IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
Docket No. 25-ICA-289

TESSA WARREN, individually and in her capacity as
Administratrix of the ESTATE OF KEVIN M. WARREN,
Plaintiff/Petitioner,

v.

APPALACHIAN POWER COMPANY,
Defendant/Respondent.

On Appeal from the Circuit Court of Logan County, West Virginia
Civil Action No. 23-C-122
(Honorable Joshua Butcher)

PETITIONER'S BRIEF

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2. The Circuit Court erred in holding that APCO breached no duty under the National Electric Safety Code ("NESC") which was adopted in West Virginia, its own best practices, and/or any other regulatory or statutory provision.

3. The Circuit Court erred in ruling APCO did not owe a common law duty as it was not reasonably foreseeable to give rise to a duty.

4. The Circuit Court erred in holding that only Federal Aviation Administration (FAA) regulations can establish the duty owed by Respondent APCO, preempting claims based on West Virginia law.

5. The Circuit Court's entry of APCO's Proposed Summary Judgment Order was clearly erroneous under *Taylor v. W. Va. Dep't of Health & Human Res.*, 237 W. Va. 549, 787 S.E.2d 904 (W. Va. 2016) as the Circuit Court adopted APCO's Order in its entirety.

STATEMENT OF THE CASE

This appeal involves the death of Kevin Warren, 52, an engineering professor at Vanderbilt University, who tragically died in a June 22, 2022 helicopter crash near Logan, WV. [JA0027]. Kevin Warren is survived by his wife, Petitioner Tessa Warren and two young children. [JA0206-0207, JA1312].

During the subject flight, the helicopter experienced engine trouble and during the process of entering into an autorotation, the Huey helicopter he was riding in struck unmarked power lines, crashed, and became engulfed by fire. [JA0028-0029, 0036, 0155 at No. 8, 0177-0178, 0206, 0983]. Post crash, due to the severity of the fire, Mr. Warren could only be identified by his fingerprints, and his autopsy report noted he died of "blunt force and thermal injuries.". [JA1058 and 1061].

An autorotation occurs when the helicopter loses power, necessitating the pilot to enter into a common emergency landing procedure, which is what investigators determined had occurred here, and for which there was an Expert Opinion and Expert testimony from Plaintiff's Expert. [JA0178-0180, 0579-0580, 0584, 0983]. As the helicopter maneuvered, it struck essentially invisible, unmarked APCO powerlines, strung at a height of 231 feet in the air. [JA0857, 0935-0936, 0179, 0356, 0154-0155, 0264]. There is no dispute that the subject power lines were unmarked, or that they had been abandoned and left in place for over 26 years in an unmaintained state. [JA0091, 0155, 0244, 0356, 1225]. APCO admitted that it left the line in place in an unmarked state, and contended it did not operate or maintain the subject lines, as outlined in Paragraph 32 of its Answer to Plaintiff's Complaint. [JA0091, 0155].

During discovery, evidence was presented related to the harm posed in this matter as being reasonably foreseeable. Petitioner's aviation expert, Don Sommer, specifically stated that a

helicopter's loss of power is a common, foreseeable incident and that this is why helicopter pilots are required to practice autorotation maneuvers. [JA1095-1096]. Respondent's own aviation expert, Richard Stimpson, admitted that autorotations are practiced because engine failure is foreseeable. [JA1099-1100]. In fact, Defendants' APCO and UAC's aviation experts admitted to having performed hundreds and/or thousands of autorotations successfully. [JA1099-1100, 1102]. As such, given the frequency of helicopter loss of power, the need to autorotate, and the fact the roadway under the Lines was the only usable location along Blair Mountain Highway that the helicopter could have been successfully landed,[2] material questions of fact exist as to the harm exposed to the helicopter occupants being reasonably foreseeable. In this instance, the roadway under the Lines was the only usable landing location along Blair Mountain highway.

As there were initial questions related to ownership of the subject power lines, the *Warren* Estate initiated litigation against both Appalachian Power Company (APCO) and United Affiliates Corporation (UAC/landowner). [JA0024-0038]. The *Warren* Estate had also made claims against Gordon F. Prescott (the owner of the subject helicopter) and Marpat Aviation, LLC. [JA0024-0038]. Gordon Prescott and UAC were dismissed following settlements, and Marpat was also dismissed, leaving APCO as the only party in interest in this Appeal. [JA0124-0129, JA0130-0147, JA1310-1320]. Discovery for the *Warren* matter was consolidated with the other similar helicopter cases, those of *Bledsoe*, *Collins*, and *Furnas*.[3]

As discovery commenced, the parties engaged in discovery depositions and the retention of expert witnesses. Plaintiff's electrical expert, Gary Colburn provided an expert report and

[2] [JA1054. JA1096, JA0359-0360,0363].

[3] *Bledsoe v. Marpat Aviation, LLC, et. al*, Civil Action No. 22-C-128, Cir. Ct. Logan Co., *Collins v. Appalachian Power Co., et. al,* Civil Action No. 22-C-129, Cir. Ct. Logan Co., *Furnas v. Appalachian Power Co. et al.*, 2024 WL 3996084 (S.D. W.Va. Aug. 29, 2024).

testimony related to the duties of APCO as a utility company, while Don Sommer provided an expert report and testimony related to the operation of a helicopter.

Per West Virginia CSR 150-3-5.1, *et seq.*, it was determined that West Virginia adopted the NESC (National Electrical Safety Code). Plaintiff's expert, Gary Colburn, subsequently opined that the NESC required that an electrical utility (such as APCO) perform one of two alternatives during the permanent abandonment of electrical lines, namely to: either remove the lines, or maintain them in a safe condition. [JA0279, 0355-0357, 1119, 1491].

In 1998 or 1999 (at least two years after the power line in this case was retired), APCO stated that it had an unwritten, "best practice" that power lines were generally removed when they were retired. [JA0241, 0246, 0248]. Again, APCO did not follow their own policy, and left the abandoned lines in an unmarked condition. [JA0091, 0155, 0244, 0356, 1225]. The statutory violation of the NESC and admitted violations of APCO's own "best practices" are clearly duties that were not followed by APCO.

Accordingly, the Petitioner asserts there were abundant facts presented during these proceedings to, at a minimum, create a genuine issue with respect to foreseeability to overcome APCO's Motion for Summary Judgment which requires submission of the matter to a jury at trial.

With regard to the procedural posture of this case, the Petitioner notes that there were three helicopter cases which were brought and heard before Logan County Circuit Court Judge Butcher in this matter.[4] The *Warren* matter being the third of those cases. Robert Berthold, Jr., was counsel of record in one of those prior cases, *Collins v. Appalachian Power Co., et. al,* Civil Action No. 22-C-129, Cir. Ct. Logan Co. Those cases were consolidated with this case for discovery and

[4] The *Warren* matter, *Bledsoe v. Marpat Aviation, LLC, et. al*, Civil Action No. 22-C-128, Cir. Ct. Logan Co., and *Collins v. Appalachian Power Co., et. al,* Civil Action No. 22-C-129, Cir. Ct. Logan Co.

argument purposes. [*See* JA1073-1075]. Arguments were held on Summary Judgment Motions brought by APCO seeking dismissal of Petitioner's claims. [JA1073-1093].

The Circuit Court heard arguments on APCO's First MSJ in the *Collins* case on August 28, 2024 and issued a ruling on said Motion for Summary Judgment on September 11, 2024. [JA1073-1093]. Of significance, the Plaintiff Collins directed the Circuit Court to the portion of its ruling noted in the transcript wherein Plaintiff's Counsel argued that the Plaintiff's claim is:

> based on the negligence of APCo for not following their own standards and best practices for over 25 years. And their own witness Mr. Wilson which we pointed out in our order and in our briefs, and Ms. Pomeroy ignored that whole issue. That's the main violation that's absolutely clear it has nothing to do with preemption. It's a straight duty on them to follow their own best practices and removing the line. It doesn't say anything about marking the line, it's removing the line. They did not remove the line here[.]

