No. 22-639

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.,
MOUNTAINEER GAS COMPANY,

Petitioner,

v.

THE HONORABLE CRAIG TATTERSON,
THE ESTATE OF CORY COLTON KEITH CARPER, et al.,

Respondents.

RESPONDENTS' BRIEF

From the Circuit Court of Roane County
Civil Action No. 19-C-9

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QUESTIONS PRESENTED

Question 1:

Whether the Petition meets its burden under the five (5) factor criteria for the rare issuance of a Writ of Prohibition, a remedy described by this Court as "drastic" and to be invoked "only in extraordinary situations."

Question 2:

Whether the Circuit Court was "clearly erroneous" in applying well-established principles to find that 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 and that there are well-established doctrines to be applied when there are allegations of multiple causes by multiple actors.

Question 3:

Rather than focusing on any action of the Public Service Commission, whether the Petitioner's proffered construction of the language of its Tariff as providing immunity from liability to Respondents fails because the scope of the Tariff's application, if at all, requires findings of fact and Petitioner's proffered construction would otherwise be unreasonable, given express duties under the Statutes, Rules and Common Law of West Virginia.

STATEMENT OF THE CASE

This case arises from a fatal December 17, 2018 Carbon Monoxide poisoning following a vent pipe explosion at the Carper family home in Looneyville, West Virginia. *See* Order Denying Motion for Summary Judgment (A. 0001-0030) (hereafter "Order"). This Fatal Event led to the tragic death of ten (10) year old Cory Carper, as well as severe injuries to his mom and dad, Respondents Amanda and Chris Carper, and to Cory's best friend who was spending the night, then ten (10) year old Respondent, Elijah Armstead. *See* Order ¶ 2 (A. 0003). The other Respondents came to the horrific scene the next day after no contact and found their loved ones poisoned at the Carper home. *Id*. The Respondents brought claims against the Petitioner under

the legal theories of Negligence (and Negligent Infliction of Emotional Distress) for its conduct (i.e., failure to maintain its equipment), as well as under Strict Liability, Failure to Warn, Breach of Warranty and Breach of Contract for its product (i.e., dangerously poor quality of gas provided). *Id*. at ¶¶ 6-8 (A. 0003-4). Respondents allege that each was a separate and independent cause of the Fatal Event. *Id*. at ¶¶ 44, 46 (A. 0010-11).

The Carper Respondents are a Roane County family who were residential natural gas customers of the Petitioner, Mountaineer Gas Company ("MGC"). Although they paid a monthly gas bill from Petitioner MGC, Petitioner MGC provided the Carpers with natural gas from a third party pipeline. *See* Petition, p. 7. While the Respondents knew that they paid Petitioner for natural gas from a nearby pipeline, there is no evidence that they were personally informed of the dangerous nature of the gas, or that Defendant was not properly maintaining its equipment. Of critical importance to Respondents' claims, after receiving the gas from the third party pipeline, Petitioner MGC first routed the natural gas through its own equipment ("Gas Devices") before providing it for the Carper home. *See* Order ¶ 16 (A. 00005); Petition, p. 7. Petitioner's Gas Devices include its Piping, Percolator ("Perk") Tank, Regulator and Meter, all of which are solely installed, controlled, maintained and serviced by the Petitioner. *Id.* There is no dispute that the Gas Devices require proper inspection, service and maintenance by the Petitioner. *Id*. The specific Gas Devices at issue service only the Carper home. *Id.*

All of the Respondents' causes of action fall into one (1) of two (2) general areas: (1) those resulting from the Petitioner's failure to exercise due care in the maintenance of its Gas Devices (i.e., Petitioner's Negligence); and (2) those arising from the dangerously poor quality of the natural gas Petitioner supplied to the Carpers (i.e., Petitioner's "Bad Gas"). The Respondents

claim that both Petitioner's conduct, as well as its product, each caused the fouling of the subject furnace and were, thus, each a cause of the pipe explosion that allowed the fatal Carbon Monoxide inundation on December 17, 2018. *See* Order ¶ 38, (A. 007-8). At the close of discovery, Petitioner filed a Motion for Summary Judgment, the denial of which is the subject of the present Petition. *See* Motion for Summary Judgment (A. 0069-89) (hereafter "MSJ"). The Respondents contend that issuance of the extraordinary remedy of a Writ of Prohibition is improper as the Circuit Court did not exceed its legitimate powers and commit a substantial legal error. Further, Respondents contend that the Circuit Court correctly denied the Motion, having found both that there are multiple questions of fact proper for jury determination, and that the Petitioner is not entitled to judgment as a matter of law.

A. The Fatal Explosion

The parties agree that the Carbon Monoxide entered the Carper home through the natural gas fired furnace, escaping through a metal seam in an air exhaust vent that was "blown out" from an explosion of Petitioner MGC's natural gas. *See* Order at ¶ 37 (A. 0008). With regard to the cause of that initial pipe explosion, Respondents' Engineering Expert 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.

See Order ¶ 42 (A. 0009); Response to MSJ, Exhibit A, Expert Natoli Report p. 19, (A. 0369). In turn, the explosion which blew out the metal seam was caused by an accumulation of soot and carbon build-up from incomplete combustion of Petitioner'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.

See Order ¶ 42 (A. 0009); Response to MSJ, Exhibit A, Expert Natoli Report p. 25, (A. 0375).

The question at the heart of this case is the factual determination of the cause or causes of that accumulation of soot and carbon build-up in the furnace – known as "fouling" – which led to the Fatal Explosion. The Respondents contend that the Petitioner's Negligent conduct in failing to maintain its Gas Devices was a cause. *See* Order ¶ 38 (A. 0008-09). The Respondents also contend that the unreasonably dangerous condition of Petitioner's product was a cause. *Id.* On the contrary, the Petitioner contends that neither its conduct nor its product caused or contributed to the pipe explosion that allowed the fatal inundation of Carbon Monoxide. *See* Order at ¶ 47 (App. 0010). Instead, the Petitioner defends with allegations that one or more other, unrelated causes, involving the Respondents or other actors, was/were the sole cause of the Fatal Event. These allegations include the Comparative Negligence of the homeowner Respondents, the Negligence of a licensed HVAC servicer who performed Annual Inspections on the furnace prior to the Fatal Event, and/or the unidentified person or entity responsible for the improper placement of Rolloff Switches in the furnace. *See* Order at ¶¶ 47, 52-55 (A. 0012-13).[1]

Because the Circuit Court correctly ruled that the determination of the cause or causes of the Fatal Event is a jury question not circumvented by the operation of the Tariff, a brief outline of the competing causation claims presented to the Circuit Court is necessary.

