongahela Power Company is that the "neutral" electrical line was installed above the "live" electrical line. However, this configuration does not violate any specific NESC standard, as evidenced by Mr. Orosz's admission that this configuration may be appropriate. (PETAPP00434 at 58.3-58.7).

Faced with this reality, Petitioners resort to citing non-mandatory precedent from the Supreme Court of Colorado (*Yampa Valley Ass'n. Inc., v. Telecky*, 862 P.2d 252) to support the argument that evidence of compliance "with applicable industry standards in a tort case is both relevant and admissible for determining whether the defendant either breached, or satisfied, the duty of care it owed to an injured plaintiff," but that "such evidence is not conclusive on the issue of due care." (See Petitioners' Brief at p. 24). Monongahela Power Company is somewhat perplexed by this citation as Monongahela Power Company has never contended that NESC requirements and/or violations are not relevant or admissible. To the contrary, Monongahela

Power Company has repeatedly pointed out that there is no evidence that the configuration of its subject overhead lines violated the NESC.

Notwithstanding this fact and irrelevance of Colorado legal authority, *Telecky* is easily distinguishable from the instant matter as it involved a plaintiff who unintentionally came into contact with an electrical line, unlike Mr. Boyce, who climbed on top of his truck, wrapped shrink-wrap around the utility lines and grabbed the live electrical line with his bare hand. (PETAPP00419 at 24.9-24.14, 25.2-25.19; (PETAPP00420 at 26.1-27.11).

Petitioners next cite to *Telecky* to argue that Monongahela Power Company owed an “enhanced degree of care” as its services involved electricity. (Petitioners’ Brief at p. 25). Monongahela Power Company is again perplexed by Petitioners’ citation to *Telecky* on this issue as the Circuit Court found, when considering the undisputed record evidence, that Monongahela Power Company was not negligent and did not breach any duty of care, thereby rendering the reference to the “enhanced degree of care” irrelevant. Petitioners’ reliance on and citation to *Bice v. Wheeling Elec. Co.*, 62 W.Va. 685, 59 S.E. 626 (1907) is therefore likewise irrelevant.

Moreover, pursuant to West Virginia law, electricity providers are not “insurers against all injury” resulting from dangers associated with high voltage electricity. *Sutton v. Monongahela Power Co.*, 151 W.Va. 961, Syllabus ¶ 7, 158 S.E.2d 98 (1967). Monongahela Power Company “is not liable to one who is injured thereby in a manner which could not be reasonably anticipated.” *Id.* at Syllabus ¶ 8.

Petitioners have consistently attempted to divert the Circuit Court’s and now this Honorable Court’s attention away from this undisputed evidence by muddying the waters and summarily concluding that Mr. Boyce’s actions were foreseeable and/or that it should be up to a jury to decide this issue. Applying Petitioners’ logic, nearly every single negligence case that is

filed in the State of West Virginia should survive motions for summary judgment. Of course, such an argument is nonsensical and wholly disregards the undisputed evidence in this case.

In the case *sub judice*, Monongahela Power Company's electrical lines were installed with the appropriate NESC clearance heights. Pursuant to *Maggard v. Appalachian Power Co.*, 111 W.Va. 470, 477-478, (1992) "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, the owner or operator of the lines is not chargeable with negligence where someone, doing an act which he had no reason to expect or anticipate, suffers an injury which might not have been suffered if the wires had been at a higher elevation." (Citing *Braun v. Buffalo Gen. Elec. Co.*, 200 N. Y. 484, 94 N. E. 206, 34 L. R. A. (N. S.) 1089, 140 Am. St. Rep. 645, 21 Ann. Cas. 370).

Monongahela Power Company could not have reasonably anticipated that a truck driver such as Mr. Boyce, without any training and/or experience in the electrical field would, 1) climb on top of a truck into imminent danger with contact from utility wires; 2) apply shrink-wrap around the utility wires; and 3) grab a live electrical line with his bare hand. The Circuit Court recognized the glaring absence of foreseeability of such egregious and reckless conduct, which was entirely separate from the mere presence of Monongahela Power Company's utility lines, and concluded that a reasonable jury could not have determined that the Incident was foreseeable. Petitioners understandably disagree with this conclusion but said disagreement does not equate to an error or misapplication of law so as to warrant reversal of the Circuit Court's rulings.