[JA1080]. The *Warren* Plaintiff also directed the Circuit Court to the portion of the transcript ruling wherein it questioned Plaintiff's Counsel as to whether the Plaintiff argued that the "removal of the line theory as completely detached from [the] failure to notify or failure to mark the line theory," to which Plaintiff's Counsel indicated in the affirmative. [JA1083].

The Circuit Court further questioned the Plaintiff Collins as to whether the cases of *Brumfield* [5] and *Raab*[6] "might not stand for the proposition that federal law doesn't preempt state law necessarily, but only if a plaintiff can first show a breach of a federal duty." In response to this question, Plaintiff's Counsel stated:

> the *Raab* case provided "I quote 'implied preemption is inapplicable when state law causes of action exists independently of federal law that are asserted." And this best practices argument has been around for a long time. They may not have wanted to address it, but we clearly do and they didn't follow their own best practices and industry standards. It's much like a malpractice case. We should be entitled to prove that and they can rebut it or use whatever logic they want to say it's inapplicable. But if they had followed their own best

[5] *Brumfield v. Medtronics, Inc.,* 2021 WL 933869 (S.D. W.Va. 2021).

[6] *Raab v. Smith & Nephew, Inc*. 150 F.Supp.3d 671 (S.D. W.Va. 2015).

> practices, none of us would've met. They would have removed the line. That's noted in the email that was provided in one of the materials that we gave you. So I think that an independent state law cause of action can exist and this is a state law cause of action on that -- on that issue. It doesn't have anything to do with marking the lines, it has to do with the removal of the lines. They can either mark it or remove it.

[JA1082-1083].

With that context, the Circuit Court considered the party's arguments, and held in *Collins*: "I am finding myself persuaded to deny the motion in regards to the claims that plaintiffs have under duties that are established by state laws that have nothing to do with air safety[.]" [JA1090]. The Circuit Court further held that this was a matter broader than violations of FAA regulations, and involved "generalized duties of landowners and easement holders to people who traverse upon the land." [JA1090-1091].

In *Collins,* APCO then brought a Second MSJ as an attempt to relitigate what the Court had already considered. It should be noted that the Circuit Court had already ruled that Plaintiff Collins common law and state law negligence claims survived summary judgment. [JA1090-1092]. While the Court focused on foreseeability at hearing of that second summary judgment in *Collins*, and although the transcript cited to by APCO references the fact that the judge might be inclined to enter such an order, subsequent to the hearing, all parties entered into a complete settlement of their claims and no order was entered. Indeed, the introduction of the Final NTSB Report did not somehow reverse the Court's prior ruling. The only difference is after review by experts of the helicopter remains it was determined that the Huey helicopter also sustained an engine failure during the fatal flight in question. As both Petitioner's and Respondent's experts have admitted, engine failure of a helicopter **is** foreseeable, and helicopter pilots are trained to enter an autorotation to safely land in those instances. [JA1096, JA1100, JA1102]. Given this, the fact remains that the lines the helicopter struck were neither removed nor marked. Whether

the engine failed is inconsequential to the Circuit Court's prior ruling that Collins state law claims related to "generalized duties of landowners and easement holders to people who traverse upon the land" which survived APCO's First MSJ in *Collins*. [JA1090-1091]. The only significance of any engine failure is that it may or may not have a bearing on liability of other parties, but hitting the lines putting the helicopter out of control is what caused Kevin Warren's death.

Prior to the hearing even being held on APCO's Summary Judgment Motion in this case, APCO submitted a 16-page Proposed Order, replete with factual inaccuracies and specious one-sided argument rather than undisputed facts and legal analysis directed by the Court. This Proposed Order also included factual findings and legal arguments no longer pursued by the Petitioner. The Hearing was held on May 21, 2025. [JA1260–1309]. On June 18, 2025, the Trial Court entered APCO's Proposed Order in its entirety, granting summary judgment with no changes other than one small addition at the end of the final numbered paragraph of the Proposed Order. [JA1481–1498]. On appeal, Petitioner seeks an Order of this Court reversing the Trial Court's Order granting Summary Judgment, allowing Petitioner to have her day in court in this very significant case, and to exercise her right to have her case heard by a jury.

Lastly, many of the facts APCO contended are undisputed in its Motion for Summary Judgment were taken out of context, in some circumstances incorrectly stated, and in other instances clearly wrong. Although there are many incorrect alleged statements of "undisputed material facts," Petitioner has addressed some of the major incorrect statements that APCO contended were "undisputed material facts" in Sections I and V of this brief.

SUMMARY OF ARGUMENT

The Circuit Court erred on multiple grounds in granting Respondent APCO summary judgment in this matter. The Circuit Court totally and fully adopted a sixty-one paragraph

Proposed Order, submitted by APCO in advance of the Court hearing argument on APCO's Motion for Summary Judgment. APCO's Proposed Order contained facts and findings inconsistent with the facts presented and arguments made at the hearing, however the Court nonetheless entered APCO's Order despite concerns being raised by Petitioner's Counsel prior to its entry. The total adoption of Respondent's Proposed Order itself constitutes reversible error, but beyond that, the Court's Order and grant of summary judgment should be reversed on multiple grounds. Importantly, there are a plethora of genuine issues of material fact set forth that require resolution by a jury, thus making the grant of summary judgment improper.

Moreover, the Circuit Court's wholesale approval of APCO's Order wrongly held that the Federal Aviation Administration regulations preempt any claims under West Virginia law. To the contrary, the FAA is not the sole basis of any duty owed by APCO simply because this matter involved a helicopter. The Circuit Court's Order was wrong and would seriously and significantly impact West Virginia's ability to protect its citizens and others within its borders. Further, the Circuit Court's Order wrongly held that APCO breached no duty under the National Electric Safety Code and/or any other regulatory or statutory provisions despite the clear application of the NESC to it, and the requirements thereunder that power lines be removed or safely maintained when they are abandoned [JA1491-1492, *See* West Virginia CSR 150-3-5.1, *et seq.,* [JA0278-0281, 1106-1120]. APCO admittedly did neither, and that at a minimum creates a question of fact with regard to whether APCO violated its duty to remove the lines, a question that should have gone to a jury. Finally, the Circuit Court likewise wrongly held that APCO had no common law duty in this matter and that it was not reasonably foreseeable to give rise to a duty. There is abundant evidence, including testimony from Respondent's own experts, that helicopters losing power and entering

into an "autorotation" procedure to safely land the helicopter happens often and is foreseeable[7]—the very reason helicopter pilots are required to practice autorotations as part of their licensing. Further, given Respondent's own best practice of removing lines when they are retired,[8] and that the stretch of roadway under the lines at issue was the only nearby clearing, it was entirely foreseeable that a helicopter would lose power and attempt to land right where the Respondent's line was abandoned and left in place. Unmarked power lines over a roadway are a potential hazard, otherwise marker balls used today would not be necessary to warn governmental or police aviators who regularly patrol the roadway. At a minimum, this general foreseeability requires the issue be sent to the jury for the ultimate determination under the precise facts in this matter. The Circuit Court's Order granting summary judgment, however, improperly takes that determination out of the hands of the jury. Accordingly, the Circuit Court's Order granting summary judgment should be reversed, and the matter remanded for trial so the Petitioner can have her case decided on the facts by a jury.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner deems oral argument in this matter to be necessary. Petitioner would submit that oral argument is appropriate, consistent with W.Va. Rules of Appellate Procedure Rule 20(a) (a)(2) as involving issues of fundamental public importance, including the ability of West Virginia to exercise its fundamental and essential function to provide for the protection of its citizens through the application of its own standards of negligence, as well as pursuant to Rule 19 because the decisional process would be significantly aided by oral argument. A memorandum opinion would not be appropriate under either W.Va. R. App. P. 19 or W.Va. R. App. P. 20.

[7] [JA1096, 1100, 1102]

[8] [JA0705].