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[1]Testimony includes recollection of a "short, fat, dark-haired man" looking at the furnace prior to the Fatal Event, but the witness could not provide an identity or specific date. *See* Order at ¶ 34 (A. 0034); Response to MSJ, Exhibit H, Amanda Carper Deposition, 69:18-23 (A. 0495).

B. Respondents' First Causation Claim: Petitioner's Negligence as a Cause of the Fatal Explosion

The Respondents' first causation claim is that the Fatal Explosion was caused by the Petitioner's Negligence in failing to maintain its Gas Devices. This claim is based on evidence adduced that the Petitioner's played an active role in supplying gas to Respondents for profit. Petitioner concedes that it assumed custody and control of the natural gas supply from a third party and then affirmatively directed it through Gas Devices that it owned and which required due care in their maintenance and service. In undertaking these responsibilities in the distribution of natural gas to the Carper family, the Petitioner assumed legal duties to carry out its responsibilities with due care. This is the essence of Respondents' Negligence claim, which, as discussed, *infra*, Petitioner concedes is the type of claim permitted *even with its proffered construction of the Tariff.*

Those responsibilities assumed by the Petitioner as a Public Utility include a statutory duty "to establish and maintain adequate and suitable facilities, safety appliances or other suitable devices" and to "perform such service in respect thereto which is reasonable, safe and sufficient." *W. Va. Code* § 24-3-1 (2018); *cf State v. Blair*, 190 W.Va. 425, 438 S.E.2d 605 (1993) (statute held as too vague to allow a criminal prosecution). This statutory duty was referenced in *Reed v. Smith Lumber Co.*, 165 W.Va. 415, 268 S.E.2d 70 (1980), in which this Court also recognized that there exists a common sense, common law duty on Public Utilities 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*, 165 W.Va. at 418, 268, S.E.2d at 71 (*citing Groff v. Charleston-Dunbar Nat'l Gas Co.*, 110 W.Va. 54, 156 S.E. 881 (1931))(emphasis added).

Discovery revealed that Petitioner had no set schedule for servicing its Gas Devices for the Carper home, and that the last time it actually did so prior to the December 17, 2018 Fatal Explosion was on March 17, 2017. *See* Order at ¶ 19 (A. 0005-6).; Response to MSJ, Exhibit C, Parker Deposition 30:9-13, (A. 0489) and Exhibit D (A. 0490-91). On that date, MGC Service Technician Randy Parker noted "Serviced Perk Tank and Reg[ulator]. Tested and Restored." *Id.*; Response to MSJ, Exhibit D, (App. 0490-91). MGC's Service Technician returned to the Carper home almost a year later, on March 3, 2018 to "Investigate a High Bill," but performed no service work on the MGC Gas Devices serving the Carpers. *See* Order ¶ 21 (A. 0006); Response to MSJ, Exhibit E, (App. 0492-93). Instead, a note was recorded that "cust[omer] not home - called no answer. Left knob card explaining usage and est[imated] reads." *Id.* MGC's Technician noted that he found and left the gas supply active and, while he found Atmospheric Corrosion on MGC's Gas Devices, that the same was "Not Repaired." *Id.*

With these facts, and in support of the breach and causation elements of the Negligence claim, Respondents' Engineering Expert opined that the Petitioner's acts or omissions in carrying out its maintenance and servicing of its Gas Devices were improper and created the dangerous condition that lead to the Fatal Event:

> 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.

See Order ¶ 46 (A. 0011); Response to MSJ, Exhibit A at pp. 25-26, (A. 0375).

This is the basis of Respondents' claim that Petitioner's Negligence in failing to properly maintain its Gas Devices was a cause of the Fatal Event.

C. Respondents' Second Causation Claim: Petitioner's "Bad Gas" as a Cause of the Fatal Explosion

Respondents separately and independently claim that Petitioner's "Bad Gas" was a cause of the Fatal Event. In support thereof, Respondents adduced opinion testimony from their Engineering Experts, who reviewed Petitioner's analysis of Gas Samples taken by the Petitioner on December 19, 2018 – just two (2) days after the Fatal Event. Respondents' Experts opined that excessive long-chain hydrocarbons rendered the gas provided by the Petitioner unreasonably dangerous and was also a cause of the fouling of the Carpers' furnace:

> 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.

See Order ¶ 44 (A. 0010); Response to MSJ, Exhibit A, Expert Natoli Report p. 25 (A. 0375); *see also* Response to MSJ, Exhibit B, Expert Davis Report pp. 7-8 (A. 0390-91).

This is the basis of Respondents' claim that Petitioner's product ("Bad Gas") was a cause of the Fatal Event.

D. Petitioner's Competing Customer Equipment Causation Argument

On the contrary, Petitioner contends that the Fatal Event was caused by neither its Negligence nor its Bad Gas, but instead solely caused by the Carpers' furnace, for which it should not be liable. Specifically, its Motion for Summary Judgment focused on the legal effect of Rollout Switches in the Carpers' furnace that were not properly in their place and their role in the events following the explosion. In doing so, Petitioner argues that an actor other than it caused the Fatal Event. In its Answer, Petitioner asserted several corresponding affirmative defenses, including: (1) Comparative Fault ("[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."); (2) Intervening or Superseding Causation ("plaintiffs' injuries and/or damages, if any, were caused by intervening and/or superseding causes that relieve Mountaineer Gas from any potential liability."; and (3) Fault of Others ("[p]laintiffs' injuries and damage, if any, were caused in whole or in part by the acts or omission of Plaintiffs or others for whose conduct Mountaineer Gas is not responsible." *See* Order ¶¶ 52-54, (A. 0013). Additionally, Petitioner 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 HVAC Company, Capital Maintenance, LLP, as non-parties who may be considered by the trier of fact to be wholly or partially at fault. *See* Order ¶ 55, (A. 0013).

This is the basis of Petitioner's position that neither its conduct nor its product was a cause of Fatal Event, but that its sole cause was conduct of another.

SUMMARY OF ARGUMENT

The Petition for Writ of Prohibition should be denied as it fails under the five (5) factors set forth in Syllabus Point 4 of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996) used to determine whether the rarely proper, and extraordinary remedy of a Writ of Prohibition should be issued. Petitioner has an adequate means to obtain the desired relief through a direct appeal, which would arguably be more specifically tailored after the facts that govern a Tariff's operation are determined below. Furthermore, the normal course of a direct appeal could correct any perceived damage or prejudice it argues to suffer by the interlocutory Order denying the Motion for Summary Judgment. Finally, the legal issues raised herein are neither an "oft repeated error" nor evidence a "persistent disregard" of law, but are fairly characterized as a matter of first impression. Considered together, a Writ of Prohibition is not warranted.