C. The Circuit Court's Citation and Partial Reliance Upon *Maggard v. Appalachian Electric Power Co.* Was Appropriate.

Petitioners next contend that the Circuit Court erred by citing and partially relying upon *Maggard, supra*, because it was not a "nearly identical" fact pattern. In doing so, Petitioners are again attempting to confuse the issues by portraying irrelevant factual distinctions as grounds for

the application of *Maggard* being deemed an error of law. With respect to Monongahela Power Company, Petitioners contend that *Maggard* should not have been applied because the facts in *Maggard* “did not include any allegations that the primary wire was negligently installed below the neutral wire” and because the plaintiff in *Maggard* “was in the process of constructing a road that was to run beneath the wires[, while] Mr. Boyce was attempting to travel on a road/driveway that already existed.” (Petitioners’ Brief, page. 24). These factual distinctions are entirely irrelevant to the holding and reasoning outlined by the *Maggard* Court and applied by the Circuit Court. These factual distinctions also pale in comparison to the extremely similar and relevant factual similarities between *Maggard* to the instant case.

In *Maggard*, the Supreme Court of West Virginia held that the defendant power company could not have reasonably anticipated that a construction company, “with gross negligence, [would] elevate the end of the boom of the shovel near the wires [32 feet above the road] and send one of its workers up the boom into imminent danger from contact with the wires. *Id* at Syllabus

¶ 2. The Court explained that

[t]he law does not make an electric company an insurer against injury from its high-tension wires. If so, it would be required to insulate them in uninhabited places where persons might go in pursuit of pleasure, or other purpose. If such was the law, the occupants of an airplane could recover if, perchance, the plane came in contact with such wires in lawfully flying on its journey and the occupants injured by the electric current.

* * *

We think it unreasonable to hold defendant responsible for the gross negligence of the contractor, or to hold that defendant could reasonably anticipate that the contractor would conduct his operations other than in a prudent and reasonable manner. The proximate cause of plaintiff’s injury was the negligent act of the contractor. Of course, if the wires had not been there no electrocution would have resulted; but it must be remembered that they were there of prior right.

* * *

On the whole, we have come to the conclusion that defendant could not reasonably anticipate the injury to plaintiff and no legal duty rested upon it to insulate its wires at that place or raise them higher.

Id.

In reaching its conclusion, the *Maggard* Court explicitly relied upon a Minnesota appellate case and explained:

Bunten v. Eastern Minn. Power Co., 178 Minn. 604, 228 N. W. 332, cited by defendant, is in point. There the uninsulated wires were maintained across a spur track of a railway at a height of 25 1/2 feet, ample for the protection of trainmen on top of box cars. A road building machine had been loaded on a flat car without removal of a stationary boom extending 20 feet up in the air. The car was then negligently moved near the overhanging wires bringing the boom close to them, and plaintiff, with others, proceeded to remove the boom. Plaintiff went to the top of the boom to disentangle a cable from the pulley, came in contact with the wires, and was injured. It was argued that it was a question for the jury to determine whether defendant should have anticipated that such machinery might be transported, the dismantling of which after being loaded would endanger the safety of the workmen. The court held it was not a jury question and that defendant had no reason to anticipate that any one would be injured at that height above the railroad spur.

Id.

The *Maggard* Court also referenced a similar case that was decided by the Supreme Court of Wisconsin:

Reiland v. Wisconsin Valley Elec. Co. (1930) 202 Wis. 499, 233 N. W. 91, is somewhat similar to the instant case in its main features. There defendant was called upon by a road contractor to move its wires which hampered road construction and complied with that request and placed the wires higher, to the apparent satisfaction of the contractor. Plaintiff's decedent, twenty-six years old, was operating the steam shovel, went up on the ladder of the boom and attempted to tie up some telephone wires which had sagged in the way of the boom, and in doing so came in contact with the uninsulated wires and was electrocuted. The court held that there was no negligence on the part of defendant, and that if there had been, plaintiff's decedent was guilty of contributory negligence barring recovery. There are other cases of like import referred to in the two cases last cited, but space forbids more than a reference to them.

Here, like *Maggard*, Monongahela Power Company's overhead lines were installed with the appropriate clearance heights. As the *Maggard* Court explained, "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, the owner or operator of the lines is not chargeable with negligence where someone, doing an act which he had no reason to expect or anticipate, suffers an injury which might not have been suffered if the wires had been at a higher elevation." *Id.*, citing *Braun v. Buffalo Gen. Elec. Co.*, 200 N. Y. 484, 94 N. E. 206, 34 L. R. A. (N. S.) 1089, 140 Am. St. Rep. 645, 21 Ann. Cas. 370.