STANDARD OF REVIEW

On appeal in West Virginia, the court reviews a circuit court's grant of summary judgment *de novo* and, it therefore applies "'the same standard as a circuit court,' reviewing all facts and reasonable inferences in the light most favorable to the nonmoving party." *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W. Va. 692, 698, 474 S.E.2d 872, 878 (W. Va. 1996).

The Supreme Court of Appeals of West Virginia has held:

> A grant of summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." W.Va. R. Civ. P. 56(c)…
>
> * * *
>
> Of course, summary judgment is appropriate only if the record reveals no genuine issue of material fact and *the movant demonstrates an entitlement to judgment as a matter of law*. *See* W.Va. R. Civ. P. 56(c)…
>
> Under our summary judgment standard, *a party seeking summary judgment must make a preliminary showing that no genuine issue of material fact exists. This means the movant bears the initial responsibility of informing the circuit court of the basis of the motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact*…

Powderidge Unit Owners Association v. Highland Properties, Ltd., 196 W. Va. at 698, 474 S.E.2d at 878-79 (emphases added; footnote omitted).[9]

The Court has cautioned that:

> . . . The circuit court's function at the summary judgment stage *is not "to weigh the evidence and determine the truth of the matter but*

[9] Syl. Pts. 2 & 4 *Accord Pritt v. Republican Nat. Committee*, 210 W. Va. 446, 453, 557 S.E.2d 853, 860 (2001), *Payne's Hardware & Building Supply, Inc. v. Apple Valley Trading Company of West Virginia*, 200 W. Va. 685, 688-90, 490 S.E.2d 772, 775-77 (1997); *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 60, 459 S.E.2d 329, 337 (1995) ("In other words, as suggested in *Crain v. Lightner*, 178 W. Va. 765, 769 n.2, 364 S.E.2d 778, 782 n.2 (1987), *the initial burden of production and persuasion is upon the party moving for a summary judgment*." (emphasis added)).

> *to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986). Consequently, *we must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion*…In assessing the factual record, *we must grant the nonmoving party the benefit of inferences, as "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge*[.]" *Anderson*, 477 U.S. at 255, 106 S.Ct. at 2513, 91 L.Ed.2d at 216. Summary judgment should be denied "*even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom*." *Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir.) cert. denied, 342 U.S. 887, 72 S.Ct. 178, 96 L.Ed. 666 (1951). Similarly, *when a party can show that demeanor evidence legally could affect the result, summary judgment should be denied*.

Id. 194 W. Va. at 59, 459 S.E.2d at 336 (emphases added; footnotes and citations omitted).[10]

The Court has also noted:

> . . . [T]his Court will reverse summary judgment if we find, after reviewing the entire record, a genuine issue of material fact exists or if the moving party is not entitled to judgment as a matter of law. *In cases of substantial doubt, the safer course of action is to deny the motion and to proceed to trial*.

Id.[11]

The Court has also been wary of allowing summary judgment in negligence actions and has held that questions of negligence, due care, proximate cause and concurrent negligence present issues of fact for jury determination when the evidence is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions from them. *Board of Educ. v. Van Buren & Firestone, Architects, Inc.*, 267 S.E.2d 440 (W. Va. 1980); *Hatten v.*

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[10] *Accord Pritt v. Republican Nat. Committee*, 210 W. Va. 446, 453, 557 S.E.2d 853, 860 (2001); *Pruitt v. West Virginia Dept. of Public Safety*, 222 W. Va. 290, 297, 664 S.E.2d 175, 182 (2008).

[11] *Accord; Powderidge Unit Owners Association v. Highland Properties, Ltd.*, 196 W. Va. at 698, 474 S.E.2d at 878; *Pritt v. Republican Nat. Committee*, 210 W. Va. at 452, 557 S.E.2d at 859; *Pruitt v. West Virginia Dept. of Public Safety*, 222 W. Va. at 298, 664 S.E.2d at 183.

Mason Realty Co., 135 S.E.2d 236 (W. Va. 1964); *Anderson v. Turner*, 184 S.E.2d 304 (W. Va. 1971). As held by the Court in numerous cases:

> "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 from them."

Syl. pt. 1, *Ratlief v. Yokum,* 167 W. Va. 779, 280 S.E.2d 584 (W. Va. 1981), quoting syl. pt. 5, *Hatten v. Mason Realty Co.*, 148 W. Va. 380, 135 S.E.2d 336 (1964). Syl. Pt. 2, *Wehner v. Weinstein*, 444 S.E.2d 27 (W. Va. 1994). *Accord* Syl. Pt. 6, *Neely v. Belk Inc.*, 222 W. Va. 560, 668 S.E.2d 189 (2008); Syl. Pt. 14, *Marcus v. Staubs*, 230 W. Va. 127, 736 S.E.2d 360 (2012).

ARGUMENT

I. The Circuit Court Committed Error In Granting Summary Judgment For Appalachian Power Company ("APCO") When The Parties' Factual Recitations And Arguments Identify Genuine Issues Of Material Fact.

The Circuit Court committed error in granting summary judgment for Respondent APCO when the parties' factual recitations, and arguments in response, identify clear disputes in the facts surrounding this matter. Genuine issues of material fact clearly exist, which is the province of the jury, and not appropriate for summary disposition when viewed in the light most favorable to the Petitioner as the non-moving party. The Circuit Court failed to deny summary judgment to allow a jury to make factual determinations. Whenever there are genuine issues of material fact, particularly given that the non-moving party must be given the benefit of all inferences, as well as conclusions to be drawn from nondisputed facts, factual determinations are to be properly made by a jury as noted in *Williamss, See Footnotes 9 and 10 supra,* and *Accord*.

Despite this obligation, the Circuit Court repeatedly ignored Petitioner's evidence and simply signed on to a Proposed Order submitted by APCO with only two added sentences. [JA1223-1239 for APCO's Proposed Order; JA1481-1498 at 1496 for entered Order]. For

example, the Order states in Paragraph 13 that in connection with Petitioner's claim that APCO did not properly maintain the Lines under the National Electric Safety Code, the only improper maintenance Petitioner's NESC expert Gary Colburn identifies is failure to place a marker on the powerlines. [JA1484]. The Petitioner notes that in his report, Gary Colburn notes that there were no "aircraft warning balls," "[t]here were also no warning lights on the surrounding structures and no visible warning system installed to notify pilots that the power line was there." [JA1107]. He elaborated that "there were no aircraft warning systems in place on the three conductors that make up the line that crosses the valley," and that "the pilots were given no warning that there was a transmission line crossing the valley approximately 230 feet above the ground at this location." [JA0111].

The Circuit Court completely ignores Mr. Colburn's Affidavit in which he indicates he has reviewed the deposition testimony of APCO's corporate representative William Page Wilson in which Mr. Wilson indicated APCO had not removed or maintained the Lines at all since it stopped using them in 1996, and that the failure to either remove or maintain the lines was in violation of their obligation to do so under the NESC. [JA1119 Colburn reference, JA1484, and JA0705-0706, 1067 for testimony]. Indeed, the failure to maintain the lines at all includes cutting back trees/brush around the lines that would make lines visible from the air.

Similarly, in Paragraph 18, the Circuit Court Order simply concluded outright that the pilots of the helicopter were "instructed to fly two approved routes," ignoring testimony indicating they were not instructed to fly on any particular "approved routes" but rather, that time of the flights—not particular routes—was the focus. [JA1125-1126, 1484]. Indeed, one of the Huey Reunion chief pilots, Robert Curtis, testified at his deposition that he did not know of any limitation for pilots to stick to certain flight paths. [JA1125-1126]. Rather, time was the only limitation and

flights were more concerned with limits on time than on where the path would take the flight. [JA1125-1126]. Again, the Circuit Court simply adopted the Respondent's Proposed Order and ignored this contrary evidence that required assessment and determination by a jury. [JA1226, 1484].