Under the third and most weighty factor, this Circuit Court's cautious approach does not rise to the level of being "clearly erroneous," as to warrant issuance of a Writ. The Circuit Court correctly found that determinations of fact are necessary to properly address the question of Petitioner's liability, if any, for causing the Fatal Event. Even if this Honorable Court would

ultimately disagree on direct appeal, the Circuit Court's decision was well-founded. It relied upon long-standing West Virginia law that found jury determination to be proper in questions of Negligence and Causation. Further, the Circuit Court noted that the Petitioner conceded that Negligence claims are permitted even under its proffered construction of the Tariff, the very language of which contemplates required factual findings to ascertain its application, if at all.

The Circuit Court's decision was not clearly erroneous in finding that West Virginia has a well-developed body of law to address situations like the present where there are supported, competing theories of multiple causes by multiple actors. These doctrines include Concurrent Negligence, Comparative Negligence and Intervening Cause, all of which are usually matters for jury determination. Particularly when applied in the context of West Virginia's Several Liability, the Circuit Court found adequate protections in order to proceed to the fact finding stage.

Finally, the Circuit Court was not clearly erroneous in finding that Petitioner was not entitled to Judgment as a matter of law through its construction of the Tariff. The Tariff cannot be used to avoid express duties imposed by the Statutes, Rules or Common Law of West Virginia. Likewise, the Tariff should not be construed in a manner that would provide absolute immunity to Respondents' claims, particularly when a sufficiently supported Negligence case is presented. The Circuit Court was not clearly erroneous in finding that Petitioner's construction, if accepted, would be unreasonable and exceed the delegated authority given to the PSC by the West Virginia Legislature.

STATEMENT RE: ORAL ARGUMENT & DECISION

Respondents respectfully request oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure as the case does involve issues of first impression and fundamental public importance.

ARGUMENT

A. A Writ of Prohibition is a Drastic Remedy to Be Invoked Only in Extraordinary Situations and Should Not Be Issued Here

Given West Virginia's appeal by right with a guaranteed written decision on the merits, the sudden disruption of a civil matter properly before a Circuit Court through a Writ of Prohibition is rarely appropriate. This Honorable Court has stated:

> Prohibition lies only to restrain inferior courts from proceedings in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers, and may not be used as a substitute for [a petition for appeal] or certiorari.

Syl. Pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953). The Court has highlighted the rarity of its application, holding that "writs of prohibition ... provide a **drastic remedy** to be invoked **only in extraordinary situations**." *State ex rel. Allen v. Bedell*, 193 W.Va. 32, 36, 454 S.E.2d 77, 82 (1994) (Cleckley, J., concurring)(emphasis added); *see also State ex rel. Vanderra Resources, LLC v. Hummel*, 242 W. Va. 35, 40, 829 S.E.2d 35, 40 (2019)(stating that "[w]e are mindful that a writ of prohibition is an **extraordinary remedy** and not available in routine circumstances . . . .")(emphasis added). This Court has further stated:

> [T]his Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

State ex rel. Vanderra Resources, LLC v. Hummel, 242 W. Va. 35, 40, 829 S.E.2d 35, 40 (2019) (*citing with approval* Syl. Pt. 1, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979), *superseded by statute on other grounds as stated in State ex rel. Thornhill Grp., Inc. v. King*, 233 W. Va. 564, 759 S.E.2d 795 (2014)).

There is a clearly articulated standard for whether a Writ of Prohibition should issue in instances, such as here, where a party to the underlying action alleges that the Circuit Court has exceeded its legitimate powers:

> "In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight."

Syl. Pt 1, *State ex rel. Wiseman v. Henning*, 212 W. Va. 128, 130, 569 S.E.2d 204, 206 (2002)(*quoting* Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996)).

Factors 1 and 2 of *State ex rel. Hoover v. Berger* underscore that the rare, extraordinary remedy of a Writ of Prohibition on an interlocutory Circuit Court Order is rarely appropriate substitute for the preferred regular process of a direct appeal. First, in the case at hand, the Petitioner clearly has other adequate means to obtain the desired result – such as filing an Appeal of the denial of Summary Judgment in the event of verdict for the Respondents at Trial. Depending on the Jury's findings of fact as to the causes of the Fatal Event, and even as to

whether Defendant was Negligent as a primary matter, there may be no need for an appeal. However, if so, then this Court routinely handles appeals from dispositive motions by an aggrieved party, and should do so here, only if warranted.

Second, by allowing the Circuit Court to continue handling the case, the Petitioner will neither be damaged nor prejudiced in any way *that is not correctable on Appeal*. Should Respondents prevail at Trial, and an Appeal be taken which includes the Circuit Court's Summary Judgment Order as an Assignment of Error, then the appellate process allows, through its normal course, argument to be heard and, if appropriate, to reverse the Circuit Court on this issue. The Court should allow that process to continue in its normal course and only in the event that it is appropriate after doing so, correct any perceived error below.

The third factor of *State ex rel. Hoover v. Berger* is to be given substantial weight. It focuses on whether the Circuit Court's Order is clearly erroneous as a matter of law. As discussed in Section V.B. *infra*, Respondents contend that the Circuit Court's decision to deny Petitioner's Motion for Summary Judgment was sound and supported by the evidence. While there is a dispute as a matter of law as to whether the Respondents' "Bad Gas" claim (and those causes of action which rely thereon – Strict Liability, Failure to Warn, Breach of Warranty and Breach of Contract) is foreclosed by the Tariff, both sides agree that Negligence claims are permitted, *even under Petitioner's proffered construction of the Tariff*. Being a fact-driven, case-specific question, the Petitioner concedes that "**[a] plaintiff's allegations and the facts of a given incident dictate how a tariff applies, if at all.**" *See* Petition, p. 26 (emphasis added). There must be a determination of those facts in order to even determine whether, and if so, how, the Tariff would apply to Respondents' claims. The Circuit Court was, therefore, wholly correct

in denying the Motion for Summary Judgment and sending the case for factual determinations by the Jury, *even on the Tariff defenses*.

Factors 4 and 5 of *State ex rel. Hoover v. Berger* focus on whether the Circuit Court's decision reflects an "oft repeated error" or "manifests persistent disregard" for law, and whether the Order raises issues of law of first impression. *Id*. The former is inapplicable as there does not appear to be any other instance in which a similar decision has been made in order to be "oft repeated" or "persistent." The specific dispute between the parties does appear to be a matter of first impression, but it is the Respondents' position that the fact-specific application of a Tariff, as conceded by the Petitioner, would tend against addressing "new and important problems" or even taking up issues of law of first impression, *until those necessary factual determinations, which "dictate how a tariff applies, if at all," are made in the Circuit Court below.*

Accordingly Respondents respectfully submit that the rare issuance of a Writ of Prohibition would be improper under the facts set forth by this Honorable Court in Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

B. The Circuit Court's Order was Not Clearly Erroneous

Expounding upon Factor 3 of Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996), Respondents contend that the Circuit Court's Interlocutory Order of July 13, 2022 was not clearly erroneous, but instead wholly proper.