Applying *Maggard*, which partially relied upon *Bunten*, and *Reiland*, the Circuit Court concluded that Monongahela Power Company could not have reasonably anticipated that Mr. Boyce, a truck driver without any training and/or experience in the electrical field, would: 1) climb on top of a truck into imminent danger with contact from utility wires; 2) apply shrink-wrap around the utility wires; and 3) grab a live electrical line with his bare hand. (PETAPP00419 at 24.9-24.14, 25.2-25.19; PETAPP00420 at 26.1-27.11). The Circuit Court's ruling is consistent with the explicit reasoning and holding in *Maggard* that the owner or operator of electrical lines ("at a height in the air at which they would not come into contact or dangerous proximity to persons not reasonably expected to come near them") "is not chargeable with negligence where someone, doing an act which he had no reason to expect or anticipate, suffers an injury which might not have been suffered if the wires had been at a higher elevation." According, Petitioners' third assignment of error is unsubstantiated.

D. The Circuit Court Correctly Cited and Relied Upon the Undisputed Record Evidence that Mr. Boyce Intentionally Grabbed Monongahela Power Company's Live Electric Wire.

Petitioners next incredibly contend that the Circuit Court erred in merely accepting the

undisputed evidence that Mr. Boyce intentionally applied shrink wrap around utility wires and intentionally grabbed a live electrical line with his bare hand. It is undisputed that Mr. Boyce voluntarily and intentionally: 1) climbed on top of a truck into imminent danger with contact from utility wires; 2) applied shrink-wrap around the utility wires; and 3) grab a live electrical line with his bare hand. (PETAPP00419 at 24.9-24.14, 25.2-25.19; PETAPP00420 at 26.1-27.11). The fact that Mr. Boyce allegedly did not know that he was grabbing a live electrical line does not somehow negate any of his voluntarily and intentional actions in doing so. Petitioners are playing a game of semantics and attempting to confuse the issues by misleading this Honorable Court by suggesting that the Circuit Court granted summary judgment and denied Petitioner's Motion to Alter Judgment on the basis that Mr. Boyce knew prior to the Incident that he was specifically grabbing a live electrical line and intended to harm himself. Neither Monongahela Power Company nor any other respondent has advanced such an argument, and the Circuit Court made no such finding with respect to Mr. Boyce's personal knowledge prior to the Incident that he was grabbing a live electrical wire. To the contrary, the Circuit Court merely accepted the undisputed evidence and testimony that Mr. Boyce applied shrink-wrap around multiple utility lines and thereafter intentionally and voluntary grabbed one of the lines.

E. **Petitioners' Argument Regarding the Circuit Court's Reference to OSHA Regulations is Irrelevant and Inapplicable to Monongahela Power Company.**

Petitioners' next assignment of error pertains to the Circuit Court's reference to specific OSHA regulations near the conclusion of its Order granting summary judgment that Petitioners contend are not applicable to the Incident and/or Mr. Boyce. Petitioners are advancing this argument a second time, after unsuccessfully doing so in their Motion to Alter Judgment, in an attempt to divert this Honorable Court's attention from the undisputed fact that Mr. Boyce, a delivery truck driver for Lowe's who had no training, certification, experience, or qualifications

in the electrical field and was delivering items to a private homeowner, did not have Mon Power's (or any other defendants') permission and/or the legal right to intentionally manipulate, handle and alter Monongahela Power Company's facilities that were located numerous feet above the ground and above Mr. Boyce's truck.

Notwithstanding the alleged applicability or inapplicability of the OSHA regulations referenced in the Circuit Court's Order, these regulations played absolutely no role in the Circuit Court's grant of Monongahela Power Company's motion for summary judgment and/or denial of Petitioners' Motion to Alter Judgment (as it pertains to Monongahela Power Company). As previously noted, Monongahela Power Company did not advance any arguments pertaining to OSHA in its Motion for Summary Judgment and/or during oral argument on its Motion for Summary Judgment. Monongahela Power Company likewise did not advance any arguments regarding the applicability of specific OSHA regulations when opposing Petitioners' Motion to Alter Judgment. Put simply, Petitioners' fifth assignment of error is both irrelevant and inapplicable as to Monongahela Power Company.

F. The Circuit Court Correctly Concluded that Mr. Boyce's Actions Constituted Intervening and/or Superseding Causes that Were Not Foreseeable.

In their sixth assignment of error, Petitioners largely duplicate one of their previous assignments of error by arguing that the Circuit Court erred by concluding that Mr. Boyce's intentional and voluntarily actions immediately prior to the Incident constituted a superseding and/or intervening cause. It is worth reiterating that these actions consisted of Mr. Boyce, a delivery truck driver with no electrical training: 1) climbing on top of a truck into imminent danger with contact from utility wires; 2) applying shrink-wrap around the utility wires; and 3) grabbing a live electrical line with his bare hand.