Likewise, the Circuit Court's Order repeatedly references the case *Furnas v. Appalachian Power Co. et al.,* 2024 WL 3996084 (S.D. W.Va. Aug. 29, 2024) and states in paragraph 5 that it was "based on the same accident with the same legal theories" as this matter. [JA1486]. Once again, the Circuit Court ignored different and distinct material facts put forth by the Petitioner in simply adopting the Respondent's Proposed Order. Indeed, the facts and legal arguments had substantially changed between the *Furnas* decision and the last hearing on Summary Judgment in this case. The *Furnas* decision proceeded on a theory the helicopter had been flying low below the ridgelines when it contacted the Lines, not—as the facts later developed—that the helicopter lost power, entered an emergency autorotation procedure to land on Blair Mountain Highway, but did not see the Lines and therefore struck them, resulting in the crash instead of a safe autorotation landing. *Furnas* at * 3. These are stark differences that the Circuit Court ignored, and again rather than drawing all inferences in favor of Petitioner as the non-movant, simply adopted the Respondent's Proposed Order. Given the abundance of disputed facts, summary judgment should have been denied and the Circuit Court's grant of summary judgment should therefore be reversed.

II. The Circuit Court Erred In Holding That APCO Breached No Duty Under The National Electric Safety Code ("NESC") Which Was Adopted In West Virginia, Its Own Best Practices, And/Or Any Other Regulatory Or Statutory Provision.

The Circuit Court erred in holding that APCO breached no duty under the NESC, which was adopted in West Virginia, its own best practices and/or any other regulatory or statutory provision. [JA1481-1498 as a whole, but specifically 1491-1492]. The Circuit Court Order errs

on multiple grounds with respect to the failure of APCO to adhere to its duty under the National Electric Safety Code ("NESC") to either remove the Lines or maintain them in a safe condition after abandoning them in 1996. Beginning with the issue of preemption, the Circuit Court improperly dismisses out of hand the State law-based duty of an electrical utility company in West Virginia such as APCO to safely remove or maintain electrical lines it has abandoned, due to purported "preemption." That argument is without merit, does not justify refusing to enforce a duty under the NESC, and accordingly the Circuit Court's grant of summary judgment in that regard should be reversed. Under West Virginia CSR 150-3-5.1, *et seq.*, which adopted the NESC (National Electrical Safety Code), specifically a duty of an electric utility such as APCO is set forth in NESC Section 214.B.3, p. 78, which indicates that if an electrical transmission line is no longer to be used, it must be removed or maintained in a safe condition. [JA0280, 0355, 1119, *See* NESC 214]. It is undisputed that the Lines were abandoned, but never removed, as APCO admits as much in its Motion for Summary Judgment. [JA0154-0155]. Moreover, the deposition testimony of William Page Wilson, Jr., 30(b)(6) Representative of APCO, reflected that since APCO abandoned the Lines in 1996, APCO has **not** maintained the Lines in any way[12]—which is directly contrary to the requirements under the NESC to maintain them in a safe condition if they don't remove them. [JA0157, 0280, 0355, 1119, *See* NESC 214] Additionally, Petitioner's Expert, Gary Colburn, opined that APCO violated "NESC-IEEE C2-2017-Section 214.B.3, p. 78 [which] says: Lines and equipment permanently abandoned shall be removed or maintained in a safe condition." [JA0355-0357, 1119]. Petitioner submitted evidence that a way to properly maintain abandoned lines is to mark them with marker balls. [JA0355-0357, 1110-1111].

[12] [JA0154-0155, 0705-0706, 1067].

Similarly, the Circuit Court's Order never addresses APCO's failure to obtain a permit or Order from the West Virginia Public Service Commission pursuant to W.Va. Code § 24-3-7 prior to abandoning the Lines. That provision requires a public utility like APCO to do so, yet evidence demonstrates APCO never made such application. [S*ee* W.Va. Code § 24-3-7, JA1142].

In Fact c.17 of APCO's Motion for Summary Judgment, APCO blanketly contends that it "adopted an unwritten, 'best practice' in 1998 or 1999, contending that was two years after it retired the subject line in place. [JA0157]. Even if it were in 1998 or 1999, internal APCO emails show that APCO intended to remove this line, but failed to do so [JA1105]. *See also* the attached news story that APCO recognized the need to replace wooden poles from the 1940s and 50s with safer modern steel structures,[13] and the video clip of a news story (and news article discussed further herein) involving statements made by an APCO spokesperson George Porter which indicated that it is APCO's policy to remove old and obsolete infrastructure "built in the 30s and 40s. . . they've aged out," as "everyday we are looking at what can we do better." [JA1103-1104].

In Fact c.18 of APCO's Motion for Summary Judgment, it should be clear that while APCO contends it would look at the circumstances surrounding each retired line when determining what to do with the line, such a contention should not extend to the subject line. [JA0157]. APCO never notified the landowner about its decision to abandon the subject lines. [JA1071-1072]. Significantly, internal APCO emails recognized this line needed to be removed, but APCO did not budget for its removal as the subject lines were "inadvertently left out" of the proposal to shut down the lines, and therefore "there is no money in the [budget] to remove this line. **We will have to budget for and remove this at a future date**." [JA1105]. (emphasis added). APCO would not

[13] [JA1103] *Appalachian Power to Remove Old Transmission Line,* June 5, 2023, WV Metro News, https://wvmetronews.com/ 2023/06/05/appalachian-power-to-remove-old-transmission-line/, accessed January 6, 2025.

have sent emails about having failed to budget for removal of this line if it were not following this policy or "best practices," as well as following the industry standards, and West Virginia's statutory adoption of the NESC standard that indicates that lines that are abandoned, as this particular line, are to be removed or maintained in a safe condition.

In Fact a.3 of APCO's Motion for Summary Judgment, while the easement language may be accurate, any implication that APCO's rights were terminated, and that the lines reverted back to UAC is a material issue in dispute, as outlined in UAC's (landowner) Summary Judgment Motion. [JA1054].

In Fact c.19 of APCO's Motion for Summary Judgment, any contention by APCO that its practices were being followed as there was no requirement to remove a retired line, is a conclusory statement, and clearly in dispute, as noted by the NESC standard quoted by APCO in this very paragraph. [JA0157]. Moreover, APCO never maintained the lines in a safe condition, a fact that was confirmed by APCO's Corporate Representative William Page Wilson, Jr., who testified APCO did not maintain the lines or poles as he contended that APCO's rights were "terminated to do otherwise," and as such the lines and poles were left in place, and became the responsibility of co-defendant landowner UAC. [JA0705-0706, JA1067].

In Fact c.20 of APCO's Motion for Summary Judgment, contrary to APCO's contention, Petitioner's Expert Gary Colburn did identify violations, as contained in his Report and testimony, previously noted herein. [JA0157, 1106-1117 (Colburn Report), JA1118-1120].

In Fact c.21 of APCO's Motion for Summary Judgment, APCO contends "[t]here is no evidence in the record that the power line posed any risk to the public." [JA0157]. As APCO is aware, a helicopter hit these power lines and crashed, killing all occupants. There has been

testimony from Petitioner's Expert Don Sommer that the lines were invisible. [JA1122-1123]. Furthermore, Andy Cecil, UAC's 30(b) designated representative, testified as follows:

> Q. Do you agree that the power lines not clearly marked could pose a safety hazard?
> A. Yes.

[JA1129]. All of these portions of testimony reflect the power lines posed a risk to the public, and as such are foreseeable.

In Facts d.34 to d.35 of APCO's Motion for Summary Judgment, APCO makes contentions related to Petitioner's Expert Donald Sommer, which were also expressed in its separately filed *Motion to Exclude the Expert Testimony of Donald Sommer*. [JA0160, 0831-0910]. The Petitioner's *Response* to APCO's *Motion to Exclude the Expert Testimony of Donald Sommer* set forth in detail why APCO's contentions regarding Sommer were inaccurate,[14] but to point out a few discrepancies between Sommer's testimony/report and what APCO contends is their version of the facts, it should be noted that while APCO contends that "Sommer conceded that there was no factual basis" for the pilot not seeing the lines. Sommer in fact did provide testimony related to his basis for these opinions, as outlined below.