1. The Circuit Court Correctly Recognized that Each of Respondent's Causes of the Fatal Event Require Jury Determination

The Circuit Court denied Petitioner's Motion for Summary Judgment because it found that multiple questions of fact exist for jury determination, particularly as to the causation of the

fatal event, and because Defendant is not entitled to judgment as a matter of law. *See* Order at p. 28 (A. 0029). While the Petitioner states that it is only raising the issue of the legal implications of the Tariff, in doing so, it necessarily implicates the Circuit Court's fact-driven causation findings with regard to the Respondents' furnace. This aspect of the parties' dispute focuses on the legal effect of what are argued by the parties as multiple, competing causes of the Fatal Event: (1) the Petitioner's negligence in maintaining its Gas Devices, which fouled the Respondents' furnace; (2) the dangerously poor quality of Petitioner's natural gas, which fouled the Respondent's furnace; and/or (3) whether an actor other than Petitioner MGC is liable for failing to maintain or improperly service the furnace, namely the placement of the furnace's Roll-Out Switches at the time. Petitioner's argument is that the Tariff should be construed to as to eliminate the need for findings of fact as to causation, even as to supported allegations that its own Negligence was a cause of the fouling to the Customer's Equipment. The framing of the Petition as only challenging "legal issues concerning the application of the Tariff," attempts to lead away from the Circuit Court's extensive rulings based upon the well-established province of the Jury in matters of Negligence and Causation.

2. Petitioner concedes that its Tariff permits Negligence Claims

The Petition makes multiple concessions that *even with its proffered construction of the Tariff*, it can be held legally liable for damages which are caused by its Negligence. This is a matter of primary importance to the viability of this case. To this end, the Petition contains the following statements:

- ". . . MGC's Tariff only permits claims for negligence." (Petition, p.14)
- "MGC is not immune from suit . . . ." (Petition, p. 15)

- "MGC is not suggesting that it is immune from claims for negligence." (Petition, p. 26)
- "Negligence claims are allowed, subject to the tariff." (Petition, p. 36).

Even assuming that the Petitioner is ultimately found to be correct on the application of the Tariff to Respondents' "Bad Gas" claims, a Jury could still determine that Petitioner breached a legal duty by failing to maintain its Gas Devices and could find Petitioner's breaches to be a cause of injury to Respondents. In that case, the Negligence claim will have been proven. The concession that Tariffs do not provide absolute immunity was also noted by the Circuit Court in properly denying the Motion for Summary Judgment. *See* Order ¶49 (A. 0012).

3. The Language of Petitioner's Tariff Itself Contemplates the Need for Finding of Facts to Determine the Scope of its Application, if at all

It is correctly noted by the Petitioner that "[a] plaintiff's allegations and the facts of a given incident dictate how a tariff applies, if at all." (Petition, p. 26). In making its Tariff arguments, Petitioner proffers its construction of three (3) provisions of the Petitioner's Tariff. First, Petitioner cites Tariff Section 3.1, a section addressing liability for injuries to persons arising from a cause inside the Customers' property line. It reads:

> 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 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.***

See Petition at p.12-13, MSJ Motion, Ex. M, Tariff at § 2.6 (A. 0255) (emphasis added). Twice within this section of the Tariff, any limitation of liability is explicitly subject to an exception for

injury which is "the result of" – i.e., caused – by Petitioner's Negligence. All parties agree and the Circuit Court recognized that the Respondents have alleged injury to persons as "the result of negligence of [and on the part of]the Company," – namely that Petitioner's failure to maintain its Gas Devices was a cause of the Fatal Event. If the jury determines factually that the Petitioner was Negligent, and that Petitioner's Negligence was a cause of the Respondent's damages, then the language of Section 2.6 itself would permit liability, only for that portion of Respondents' damages its Negligence is found to have caused. If the jury determines factually that the Petitioner was not Negligent, or that its Negligence was not a cause of the Respondent's damages, then there would be no liability for the Petitioner in any event, notwithstanding the Tariff.

Petitioner also cites Tariff Section 3.3, a section addressing liability for injuries to persons caused by Customer Equipment. That provision reads:

> 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 the Customer's premises. The Company will not be responsible for the use, care of handling of the gas service delivered to Customer after same passes beyond the point of delivery.

See Petition at p.13, MSJ Motion, Ex. M, Tariff at § 3.3 (A. 0256) (emphasis added). However, this section of the Tariff likewise contains language that conditions any limitation of Petitioner's liability to that which is "by reason of" – i.e., caused by – the Customer's Equipment. This is precisely the subject of the Customer Equipment Defense addressed *infra*. Our law already handles this properly under the mechanics of Comparative Fault and Several Liability. To the extent that the Jury determines that the Customer's Equipment was a cause of the Fatal Event and assigns a percentage of fault, then Petitioner would not be liable in any event for that share of

Respondents' damage by operation of the Doctrine of Several Liability under West Virginia Code section 55-7-13c(a) (2020). As such, Petitioners' concern for being held liable for damages beyond its own fault is without merit, and if the Jury determines that Petitioners' competing theory or theories of causation by another prevail, it is protected and the Tariff's limitation would be upheld, as a matter of practical reality.

Finally, Petitioner cites Tariff Section 2.6, a section addressing Warrant(ies) made by Petitioner as to the quality of its natural gas sold to "Mainline Consumers," usually West Virginians living in rural areas of the Mountain State, like the Respondents. It reads:

> 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.

See Petition at p.12, MSJ Motion, Ex. M, Tariff at § 2.6 (A. 0255) (emphasis added). This is the Tariff Section that underlies Petitioner's defense to the Respondents' "Bad Gas" theory. As a primary matter, Respondents maintain the Tariff cannot be construed in any event by Petitioner to relieve it from statutory and regulatory duties, to be discussed in Section V.B.5., *infra*. However, the very language of this Tariff section itself should be applied, if at all, only as a limitation of liability for Breach of Warranty claims. Respondents respectfully submit that to apply this section to all of their claims of liability would go beyond the literal terms of the liability limiting language being advanced. Again, this may be a moot issue if the Jury finds factually any of the following: (1) the Petitioner's natural gas was not unreasonably dangerous; (2) even if unreasonably dangerous, it was not a cause of the Fatal Event; or (3) even if unreasonably dangerous and a cause of the Fatal Event, there was a superseding or intervening cause.