Thus, Petitioners are specifically arguing that Mr. Boyce's actions do not operate independently of the configuration of Monongahela Power Company's electrical lines (which did not violate the NESC). In advancing their argument, Petitioners mistakenly rely upon the unsubstantiated contention that Monongahela Power Company was negligent and that said negligence was one of the proximate causes of the Incident. As previously noted, there was no record evidence that Monongahela Power Company was negligent, which the Circuit Court recognized.

Petitioners proceed to summarily conclude that the Circuit Court should have allowed the jury to reach a conclusion on this issue because "questions of negligence . . . proximate cause, intervening cause and concurrent negligence are questions of fact for the jury where the evidence is conflicting or when the facts, though undisputed, are such that reasonable men draw different conclusions." *Evans v. Farmer*, 148 W.Va. 142, 133 S.E.2d 710, Syl. Pt. 2 (1963).

Petitioners' sole basis for the negligence claim against Monongahela Power Company is that the "neutral" electrical line was installed above the "live" electrical line, which Petitioners claim is a violation of unknown "customs, practices and standards of care." Mr. Boyce's negligent actions (climbing on top of a truck into imminent danger with contact from utility wires, applying shrink-wrap around the utility wires, grabbing a "live" electrical line with his bare hand) operate wholly independently of Monongahela Power Company's relevant actions and serve as the only proximate cause of the Incident as Mr. Boyce's negligent actions, unlike Monongahela Power Company's actions, were reasonably expected to produce an injury and the specific type of incident that unfortunately occurred. While issues of negligence and proximate causation are often appropriate for a jury's consideration, there are instances, such as the case *sub judice*, where summary judgment on those issues is appropriate as reasonable persons could not draw different

conclusions. The Circuit Court appropriately recognized this and was correct in granting summary judgment.

G. The Circuit Court Did Not Err in its Finding, based upon the Testimony of James Orosz, that Mr. Boyce was a Trespasser.

Petitioners next contend that the Circuit Court erred by noting, in its Order granting summary judgment to Respondents, that Petitioners' expert, James Orosz ("Orosz"), testified that Mr. Boyce was a trespasser with respect to the Respondents' overhead lines. Petitioners specifically aver that noting this testimony was erroneous because Petitioners' counsel objected to questions posed to Orosz during the deposition regarding the issue of trespassing and that an evidentiary hearing was not held to determine the admissibility of this testimony.

Put simply, this argument is a red herring. In its Order, the Circuit Court merely notes Mr. Orosz offered testimony that Mr. Boyce was a trespasser at the time of the Incident. The Circuit Court does not explicitly hold as a matter of law that Mr. Boyce was a trespasser, despite the fact that the undisputed facts render it apparent that Mr. Boyce, a delivery driver employed by Lowe's, was not permitted to move, grab and/or otherwise manipulate utility lines located on another person's property that were owned, operated and controlled by the Respondents.

Furthermore, the determination as to whether Mr. Boyce was a trespasser at the time of the Incident (with respect to Respondents' overhead wires) is entirely unrelated to the aforementioned issues of proximate cause, superseding/intervening cause(s), lack of foreseeability, and the lack of any evidence of negligence. Even if this Circuit Court determines that the one sentence contained in the Circuit Court's order regarding Orosz' testimony should not have been included, which Monongahela Power Company denies, it has absolutely no bearing on the Circuit Court's ultimate conclusions and grant of summary judgment to Monongahela Power Company.

IV. CONCLUSION

Based upon the foregoing, it is apparent that the Circuit Court did not err in granting summary to Monongahela Power Company. No genuine issues of material fact exist, and Monongahela Power Company respectfully requests that this Honorable Court affirm the Circuit Court's denial of Petitioners' Motion to Alter Judgment, which upheld its grant of summary judgment in Monongahela Power Company's favor.

Respectfully submitted,



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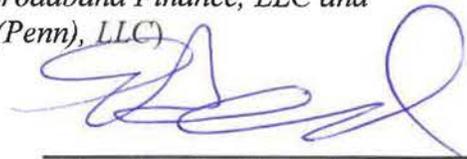
CERTIFICATE OF SERVICE

The undersigned does hereby certify that he served a true and accurate copy of the within *Respondent Monongahela Power Company's Brief* on this 7th day of September, 2022, via United State mail, postage prepaid and/or via email, upon the following;

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