Sommer was asked during his deposition to provide his evidence for the pilot not having seen the power lines, to which he testified "I've got evidence that there, there was a flight test done by me in a helicopter; and I flew the exact same route about three or four times and I didn't see the wires, and I was, -- -- I was sure as hell looking for them." [JA1133-1134]. Furthermore, without going into every contention, APCO contends that Sommer did not know a myriad of other factors such as the flight path, whether the helicopter could maneuver after engine failure, could have avoided the wire, etc. [JA0160]. APCO ignores contrary testimony from Sommer such as his

[14] [JA0911-0990].

testimony that the helicopter went into auto rotation after the engine failed, and his calculations on how quickly the helicopter was falling. [JA0964-0975, 0977- 0981]. Sommer additionally testified "once it hit the wires it was no longer controllable," "had they been marked, it is much more likely that they would have been seen before they were encountered," and further "it's more likely than not that they would have been seen." [JA0577, 0586-0587]. As to the flight path, Sommer testified that he made calculations to determine the flight path, and in particular, it was reconstructed as follows:

> I took the crash path of the helicopter from the wires to the site where it ran into the rock face of the cliff that it ran into and determined what the angle of descent was, and extended the crash path rearward in a straight line, and found that that pretty much followed the Blair Mountain Highway, and that's how I reconstructed it.

[JA0975].

Lastly, APCO contends that the Petitioner has not produced[d] any expert testimony showing any failure by APCO or UAC to meet any industry or safety standard related to the power line that would have prevented the accident. [JA0167-0170]. This is heavily disputed, as discussed further herein, and as such is not an undisputed fact.

Thus, at a bare minimum a genuine issue of material fact exists with respect to whether APCO complied with the NESC's requirements to remove or safely maintain the Lines after abandoning them, and/or whether it obtained a permit before abandoning the lines which are clearly duties that needed to be followed. These questions of fact should have been submitted to the jury for determination. The Circuit Court, however, again ignored that central tenet of summary judgment analysis and instead simply entered the Respondent's Proposed Order. The Circuit Court's Order should be reversed and this matter allowed to proceed to a jury to determine this issue.

III. The Circuit Court Erred In Ruling APCO Did Not Owe A Common Law Duty As It Was Not Reasonably Foreseeable To Give Rise To A Duty.

The Circuit Court erred in ruling Respondent did not owe a common law duty and/or that this matter was not reasonably foreseeable to give rise to a duty. [JA1486, 1492, 1496-1497]. Quite the contrary, it was entirely foreseeable that aircraft might not see unmarked power lines over a roadway. Police and other governmental aircraft regularly fly over roadways, and aircraft often fly over roads and through valleys in mountainous regions. [JA0856-0858]. That is precisely why APCO uses marker balls to mark such lines in other locations [JA0030, 0353, 0923-0924]. Michael Holbrook of Marpat Aviation, LLC testified that he saw no reason not to mark power lines with high visibility markers when they were over 200 feet high, as otherwise the lines are "helicopter killers," are safer to the flying public. [JA0985]. Moreover, under the NESC, APCO had an affirmative duty to either remove the subject line, or safely maintain by marking it with marker balls to warn such aircraft. [JA0241, 0245-0246, 0248, 0278-0281, 0355-0357, 1106-1120]. Furthermore, APCO's own best practices, [JA0705] consistent with the NESC, was to remove all abandoned lines. APCO did neither in this case. [JA0705-0706, 1067]. The Circuit Court erred in holding that Petitioner could not show that APCO owed a common law duty in this case, as noted earlier.

"The liability to make reparation for an injury, by negligence, is founded upon an original moral duty, enjoined upon every person, so to conduct himself, or exercise his own rights, as not to injure another. *Syl. Pt. 1, Robertson v. LeMaster*, 171 W.Va. 607, 301 S.E.2d 563 (1983). "One who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm." *Id. at Syl.* Point 2. 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." *Syl. Pt. 8, Aikens v. Debow*,

541 S.E.2d 576, 579 (W.Va. 2000) (citing *Syl. Pt. 3, Sewell v. Gregory*, 371 S.E.2d 82 (W.Va. 1988). Foreseeable injury is a requisite of proximate cause. *Syl. Pt. 3, Davidson's, Inc. v. Scott*, 149 W.Va. 470, 140 S.E.2d 807 (1965). "The test is, would the ordinary man in the Respondent'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*. (emphasis added). "Reasonable care and negligence are relative terms, and the degree of care required in a given case must be commensurate with the dangers to be avoided." *Morrison v. Appalachian Power Co.*, 85 S.E.2d 506 (W.Va. 1915). As such, the West Virginia Supreme Court of Appeals has stated, "[t]he risk reasonably to be perceived defines the duty to be obeyed." *Aikens v. Debow*, 541 S.E.2d 576, 582 (W.Va. 2000), *quoting Palsgraf v. Long Island R.R. Co*., 162 N.E. 99, 100 (1928). The greater the risk and danger, the greater degree of care required. *Boggess v. Monongahela West Penn Public Service Co*., 107 W. Va. 88, 147 S.E. 480 (W. Va. 1929).

In analyzing foreseeability, the Circuit Court's role was to consider whether the type of harm generally was foreseeable, **not** to determine whether under all the particular facts of this particular instance it was…as that is for a jury to decide. *Strahin v. Cleavenger*, 603 216 W. Va. 175, 180, S.E. 2d 197. However, the Circuit Court's Order improperly holds there was no duty by making precisely the factual finding reserved to the jury as to foreseeability. The West Virginia Supreme Court noted in Syl. Pts. 11 and 12 of the case of *Strahin* that:

> [w]hen the facts about foreseeability as an element of duty are disputed and reasonable persons may draw different conclusions from them, two questions arise - one of law for the judge and one of fact for the jury.
>
> -and-
>
> **[a] court's overall purpose in its consideration of foreseeability in conjunction with the duty owed is to discern in general terms** whether the type of conduct at issue is sufficiently likely to result in

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

Id. at 180 (emphasis added).

Thus, the Court's role is to view all disputed facts in the light most favorable to the Plaintiff or the nonmoving party, and determine whether, in general terms, it was foreseeable; if so, as it is here, it is then a jury question whether the harm was foreseeable under all the particular facts in this case. Accordingly, and particularly given that the Court must view all facts in the light most favorable to the Petitioner, it was foreseeable that an aircraft could crash into unmarked lines that had not been removed when they were abandoned. The Circuit Court erred by making a factual determination otherwise, and its grant of summary judgment should therefore be reversed.

A. It Was Reasonably Foreseeable That A Helicopter Could Lose Engine Power And Be Forced Into An Autorotation To Land Safely On Blair Mountain Highway At The Only Clear Stretch Nearby Where The Lines Had Not Been Removed Or Marked With Marker Balls.

Indeed, it was reasonably foreseeable that a helicopter would lose engine power and be forced into an autorotation to land safely. Both Petitioner's and Respondent's experts agree to the foreseeability of loss of engine power and the use of autorotation maneuvers to safely land upon such foreseeable loss of power, as outlined below. Petitioner's expert Donald Sommer is a licensed professional engineer, pilot and helicopter pilot, flight instructor with numerous FAA ratings, FAA licensed mechanic and aircraft inspector, and has extensive aeronautical experience with over 16,000 hours as pilot in command and recipient of the Wright Brothers Master Pilot Award by the FAA. [JA1094-1097 at 4-12]. As Mr. Sommer indicates, "a loss of engine power is very foreseeable to me as well as other aviation pilots and experts throughout the aviation industry." [JA1096 at 16]. As he further indicates, "loss of helicopter engine power is the reason all pilots

are trained and practice autorotations before they are certified to conduct flights as pilot in command." [JA1096 at 17]. In fact, Respondent's expert Richard Lee testified at deposition that he had participated in "**probably tens of thousands**" of autorotations, surviving all of them. [JA1102] (emphasis added). Likewise, APCO's expert Douglas Stimpson, similarly noted at his recent deposition that autorotations are regularly practiced by helicopter pilots, that they are trained in autorotations and have to perform an autorotation to be certified, and that he personally has performed at least 150 to 200 autorotations all of which were reasonably successful. [JA1099-1100]. In fact, and perhaps most significantly, Mr. Stimpson—APCO's own expert—specifically admitted that engine failure is foreseeable:

> Q. And these autorotations are practiced and—**because engine failure is foreseeable**, isn't it?
> A. **Yes, sir**.
> Q. And that's within the whole aviation industry?
> A. Correct.