4. West Virginia Jurisprudence Provides Multiple Doctrines Which Properly Apply to Handle Claims With Allegations of Multiple Causes by Multiple Actors

The Circuit Court's Order properly rejected the two (2) essential arguments advanced by the Petitioner in its Motion for Summary Judgment by holding that: (1) West Virginia law provides multiple, well-established doctrines for properly handling affirmative defenses whereby a Defendant denies liability by pointing to fault of another actor (i.e., addressing the Rolloff Switches); and (2) the Petitioner's Tariff should not be applied to provide immunity from the Respondents' claims. Because the Petition frames the former argument as "Customer Equipment" language in the Tariff (notwithstanding its express exception for claims of Negligence), a discussion of the Circuit Court's findings as to the proper handling of Petitioner's "Customer Equipment Causation Argument" is necessary.

Petitioner's "Customer Equipment Causation Argument" under the Tariff is really a classic causation defense which alleges that because the Rollout Switches were not in their proper placement at the time of the Fatal Explosion, no liability can attach to Petitioner, even if it was Negligent or provided Bad Gas. As an initial point, there is no suggestion that the Rollout Switches in any way caused the metal vent pipe to explode at its seam, which initiated the Carbon Monoxide inundation. Rather, it is argued that afterwards, the Switches' mis-placement failed to shut off the furnace, which would have lessened the amount of Carbon Monoxide released into the home by shutting it off. Petitioner contends that this would be the sole cause of the Fatal Event.

The Petitioner conceded below, and the Circuit Court correctly recognized, the general rule in West Virginia that issues of causation are "usually reserve[d] for the jury." *See* MSJ, p. 8 (App. 0076); Order ¶ 59 (App. 0015). 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*, 183 W.Va. 77, 394 S.E.2d 61 (1990)(*quoting* Syl. Pt. 1, *Ratlief v. Yokum*, 167 W.Va. 779, 280 S.E.2d 584 (1981)). In *Long v. City of Weirton*, 158 W.Va. 741, 214 S.E.2d 832 (1975) *superseded by statute on other grounds, as stated in Pritchard.v. Arvon*, 186 W.Va. 445, 413 S.E.2d 100 (1991), this 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, 158 W.Va. at 762, 214 S.E.2d at 848 (*quoting City of Bessemer v. Clowdus*, 64 So.2d 259, 263 (Ala. 1954)).

The Circuit Court recognized that the proper resolution of Petitioner's defense that the Customer's Equipment was the sole cause of the Fatal Event is not through Summary Judgment, but, rather, by using several well-established legal doctrines. These guide Circuit Courts as how to proceed with a properly plead defense that others are at fault, either wholly or partially, and protects Defendants from liability beyond their fault, if any.

At its core, Petitioner's Customer Equipment Causation Argument is a defense that some other actor bears fault, in whole or in part, for the mis-placement of the Roll-Out Switches, and that actor's conduct, while not causing the initial explosion which allowed Carbon Monoxide to

leave the closed system and enter the Carper home, severed the chain of causation. This would then operate to relieve Petitioner from liability, even if it was Negligent and caused the initial explosion.

However, our law is well-developed in providing guidance for situations where others are alleged to be at fault through concepts of Concurrent Negligence, Comparative Fault and Intervening Causation. All of these doctrines are implicated by the Petitioner's Customer Equipment Defense and were properly applied by the Circuit Court in denying its Motion for Summary Judgment. Most importantly they share as a common characteristic that they each present questions for resolution by a fact finder.

a. Petitioner's Customer Equipment Causation Argument is More Properly Addressed as a Jury Question of Concurrent Negligence

The Circuit Court properly found that the Doctrine of Concurrent Negligence should be used to address the Petitioner's defense that the Customer's Equipment was the sole cause of the Fatal Event, thus triggering the Tariff's Limitation on Liability language. With regard to this Doctrine, this Court has addressed allegations of causation by 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*, 183 W.Va. 77, 394 S.E.2d 61 (1990)(*quoting* Syl. Pt. 1, *Reilley v. Byard*, 146 W.Va. 292, 119 S.E.2d 650 (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, 191 W.Va. 149, 444 S.E.2d 27 (1994) (quoting *Peak v. Ratliff*, 185 W.Va. 488, 408 S.E.2d 300 (1991)) (*citations omitted*).

As such, the doctrine of Concurrent Negligence would properly apply if the finder of fact found that Petitioner MGC's Negligence contributed in any degree to Respondents' injuries. Even if the misplacement of the Rollout Switches were determined by a jury to be a cause of the injury, that finding alone would be insufficient to exonerate Petitioner MGC if its Negligence is also found to be one of the efficient causes, such as set forth in Respondents' Experts' Opinions. *See* Sections II.B and II.C, *supra*. The Circuit Court noted well the admonishment of Syllabus Point 17 of *Anderson v. Moulder*, 183 W.Va. 77, 394 S.E.2d 61 (1990) that these are clearly issues of fact for jury determination. *See* Order ¶ 59 (A. 0015).

b. Petitioner's Customer Equipment Causation Argument is Also More Properly Addressed as a Jury Question of Comparative Fault, With the Protections of Several Liability

The Circuit Court correctly found that rather than immunizing Petitioner from Respondents' Negligence claim, Petitioner's misplaced Customer Equipment Causation Argument is also properly handled under West Virginia's Doctrine of Modified Comparative Fault. This system of comparing the fault of multiple actors has governed West Virginia tort law since its adoption in 1979 by *Bradley v. Appalachian Power Company*, 163 W.Va. 332, 256 S.E.2d 879 and later codified in West Virginia Code section 55-7-13a in 2015. "Comparative fault" is defined as "the degree to which the fault of a person was a proximate cause of an alleged personal injury or death or damage to property, expressed as a percentage." *W. Va. Code* §

55-7-13a(a) (2015). In cases of allegations of fault by multiple parties, the Jury is required to assess "the liability of each person, including plaintiffs, defendants and nonparties who proximately caused the damages," and then allocate to each "in direct proportion to that person's percentage of fault." *W. Va. Code* § 55-7-13a(b) (2015). The Jury's assessment of the proportion of comparative fault assessed to each person, whether plaintiffs, defendants and/or nonparties must "equal either zero percent or one hundred percent." *W.Va. Code* § 55-7-13a(c) (2015).

The Circuit Court correctly recognized that if a Jury finds that Petitioner bears fault which proximately caused injury to the Respondents and so did another actor – whether the Respondent homeowners, the Non-Party Furnace Servicer or even the unknown "short, fat, dark haired" serviceman – then principles of comparative fault as set forth in West Virginia Code section 55-7-13a would protect Petitioner from any liability *except for that caused by its own fault*. That protection comes from the statutory process governing recovery:

> In any action based on tort or any other legal theory seeking damages for personal injury, property damage, or wrongful death, recovery shall be predicated upon principles of comparative fault and the liability of each person, including plaintiffs, defendants and nonparties who proximately caused the damages, shall be allocated to each applicable person in direct proportion to that person's percentage of fault.

W.Va. Code § 55-7-13a(a) (2020)*; See* Order ¶ 62 (A. 0016).

This is also consistent with West Virginia's principle of several liability, which likewise protects a Defendant from being liable for the recovery of damages caused by another. Pursuant to West Virginia Code section 55-7-13c, "in any action for damages, the liability of each defendant for compensatory damages shall be several only and may not be joint." *W.Va. Code* § 55-7-13c(a) (2015). Further, a Defendant "shall be liable only for the amount of

compensatory damages allocated to that defendant in direct proportion to that defendant's percentage of fault . . . ." *Id*. Thus, there is no scenario whereby Petitioner could be liable to pay damages for any harm to Respondents caused by the fault of another.[2]

c. Petitioner's Customer Equipment Causation Argument is Also More Properly Addressed as a Jury Question of Intervening Causation

Perhaps the most fitting Doctrine of Defense for the Petitioner's Customer Equipment Causation argument is that of Intervening Causation. The Circuit Court correctly recognized the clear standard under West Virginia law 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*, 183 W.Va. 77, 394 S.E.2d 61 (1990); *see* Order ¶ 63 (A.0017-22). Further, this 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*, 244 W.Va. 437, 854 S.E.2d 257 (2020)(*citations omitted*).

Here, assuming that the mis-placement of the Rollout Switches is found to be a separate cause of the Fatal Event, it must be the only proximate cause of the injury in order for the

[2]The only theoretical exception would be if the reallocation provisions of West Virginia Code section 55-7-13c(d) were to apply. However, as there is only one Defendant in the case, there is no scenario where Petitioner would be liable for any damages beyond its degree of fault and caused by another Defendant.

Petitioner to avoid liability for its own fault. It must also be found as such to trigger the Liability Limitation language in the Tariff ("by reason of" the Customer's Equipment). The Summary Judgment Motion, as well as the present Petition, clouds the need for jury determination by repeatedly referring to the nature of the mis-placement of the Rollout Switches as "intentional" and "deliberate." While this is true in the sense that these Switches do not fall out accidentally, there is not a fatal distinction with the tort concept of Negligence. This nature is likely characterized such in order to attempt to distinguish this case from those typically involving Concurrent Negligence and Comparative Fault. Furthermore, it is likely meant as an attempt to invoke two (2) extraordinary Intervening Cause cases in which no jury questions were found. However, the mis-placement of the Rollout Switches, by whomever and whenever, which lies at the heart of the Petitioner's Customer Equipment Causation Argument is much more akin to those many scenarios where this Court found the question to be properly submitted to the Jury for determination.

For instance, in *Perry v. Melton*, 171 W.Va. 397, 299 S.E.2d 8 (1982), this Court dealt with a 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 would certainly be "intentional" and "deliberate" acts under the Petitioner's characterization. The impaired driver in *Perry* struck a 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 driver of the car and the operator of the disabled tractor trailer into which the car crashed. *Id.* The question arose as to whether the deliberate decisions of the driver of the car – to drive drunk, speed past one tractor trailer and to drive in an

emergency parking lane – were an Intervening Cause 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" conduct of the drunken, speeding driver passing in an emergency parking lane in *Perry* 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, 171 W.Va. at 399, 299 S.E.2d at 10-11.

Petitioner's use of the terms "intentional" and "deliberate" attempts to change the narrative from that "usual rule" of jury determination for causation issues to urge application of two (2) very narrowly applied exceptions – that of West Virginia's "Russian Roulette" fact pattern in *Harbaugh v. Coffinbarger*. 209 W.Va. 57, 543 S.E.2d 338 (2000) and the "Stolen Car" fact pattern in *Yourtree v. Hubbard*, 196 W.Va. 683, 474 S.E.2d 613 (1996). Those cases respectively involve inapposite 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*.

Instead, the Circuit Court correctly found that the present case is much more akin to the well-known tragic case of *Wehner v. Weinstein*, 191 W.Va. 149, 444 S.E.2d 27 (1994) . In *Wehner*, 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. *Id.* There was no question that the disengagement of the parking brake was done on purpose, i.e. an act both "intentional" and "deliberate" under Petitioner's characterization. Clearly, the very intention of disabling the safety device of the parking brake was to allow the car to be moved from in front of a driveway, not to cause the ultimate harm to the victims. The 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,* 191 W.Va. 149, 444 S.E.2d 27 (1994).

Like Petitioner, a *Wehner* Defendant argued that the acts of another (Student Defendants) in disabling the car's safety feature (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 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, 191 W.Va. at 152, 444 S.E.2d at 32.

The *Wehner* Court also cited *Reese v. Lowry*, 140 W.Va. 772, 86 S.E.2d 381 (1955), *overruled on other grounds by Bradley v. Appalachian Power Co.*, 163 W.Va. 662, 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" according to Petitioner's characterization) in the furnace with actual knowledge that the furnace was not operating properly. Noting that the precedent of *Reese* found proximate cause to be 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, 191 W.Va. at 152, 444 S.E.2d at 32.

In the case at hand, the Circuit Court also correctly found that the proper resolution of the role of the Rollout Switches is not by Motion for Summary Judgment, but likewise for jury determination. Whether considered in the context of the fraternity members who "deliberately" disengaged the parking brake in *Wehner*, or the homeowners who "intentionally" placed too much coal in a furnace they knew was not operating properly in *Reese*, this Court has made clear that this issue is almost always properly determined by a jury determination, and not by the Circuit Court as a matter of law.

5. The Circuit Court Was Correct to Deny Petitioner Judgment as a Matter of Law Under its Proffered Construction of Its Tariff

Despite the overwhelming need for factual determination set forth *supra*, Petitioner argues that its Tariff filed with the West Virginia Public Service Commission (hereafter "PSC') immunizes it from the specific claims made by the Respondents. Respondents respectfully submit that the Circuit Court correctly ruled that their claims survive the same because Petitioner MGC's argument would require construction of its Tariff beyond the laws of this State. If Petitioner's construction were to be accepted, and Petitioner would be relieved from complying with the statutes, regulations and common law of West Virginia, such construction would go beyond the scope of the PSC's legislative authority, and would be unreasonable.

The Tariff was filed with the PSC – wholly a creature of statute – which is an agency delegated only certain, limited powers by the Legislature. *See W.Va. Code* § 24-2-1*, et seq*. This Court has recognized limitations to the PSC's powers and authority:

> 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, 148 W.Va. 674, 137 S.E.2d 200 (1964). In carrying out its delegated authority, the Legislature allows the PSC "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). There is no statutory language to suggest that the PSC is authorized to relieve public utilities from complying with "the laws of this state."