[JA1100] (emphasis added)).

As these experts noted, autorotations are practiced and required of all helicopter pilots specifically because a helicopter losing power is a foreseeable event, one that happens often enough that autorotations are a required safety procedure helicopter pilots must be able to perform and which almost universally result in a safe landing. In fact, Don Sommer is of precisely the opinion that in this situation "it is more likely than not that the pilot was planning on a run-on landing onto Blair Mountain Highway after the engine failure and autorotation" but that the "collision with the unmarked utility wires which remained over the road caused the pilot to lose control of the helicopter, causing the crash." [JA1096 at 18-19]. There were clearly sufficient questions of fact regarding the foreseeability of this incident to permit this matter to go to the jury, particularly given that the Court must view those facts in the light most favorable to the Petitioner. The Circuit Court's finding that the incident was not foreseeable, taking the issue out of the hands

jury where it rightly belongs, was in error and the grant of summary judgment should therefore be reversed.

B. APCO Had A Duty To Remove The Dangerous Power Lines That Had Been Abandoned And Unmaintained By APCO For Approximately 26 Years Before The Crash.

The West Virginia Supreme Court of Appeals recognized in *Robertson v. LeMaster*, 171 W.Va. 607, 301 S.E.2d 563 (1983), that while foreseeability of risk is a primary consideration in determining the scope of a duty an actor owes to another, "[b]eyond the question of foreseeability, the existence of duty also involves policy considerations underlying the core issue of the scope of the legal system's protection[.]" *Id*. at 612, 301 S.E.2d at 568. "Such considerations include the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the Defendant." *Id*. Here, the burden of guarding against the death of six individuals is minimal compared to the potential harm by leaving unmarked abandoned lines in place.

In this matter, the Petitioner maintains evidence that APCO's power lines were essentially "invisible" to pilots. [JA1122-1123]. Mike Holbrook of Marpat Aviation testified "I see no reason to not mark all power lines. They're helicopter killers." [JA1139]. Pilot Robert Curtis testified that he quit flying commercial as he "had landed underneath power lines [he] didn't see. . . they are impossible to see in some cases." [JA1126-1127].

APCO knew or should have known of the danger presented by these "invisible" and clearly fatal power lines. It is of no surprise to APCO that old and obsolete lines such as these were to be removed, as APCO had a practice in place of doing so, but left them in place another 26 years before the fatal crash occurred. Evidence of APCO's knowledge that they were to be removed, but not budgeted for removal, and APCO's subsequent failure to do anything, despite

acknowledging that they should be budgeted for removal, is shown in APCO's internal emails and deposition testimony, as outlined within this brief.

Other witnesses who were deposed clearly acknowledge that unmarked power lines pose a danger. UAC's corporate witness, Andy Cecil, agreed that "power lines not clearly marked could pose a safety hazard." [JA1129]. So did Michael Holbrook of Marpat Aviation, LLC. [JA1139]. Likewise, Gordon Prescott's testimony was that the purpose of high visibility marker balls was "[t]o direct the aircraft to the position [location] of wires," and that he believed "these high visibility balls serve as a warning for pilots." [JA1141]. Despite all this evidence, including APCO's own best practices and e-mail acknowledgment that the lines should have been removed,[15] despite it being clearly obvious, and despite APCO'S obligations imposed by the NESC and common law, APCO never removed or marked the lines. [JA1483].

Petitioner's Expert, Gary Colburn, opined that APCO violated "NESC-IEEE C2-2017-Section 214.B.3, page 78 [which] says: Lines and equipment permanently abandoned shall be removed or maintained in a safe condition." [JA1109]. As Mr. Colburn further opines, it is his professional opinion "that the power lines were permanently abandoned by APCO under NESC Section 214.B.3. and that APCO had an obligation and duty in accordance with NESC Section 214.B.3. to remove or maintain said lines in a safe condition, which they did neither." [JA1119]. There is certainly a reason why lines that are permanently abandoned, such as the lines here, are to be removed or maintained in a safe condition. Here, it is clear they were not removed as the helicopter struck the line, so it becomes a question of if they were maintained in a safe condition, as the Petitioner has already outlined how the lines were invisible. Thus, there are clearly genuine issues of material fact as to whether APCO maintained the power lines and poles in a safe

[15] [JA0705, 1105].

condition, and as to whether they posed a danger to the public. APCO certainly recognizes this, based on other news articles and stories about APCO replacing old and obsolete poles.[16]

When these lines were deactivated and abandoned by APCO, APCO left the poles and lines in place for over 26 years prior to the subject crash. When abandoning these poles and lines, APCO never notified UAC. [JA1071-1072]. APCO's testimony that it provided no notice to UAC about the abandonment is significant as it creates a question of material fact. It is also confirmation that APCO did not obtain a permit or Order from the West Virginia Public Service Commission W.Va. Code § 24-3-7, which provides:

> **No. . . public utility shall abandon all or any portion of its service to the public or the operation of any of its lines . . .** which would affect the service it is rendering the public **unless and until there shall first** have been **filed** with the Public Service Commission of this state an **application for a permit to abandon service and obtained from the commission an order** stating that the present and future public convenience and necessity permits such abandonment.

(*emphasis added*).[17]

Furthermore, internal APCO emails recognized this line needed to be removed, but APCO chose not to remove them, despite recognizing that it had failed to budget for its removal, and would budget "for and remove this [line] at a future date." [JA1105] If this policy did not apply, why would APCO have sent out an email outlining actions outlined and contained within APCO's policy? Certainly, APCO would not have sent emails about having failed to budget for removal of this line if it were not following their own policy, as well as following the industry standards and West Virginia's statutory adoption of the NESC standard that indicates that lines that are

[16]As stated previously, APCO recognized the need to replace old and obsolete wooden poles from the 40s and 50s with safer and sturdier modern steel structures, and AEP spokesperson George Porter told WSAZ News Channel 3 that it was the policy of AEP/APCO to remove old and obsolete infrastructure "built in the 30s and 40s . . . they've aged out," similar to the poles and lines in question. *See* JA1104 Dropbox link.

[17] [JA1142].

abandoned, as this particular line, are to be removed or maintained in a safe condition. *See* W.V.C.S.R. 150-3-5.1.

APCO's designated corporate representative, William Page Wilson, Jr. testified under oath, and explained that "[o]ur best practice today, at least since the late '90s that I'm aware of, we remove all facilities that are no longer needed. . . not only remove off the books; but we physically remove the actual equipment in the field." [JA1066].

It is not surprising that APCO's policy was to remove lines that had been deactivated and retired in place as this is a requirement of the National Electrical Safety Code ("NESC"), which has been adopted in West Virginia pursuant to *W.V.C.S.R. 150-3-5.1, et. seq.* The violation of a safety statute is prima facie evidence of negligence if the violation is the proximate cause of the Petitioner's injury. Syl. Pt. 1 *Anderson v. Moulder*, 183 W.Va. 77,394 S.E.2d 61 (1990). Petitioner's retained electrical expert, Gary Colburn, opined that APCO violated "NESC-IEEE C2-2017-Section 214.B.3, p. 78 [which] says: Lines and equipment permanently abandoned shall be removed or maintained in a safe condition." [JA1109, 1119].