Further, the Legislature inherently recognizes the tort liability of public utilities by specifically authorizing claims for damages caused by public utilities to be brought in the Circuit Courts. *W.Va. Code* § 24-4-7 (2018).

a. Petitioner Cannot Use its Tariff to Avoid Conforming to the "Laws of this State," Whether its Duties Arise Under Statutes, Rules or Common Law

It is important to note that Respondents are not challenging any specific action of the PSC, whether its approval of a particular Tariff or otherwise, but instead argue against Petitioner MGC's proffered construction of the same. As stated in West Virginia Code section 24-2-2, the PSC is authorized to require Petitioner to conform to the "laws of this state," including statutory, regulatory and common law. Here those laws include the specific duties alleged to be breached by Petitioner – both as to the negligent maintenance of its Gas Devices and the unreasonably dangerous nature of the natural gas it provided to Respondents. As to duties arising by Statute, the Legislature is clear:

> 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*, 190 W.Va. 425, 438 S.E.2d 605 (1993) (held as too vague to allow a criminal prosecution); see also *Reed v. Smith Lumber Co.*, 165 W.Va. 415, 268 S.E.2d 70 (W.Va. 1980) (*citing Groff v. Charleston-Dunbar Nat'l Gas Co.*, 110 W.Va. 54, 156 S.E. 881 (1931))(*recognizing* a utilities' common law duty to exercise "care and diligence proportionate to any danger, which is known or should be known to the utility" and specifically to include "inspection, oversight and superintendence.")

Respondents' Negligence Claim arises from Petitioner's failure to maintain its Gas Devices, and they are alleging that Petitioner breached both provisions of these statutory and common law duties. Indeed, Respondents claim specifically that Petitioner failed to "establish and maintain adequate and suitable facilities . . . and suitable devices" and that it failed to "perform such service in respect thereto as shall be reasonable, safe and sufficient . . ." under the statute. Additionally, Respondent's Negligence Claim clearly has its origin in that duty, as explained in *Reed*, to "exercise care and diligence proportionate to any danger, which is known *or should be known*." Finally, Respondents' Negligence Claim directly alleges that Petitioner failed to provide proper "inspection, oversight and superintendence" of its Gas Devices, which failure was a Cause of the Fatal Event. The Circuit Court correctly found that these statutory duties, as construed by this Honorable Court, could not be avoided through operation of a Tariff.

The Circuit Court also correctly found that Petitioner MGC's Violation of Statute would have the effect of making a case of *prima facie* Negligence, another firmly established rule in West Virginia.[3] Indeed, this Court has held:

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[3]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.*, 232 W.Va. 305, 752 S.E.2d 336 (2013), *superseded by statute on other grounds as recognized in Tug Valley Pharmacy, LLC v. All Plaintiffs Below in Mingo County,* 235 W. Va. 283, 773 S.E.2d 627 (2015). *See, e.g.*, Syl. Pt. 1, *Norman v. Virginia-Pocahontas Coal Co.*, 68 W.Va. 405, 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.*, 106 W.Va. 99, 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*, 113 W.Va. 35, 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.*, 118 W.Va. 545, 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,* 133 W.Va. 435, 439, 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*, 145 W.Va. 408, 114 S.E.2d

> 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.")).

Importantly, and also supportive of the Circuit Court's Order, this Court held in *Reed v. Phillips*, 192 S.E.2d 392, 396, 452 S.E.2d 708, 712 (1994) that "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."

Another source of Petitioner's unavoidable duties "under the laws of this State" is the PSC's own Rules, as set forth in West Virginia's Code of State Rules. In the Rules, there is found an affirmative duty on public utilities such as Petitioner MGC to take an active role in monitoring the character of the natural gas it provides to customers. Specifically under 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.

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913 (1960) ("A violation of the statute dealing with adequate brakes on a motor vehicle constitutes prima facie negligence.").

150 *W.Va. C.S.R.* 4.10 (2018). While Petitioner claims that it made no change to the composition of the gas, the Respondents' Experts opined that the failure to maintain its Gas Devices did change its composition and did fatally "affect the operation or adjustment" of Respondents's appliance (furnace). The Circuit Court correctly found that this Rule-based duty could not be avoided through operation of a Tariff. *See* Order ¶¶ 69-70.

Another unavoidable regulatory duty is found in Title 150, section 7.2.1 of the West Virginia Code of State Rules. There is found a clear statement as to the reasonable degree of gas purity for "all natural gas" distributed in West Virginia:

> 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 Petitioner's proposed construction of its Tariff, that would avoid the obligation of gas quality to customers like the Carpers, the provisions of Rule 7.2.1, on its face, apply to "*all natural gas distributed in this State*." The word "*all*" is not qualified in the rule in any way, such that its plain reading would be that the Rule applies to *"all natural gas distributed in this State*." *Id.* (emphasis added). The language of section 7.2.1 makes no exception for "mainline consumers" or any other subset of West Virginians. Here, Respondents have alleged that the natural gas distributed by Petitioner MGC was "not free from dangerous or objectionable quantities of impurities," which proximately caused them damages. Just like with violations of statute, our jurisprudence has found it as firmly established that a violation of a safety regulation constitutes *prima facie* Negligence.[4]

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[4]*See* fn. 9, *Hersh v. E-T Enterprises, L.P., et al.*, 232 W.Va. 305, 752 S.E.2d 336 (2013), *superseded by statute on other grounds*; *see also* Syl. Pt. 1, in part, *Johnson v. Monongahela Power Co.*, 146 W.Va.

Finally, the Circuit Court correctly denied Petitioner from using its Tariff to avoid liability for violating the "laws of this state" as set by the common law. In addition to the statutory and regulatory requirements above, West Virginia common law obligates anyone 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*).

It is undisputed that Petitioner MGC affirmatively engaged in active participation in the process of gas distribution to the Respondents by routing natural gas from a third party pipeline through its Gas Devices, which it installs, maintains, and services for profit. Once choosing to so act, Petitioner MGC is under a common law duty to do so with reasonable care. Respondents have adduced sufficient evidence, including expert testimony cited *supra,* that the Petitioner failed to properly carry out these affirmative duties – statutory, regulatory and common law – and that such failures to exercise reasonable care caused or contributed to the Fatal Event. It would violate "the laws of this State" and public policy to permit Petitioner to turn and avoid liability for violations of those duties through its proffered construction of its Tariff.