Moreover, APCO's admitted "best practices" of removing deactivated/retired lines, such as the subject lines, is simply keeping in line with prevailing industry standards. APCO failed to do so in this case and instead left the crash lines in place, abandoned and unmarked. Of course, "[o]ne who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm." *Syl. Pt. 2, Robertson v. Lemaster*, 171 W.Va. 607, 301 S.E.2d 563 (1983). Here, APCO knew that it failed to comply with its own best practices and policies, and knew or should reasonably have anticipated that such failure created an unreasonable risk of harm to others.

Abundant facts exist showing it is clearly foreseeable that power lines could be struck by aircraft, and if APCO had followed its own best practices, electrical industry standards, and the West Virginia CSR, by simply removing the line, or maintaining the line by placing marker balls on the otherwise invisible lines, this accident should have been prevented. APCO's own internal e-mail from 1998 indicated that it realized it should have taken down the lines in 1996, that the failure to do so was a mistake, and that doing so would need to be budgeted to take place in the future. [JA1105]. APCO failed to do this each and every year up through the time of the crash in 2022, well over twenty years.

When construing the facts in the light most favorable to the Petitioner, as the nonmoving party, there are genuine issues of material fact, related to foreseeability. Furthermore, policy considerations warrant a holding of a duty with the extent of accountability to be determined by a jury. The Circuit Court's failure to submit this matter to the jury was therefore in error and the grant of summary judgment should therefore be reversed.

IV. The Circuit Court Erred In Holding That Only Federal Aviation Administration (FAA) Regulations Can Establish The Duty Owed By Respondent APCO, Preempting Claims Based On West Virginia Law.

The Circuit Court erred in holding that only FAA regulations can establish the duty owed by Respondent APCO, preempting claims based on West Virginia law. [JA1486-1491 at 5-38].

This issue is of vital importance to the State of West Virginia as the Circuit Court's ruling would prevent West Virginia from enforcing its own statutory, regulatory, and/or common law sources of duty in negligence actions, as its traditional role in protecting its citizens and others within its borders, contrary to the U.S. Supreme Court's own recognition that "there is a strong presumption against preemption in areas of the law that States have traditionally occupied." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240 (1996).

Petitioner's theory of liability in this case relates to APCO's violations of the NESC, adopted in West Virginia, not FAA violations. Petitioner maintains that APCO, an electric utility, violated its duty to remove or mark the lines with marker balls under electrical utility law, and its own best practices.

Moveover, contrary to the Circuit Court's ruling, no controlling authority sets forth that the FAA completely preempts any action having to do with aviation. Not only is caselaw cited by the Court distinguishable, but contrary authority specifically permits actions based on state-law sources of duty. For example, the Circuit Court cites to the Third Circuit's decision in *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 364-65 (3d Cir. 1999), without in depth analysis. *Abdullah*, unlike this case, addressed only in-air safety regulations regarding what an airline must do to notify and warn passengers of potential turbulence and the need to wear their seatbelts. Moreover, a later, much more recent Third Circuit decision—*Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, (3d Cir. 2016)—limited *Abdullah* to only that context. In doing so, *Sikkelee* explained that the Third Circuit had already provided that limitation of *Abdullah* in another Third Circuit decision, which the Circuit Court failed to cite or discuss, *Elassaad v. Indep. Air, Inc.*, 613 F.3d 119, 121-31 (3d Cir. 2010)—instead, the Circuit Court simply adopted the Respondent's Proposed Order that wholly ignores this. Moreover, additional cases involving helicopters hitting unmarked lines have permitted cases to proceed on state law tort bases. *See*, *e.g.*, *Eiserman v. Kentucky Fuel Corporation*, 2016 WL 1732728 (E.D. Ky. 2016); *Griswold v. Alabama Power Co.*, 2022 WL 37016 (M.D. Alab. 2022).

Again, the Circuit Court likewise failed to address caselaw in the 4th Circuit and Southern District of West Virginia supporting that Petitioner may use APCO's violations of the NESC to prove APCO's violations of the West Virginia common law. More specifically, Federal regulations

do not prevent West Virginia law from providing a damages remedy for violation of a state law that parallels federal requirements. *Duvall v. Bristol-Myers-Squibb Co*., 103 F.3d 324, 329-30 (4th Cir. 1996) (*citing Medtronic v. Lohr*, 518 U.S. 470, 496-97 (1996)). The Southern District of West Virginia held that state law causes of action can assert viable parallel claims "even if proving those independent state law claims will rely, in part, on evidence that a federal requirement was violated." *Raab v. Smith & Nephew, Inc*. 150 F.Supp.3d 671 (S.D. W.Va. 2015); *see also Brumfield v. Medtronics, Inc.,* 2021 WL 933869 (S.D. W.Va. 2021).

Finally, the Circuit Court incorrectly stated Petitioner waived any arguments on the preemption issue, instead once again simply adopting the Proposed Order submitted by the Respondent before arguments had even been held. [JA1238 (FN1), JA1530-1531 (FN1)]. Indeed, Petitioner's brief in this matter specifically referenced argument and caselaw dealing with preemption that had been made to Judge Butcher by Petitioner's counsel in the companion *Collins* case, specifically including the *Raab* and *Brumfield* cases cited above. [*See* September 11, 2024 Hearing Transcript JA0941-0961 at 0945, 0946, 0949, 0950, 0951 for references to *Raab* and *Brumfield.*][18] Petitioner's brief specifically referenced those cases in the context of preemption, and noted that in the *Collins* case the Circuit Court had noted at hearing on summary judgment therein that the Circuit Court found itself persuaded to deny the motion with regard to state law duties unrelated to air safety and that this matter was broader than violations of FAA regulations. [JA0993-0994, 1077-1078, 1080, 1082-1083, 1090-1091]. This all specifically deals with preemption. In fact, as a result, Respondent's own counsel at the summary judgment hearing in this case brought up the *Brumfield* case and addressed it in his arguments, which clearly

[18] The term preempt/preemption is contained numerous times also within this portion of the transcript as *Raab* and *Brumfield* dealt with preemption.

demonstrates Petitioner had addressed the preemption issue.[19] [JA1267-1271, 1295-1297]. In short, Petitioner addressed the preemption issue, which had been argued by counsel for Petitioner before Judge Butcher both in the related cases and in this matter, and the issue has in no way been waived; on the contrary, this is another example of the Circuit Court's adoption of Respondent's overreaching and one-sided Proposed Order, and this Court should therefore determine that West Virginia law is not preempted in this case and protect West Virginia's ability to enforce its own laws by reversing the Order of the Circuit Court.

V. The Circuit Court's Entry Of APCO's Proposed Summary Judgment Order Was Clearly Erroneous Under *Taylor v. W. Va. Dep't Of Health & Human Res.*, 237 W. Va. 549, 787 S.E.2d 904 (W. Va. 2016) As The Circuit Court Adopted APCO's Order In Its Entirety.

The Circuit Court's entry of APCO's Proposed Summary Judgment Order was clearly erroneous, when the Proposed Order submitted by APCO was (a) entered and adopted wholesale in its entirety with only the inclusion of two sentences in Paragraph 61 of the entered Order, (b) the Court did not distinguish why the material facts identified by the Petitioner were not applicable and/or in dispute, and (c) the Trial Court did not make determinations as to whether the submitted Order accurately reflected the submissions and arguments previously made by the parties during the Court's Summary Judgment Hearing on May 21, 2025.

Five days prior to the Circuit Court's Summary Judgment Hearing on May 21, 2025, Respondent APCO filed its 61-paragraph proposed *Order Granting Appalachian Power Company's Motion for Summary Judgment* on May 16, 2025. [JA1223-1239]. On June 18, 2025, the Circuit Court of Logan County entered an Order that was a wholesale adoption of APCO's 61-paragraph Order in its entirety, with only two sentences of analysis written by the Circuit Court in

[19] *See* May 21, 2025 Hearing Transcript, JA1260-1309, where *Brumfield* is referenced at JA1267, 1268, 1269, 1270, 1271, 1295. The term "preemption" is referenced at 1265, 1267, 1268, 1270, 1272, 1273, 1280,1289, 1295, 1297, 1302, 1304, 1308.

Paragraph 61 of its Order, of which only the following two sentences were added, as outlined in the below underlined and bolded portion:

> Because APCo owed no duty in this case, this Court need not address the issues of breach or proximate cause because Plaintiff cannot show that a duty existed which could be breached. **Further, in response to the argument regarding duty, Plaintiff argued that evidence in this case more recently acquired in the nature of testimony that helicopter engine failure and subsequent necessary employment of emergency flight maneuvers are quite common. The Court, however, finds this argument unpersuasive inasmuch as it does not bear on the likelihood that any helicopter flying in whatever manner would contact these particular lines at issue.**

[JA1496 at Paragraph 61]. Otherwise, no changes were observed to any of the other Fact Finding or Conclusions of Law portions of the submitted Order.

The Circuit Court's total adoption of APCO's Order in its entirety, with only a minor modification was improper and clearly erroneous under West Virginia law. *See Taylor v. W. Va. Dep't of Health & Human Res.*, 237 W. Va. 549, 788 S.E.2d 549 (W. Va. 2016).

In *Taylor*, the West Virginia Supreme Court discussed the preparation of Orders by Counsel and their wholesale adoption by lower Courts, stating:

> we would be remiss if we failed to caution the lower courts regarding the risks attendant to adopting and entering—wholesale—orders prepared by counsel," and cautioned Courts that "[i]t is incumbent on the trial court to determine if the submitted order accurately reflects the court ruling given that it is well-established that "[a] court of record speaks only through its orders[.]"

Id., 237 W. Va. 549, 558 citing *State ex rel. Erlewine v. Thompson*, 156 W. Va. 714, 718, 207 S.E.2d 105, 107 (1973). Additionally, the West Virginia Supreme Court stated "we find it necessary to admonish counsel regarding preparing and tendering over-reaching orders which fail to sufficiently identify and address the critical factual and legal issues," finding that the respondent Order contained "seventy pages and 105 separately identified paragraphs which contain, in large

part, nothing more than a thicket of argumentative rhetoric," as their "tendered order consists entirely of their own version of the disputed facts and advocated inferences, upon which what little legal analysis it contains teeters precariously. Sections entitled "conclusions of law" are little more than one-sided rhetorical diatribes." *Id*. at 237 W.Va. 549, 558.

The West Virginia Supreme Court's rationale in *Taylor* has been followed by the West Virginia Intermediate Court of Appeals in *Jonpaul C. v. Heather C.*, 248 W. Va. 687, 889 S.E.2d 769 (W. Va. Ct. App. 2023), and most recently by the Intermediate Court of Appeals in the June 27, 2025 case of *Shaheen Shafii v. Thomas*, 2025 WL 1779833 (W. Va. Ct. App. June 27, 2025), wherein the Intermediate Court found that the SCAWV "has explained that even when a circuit court solicits proposed orders from counsel, '[i]t is incumbent on the trial court to determine if the submitted order accurately reflects the court ruling." *Id.,* at *6 citing *Taylor v. W. Va. Dep't of Health & Hum. Res.*, supra.

Here, the Order submitted by APCO is similar in nature to that in *Taylor*, inasmuch as it contains APCO's self-serving recitation of the facts in this helicopter crash, otherwise contained in the Court's wholesale adoption of APCO's one-sided factual findings and legal conclusions. The issue of APCO submitting self-serving statements in its briefing and Motions were previously raised to the Circuit Court. In fact, on pages 4-9 of Petitioner's *Response* to APCO's *Motion for Summary Judgment*, the Petitioner identified at least ten recitations that the Petitioner contended were incorrect or misstated, providing contrary citations to evidence, including exhibits, deposition excerpts, etc. [JA0995-1000]. Additionally, the Petitioner provided in her *Response* that:

> it is unfortunate that many of the facts APCO contends are undisputed in its Motion are taken out of context, sometimes incorrectly stated, and at other times wrong. Due to these many incorrect alleged statements of "undisputed material facts," the Plaintiff is forced to address some of the major inaccuracies APCO contends are "undisputed material facts."

[JA0995].

Thus, prior to the Court's wholesale entry of APCO's proffered Summary Judgment Order, the Court was on notice of Petitioner's concerns with APCO's filings containing self-serving statements and often contained one-sided factual findings and legal conclusions, more fully discussed on pages 12 through 19 of this brief. Nevertheless, the Logan County Circuit Court adopted APCO's Order in its entirety, despite being aware of a need to review self-serving facts which were in dispute, and advocated inferences by APCO.

Other examples of misstatements, incorrect representations, and/or disputed facts are discussed in detail in pages 12 to 19 of this brief. For the sake of brevity, the Petitioner refers this Court to those paragraphs rather than restate her arguments again. Additionally, in Conclusion of Law No. 43, the Court found that Petitioner/Plaintiff "adduced no evidence that APCO failed to maintain the line in a safe condition." [JA1491 at ¶43]. This is clearly in dispute, as the Petitioner adduced evidence through deposition testimony of APCO's corporate representative that indicated APCO never maintained the line at all. [JA0705-0706, 1067]. Additionally, Petitioner's Expert identified that "the power lines were permanently abandoned by APCO. . . and that APCO had an obligation and duty in accordance with NESC Section 214.B.3. to remove or maintain said lines in a safe condition, which they did neither." [JA1119, JA1067]. Other expert opinions were contained within both the Expert Report and Affidavit attached as Exhibit N and Exhibit O to Petitioner's *Response*. [JA1106-1120]. Thus, this legal conclusion is **clearly disputed** by evidence adduced by the Petitioner, despite the Court blanketly adopting APCO's statement there was no evidence. [JA1491 at 39-43]. Likewise, in Fact No. 13, the Court found that the "only improper maintenance Petitioner's NESC expert identifies is failure to place a marker on the powerlines. ." [JA1484 at ¶13]. This is incorrect, as Petitioner's Expert stated APCO had a legal duty to remove or maintain the lines in a safe condition. [JA1110-1111, 1119]. The Petitioner also submitted

APCO's own internal emails which reflected that APCO intended to remove the lines, but failed to do so, stating "[w]e will have to budget and remove this at a future date," as there was no money in the budget to remove the line at that time. [JA1105].

As identified herein, the Circuit Court's Order included factual findings and legal arguments that do not accurately reflect the submissions and arguments made by the parties during the Court's May 21, 2025 Hearing. The Order entered by the Circuit Court contained self-serving statements, inferences, and one-side factual recitations inconsistent with the facts presented to the Circuit Court, and as such the Circuit Court's wholesale adoption of the Order and its entry was clearly erroneous.

CONCLUSION

At the heart of our civil justice system and the right to obtain redress to wrongs is the right to have those disputes determined by a jury of our peers. Petitioner Tessa Warren is entitled to precisely that right to obtain redress for the wrongful death of her husband, and the father of her children, which resulted from Respondent APCO's failure to take down abandoned power lines when it stopped using them, instead leaving them up for nearly 26 years as an invisible hazard lying in wait. This at a minimum requires a jury's determination as to APCO's liability in this case. However, the Circuit Court instead simply adopted wholesale the Proposed Order submitted by APCO before arguments were even held, ignoring significant evidence creating genuine issues of material fact. The Circuit Court's Order granting summary judgment was in error, the Petitioner should be afforded her day in court in front of a jury, and the Circuit Court's Order should therefore be reversed.

Respectfully submitted,

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
Docket No. 25-ICA-289

TESSA WARREN, individually and in her capacity as
Administratrix of the ESTATE of KEVIN M. WARREN,
Plaintiff/Petitioner,

v.

On Appeal from an Order of the
Circuit Court of Logan Co., WV
(Civil Action No. 23-C-122)

APPALACHIAN POWER COMPANY,
Defendant/Respondent.

CERTIFICATE OF SERVICE

I, Robert V. Berthold, Jr., counsel for Petitioner, do hereby certify that I have filed the ***Petitioner's Brief*** on this 18th day of September 2025, using the File & ServeXpress system, which will send notification of such filing to the following counsel of record:

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