900, 900, 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*, 182 W.Va. 560, 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; . . .").

b. Petitioner's Construction of the Tariff Would Unreasonably Exceed the Statutory Authority Delegated by the Legislature to the PSC

The Tariff arguments advanced by the Petitioner, if accepted, would unreasonably permit absolute immunity for Respondents' claims, which result would be in excess of any limited powers allowed the PSC under its statutory authority. Nowhere in the delegation of limited powers to the PSC does our Legislature allow the PSC to relieve public utilities from statutory, regulatory or common law duties. Rather, the PSC is authorized to ensure conformity therewith, not avoidance. Certainly, there is no provision of delegation that permits public utilities to immunize themselves *even when Negligence is alleged.* In fact, the PSC's own Rules explicitly recognize this limitation, stating: "[t]hese rules shall not relieve in any way a utility from any of its duties under the laws of this State." *W.Va. C.S.R.* § 150-4-2.1.4 (2018).

Below, the Respondents provided persuasive authority to show that there are other Courts who have been skeptical of Utilities' attempts at liability limitation, particularly when the proffered effect is absolute immunity as a matter of law, which would be the result of Petitioner's argument, if successful. The first was *Forte Hotels. v. Kansas City Power & Light Co.*, 913 S.W.2d 803 (Kan. 1995), which was cited for the proposition that "[o]ther Courts have looked upon attempts at limitation with disfavor." Response to MSJ, p. 19 (A. 0346).[5] The second was *Southwestern Public Service Co. v. Artesia Alfalfa Growers Ass'n*, 353 P.2d 62 (N.M. 1960), to which the Petitioner focuses on the time line of Constitutional changes in New Mexico that affect

[5]When electronically updating the case, there was, and is currently, no notation as "Overruled," only two (2) Negative Citing References – "Declined to Follow" by Texas in 1999 and "Called into Doubt" by an Intermediate Appellate Court in another state in *Danisco Ingredients USA, Inc. v. Kansas City Power & Light Co.*, 999 S.W. 326 (Mo. App. 1999). Petitioner appears to be correct in explaining the fate of *Forte Hotels* through *Danisco Ingredients USA, Inc.* However, it is worth noting that even the decision in *Danisco Ingredients USA, Inc*. struck down the Utility's attempt to construe the Tariff for immunity from its willful and wanton misconduct as "not reasonable or enforceable under Kansas law." *Danisco Ingredients USA, Inc.*, 999 S.W. at 333.

Public Utility regulation. The point of the citation was the New Mexico Court's citation with favor of the decision of yet another State, Indiana, that reflected other Courts' skeptical view of self-immunization through Tariffs:

> 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 (N.M. 1960)(*citing Indianapolis Water Co. v. Schoenemann*, 20 N.E.2d 671 (Ind. 1939)). The point made is very similar to Respondents'.

Adams v. Northern Illinois Gas Co., 211 Ill.2d 32 (2004) did involve a situation where the Utility had notice of a defect, as discussed in the Response. *See* Response at p. 19 (A.0347). The point offered for persuasion, however, was that the Supreme Court of Illinois held that a Tariff did not immunize it from common law liability. Likewise, the decision of the Superior Court of Connecticut, Judicial District of Hartford, in *O'Neill v. Connecticut Light and Power Co.*, not reported in Atl. Rptr., 2020 WL 1889124 (Conn. 2020) was cited simply to suggest that other Courts have been skeptical of a similar defense as Petitioner's, 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 (Conn. 2020).

Respondents respectfully submit that this Court should also be skeptical of Petitioner's proffered construction of its Tariff to arrive at the result of absolute immunity to Respondents.

CONCLUSION

The Petition for Writ of Prohibition should be denied under the five (5) factors set forth in Syllabus Point 4 of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996). Given the fact-driven application of the Petitioner's Tariff and the parties' competing theories of causation, there are many factual determinations to be made before it can even be determined "how the Tariff will apply, if at all." As such, Petitioner has an adequate, and arguably more specifically tailored means to obtain the desired relief through a direct appeal, which could amply correct any perceived damage or prejudice it argues to have suffered. The legal issues raised herein are neither an "oft repeated error" nor evidence a "persistent disregard" of law, but are fairly characterized as a matter of first impression.

Under the third and most weighty factor, this cautious approach does not rise to the level of being "clearly erroneous," as to warrant issuance of a Writ. Even if this Honorable Court would ultimately disagree on direct appeal, the Circuit Court's decision was well-founded under the fact and the law. The Circuit Court correctly found that determinations of fact are necessary to properly handle the question of Petitioner's liability, if any. It relied upon long-standing West

Virginia law upholding the need for jury determination in questions of Negligence and Causation. Further, the Circuit Court took into account that the Petitioner conceded that Negligence claims survive under the Tariff and that the Tariff's very language contemplates factual findings to ascertain its application, if at all.

Further, the Circuit Court was not clearly erroneous in finding that West Virginia has a well-developed body of law to address situations like the present, where there are supported, competing theories of multiple causes by multiple actors. These doctrines include Concurrent Negligence, Comparative Negligence and Intervening Cause, all of which are usually matters for jury determination. Particularly when applied in the context of West Virginia's system of Comparative Fault coupled with Several Liability, there is no potential for the Petitioner to be liable for any damage to Respondent caused by anything other than its own fault, if found to be a proximate cause.

Finally, the Circuit Court was not clearly erroneous in finding that Petitioner was not entitled to Judgment as a matter of law through its suggested construction of the Tariff. The Tariff cannot be used to avoid duties imposed by the Statutes, Rules or Common Law of West Virginia. Likewise, the Tariff should not be construed in a manner that would provide absolute immunity to Respondents' claims, particularly when a sufficiently supported Negligence case is made. Finally, the Circuit Court was not clearly erroneous in finding that Petitioner's construction, if accepted, would amount to total immunity and, thus be unreasonable and in excess of the delegated authority given to the PSC by the West Virginia Legislature.

Respondents respectfully request that the Petition be **DENIED** and the case allowed to proceed in the normal course to its scheduled December 12, 2022 Trial in Roane County.

RESPONDENTS,
By Counsel

/s/ Chad Lovejoy

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No. 22-639

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.,
MOUNTAINEER GAS COMPANY,

Petitioner,

v.

THE HONORABLE CRAIG TATTERSON,
THE ESTATE OF CORY COLTON KEITH CARPER, et al.,

Respondents.

CERTIFICATE OF SERVICE

I, Chad Lovejoy, counsel for Respondents, do hereby certify that the foregoing "Respondents' Brief" has been served this 5th day of October, 2022, by filing the same with the Court's E-Filing System through File & Serve Xpress pursuant to the "E-Filing Rule," Rule 38A of West Virginia Rules of Appellate Procedure, upon all counsel of record.

/s/ Chad Lovejoy
Chad Lovejoy, Esq. (WV 7478)