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**INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA**

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)

**Respondent Appalachian Power Company's
Response to Petitioner's Opening Brief**

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STATEMENT OF THE CASE

a. Introduction

This is a negligence case that involves the intersection of state tort law with the Federal Aviation Administration's (FAA) air safety regulations. On June 22, 2022, MARPAT Aviation, LLC operated a Vietnam-era UH1B model Huey helicopter (Huey), which suffered a catastrophic engine failure mid-flight while carrying passengers. After the Huey's engine failed, the Huey fell into a powerline, collided with a mountainside, crashed to the road below, and killed everyone aboard, including Kevin Warren. Ms. Tessa Warren sued Appalachian Power Company (APCo), alleging that the powerline into which the helicopter fell should have been marked or removed. But the powerline, which stood for nearly a century without incident, complied with governing FAA regulations. That fact alone is dispositive—those regulations establish the legal duty owed in a negligence claim. The United States District Court for the Southern District of West Virginia granted summary judgment in APCo's favor in an identical case brought by another passenger aboard the Huey. Judge Berger held that the passenger's estate failed "to identify evidence of a violation of the applicable standard of care, drawn from federal regulations occupying the field of air safety." *Furnas v. Appalachian Power Co.*, No. 2:23-CV-00168, 2024 WL 3996084, at *8 (S.D.W. Va. Aug. 29, 2024).

Not only did the powerline comply with FAA regulations, there is also no evidence showing that APCo owed a duty to protect aircraft passengers against a Vietnam-era helicopter's engine failing midflight causing it to fall out of the sky into a remote powerline. Black letter law on negligence in West Virginia recognizes that "[a] person is not liable for damages which result from an event which was not expected and could not have been anticipated by an ordinarily prudent person." *Haddox v. Suburban Lanes, Inc.*, 176 W. Va. 744, 748–49, 349 S.E.2d, 910914–15 (1986). In yet another case involving the same helicopter crash, Judge Butcher, the same Judge who

granted summary judgment in this case, stated that he was inclined to grant summary judgment because APCo owed no duty to protect against the unforeseeable helicopter crash. Days later, that passenger's estate settled.

Despite this, Ms. Warren pressed her claim, which was premised on identical facts and legal theories to those that led Judge Berger to grant summary judgment and Judge Butcher to the precipice of granting summary judgment. APCo moved for summary judgment, arguing that (1) FAA regulations establish the duty owed and the powerline complied with those regulations and (2) even if common law negligence principles applied, APCo owed no duty because the helicopter crash was not foreseeable. Judge Butcher granted that Motion on both grounds. This Court should affirm. The law is clear: duty stops somewhere. APCo cannot be held liable for powerlines that fully complied with FAA regulations, especially when there is no evidence that APCo should have foreseen a helicopter falling into those FAA-compliant powerlines after its engine failed.

b. The FAA-Compliant Powerline

Everyone agrees about the facts forming the nucleus of this dispute. On June 22, 2022, Kevin Warren rode aboard the Huey which MARPAT Aviation, LLC (MARPAT) operated. J.A.0193-0211. The Huey's engine suffered a catastrophic failure, and on its inexorable descent, it fell into powerlines before also colliding with a cliff face and falling to the road below. J.A.0179; J.A.0189. Ms. Warren sued MARPAT, United Affiliates Corporation, Gordon Prescott, and APCo. *See* J.A.0027-41. As to APCo, Ms. Warren alleged that APCo owed "duties of reasonable care, relating to the marking of the power lines." J.A.0030. She alleged APCo breached these duties by "fail[ing] to mark said power lines with high visibility spheres and/or other warning devices." *Id.*

The parties contest the specific date the powerline was constructed, who built it, and who currently owns it, but agree that the powerline was constructed at the latest in the late 1930s.¹ *See, e.g.*, J.A.0226-231. The FAA, the federal agency tasked with regulating civil aviation in the United States, was not formed until 1958, meaning the line predated that agency. *See* J.A.0333-34. The line may have also predated the Civil Aeronautics Authority, one of the FAA’s predecessor agencies that was formed in 1938. J.A.0333.

APCo operated the powerline until 1996. J.A.0243-44. Around 1996, APCo “retired the line in place,” which means that the infrastructure was retired left in place even though electricity was no longer transmitted through it.² *Id.* The powerline has never been modified before or after it was retired in place. J.A.0259. Two years after the line was in place, several APCo employees wrote an email speculating that Mohammed Ahmed, an APCo engineer, inadvertently left it out of a project and that it would need to be budgeted for removal at a future date. J.A.1105. Mr. Ahmed was not on that email chain. *Id.* Mr. Ahmed was deposed in Ms. Warren’s case (but not in the previous three cases based on the same helicopter crash), and he testified that the email was wrong. J.A.1202-03. The powerline at issue in this case was not part of Mr. Ahmed’s Capital Planning Proposal, and it was not left in place for budgetary reasons. *Id.*

The powerline sits 1364 feet above sea level and hangs roughly 231 feet above a roadway. J.A.0261-64. There are two airstrips located within 3.6 miles of the powerline. Both airstrips’

¹ It is unclear who owned the powerline when the helicopter fell into it. APCo’s easement stated that it “shall terminate” once APCo no longer uses the easement to transmit electricity. J.A.0229. APCo then had “the right . . . to remove from said right of way and easements, within one year after such termination, all property, equipment, structures, appliances, and objects placed or maintained upon said right of way or easement.” *Id.* In the Circuit Court’s order granting summary judgment, it did not decide who owned the powerline between APCo and the landowner, so that issue is not before this Court on appeal.

² Retired equipment is often left in place for use by the landowner especially when the landowner is a coal company that may use the equipment for its own operations.

elevation exceeds that of the powerline. Logan County Airport is 1655 feet above sea level. J.A.0261-62. Camp Branch Landing Zone is 1588 feet above sea level. *Id.* In other words, this powerline is lower in elevation than either nearby airstrip.

The FAA promulgated a regulatory scheme that establishes when objects built prior to its current set of regulations (known as “existing objects”) are “obstructions” to “air navigation” that must be marked. Under the FAA’s regulations, “existing objects” are obstructions to air navigation when they are

A height that is 200 feet AGL, or above the established airport elevation, whichever is higher, within 3 nautical miles of the established reference point of an airport, excluding heliports, with its longest runway more than 3,200 feet in actual length, and that height increases in the proportion of 100 feet for each additional nautical mile from the airport up to a maximum of 499 feet.

14 C.F.R. § 77.17. The powerline is not “above the established airport elevation” of the two nearby airports, and it is therefore not an “obstruction” under 14 C.F.R. § 77.17. *See, e.g., Furnas v. Appalachian Power Co.*, No. 2:23-CV-00168, 2024 WL 3996084, at *6 (S.D.W. Va. Aug. 29, 2024) (“The undisputed facts establish that the crash line is approximately 231 feet above ground level and is at a lower elevation than either nearby airstrip. Thus, the Plaintiff cannot establish a violation of the regulations related to existing objects.”). Because the powerline is not an “obstruction” under the FAA’s regulations, APCo did not mark the powerline with marker balls or lights nor did APCo ask the FAA to conduct an aeronautical study. J.A.0258-59.

The FAA had several opportunities to require APCo to mark the powerline. Logan County Airport was activated on April 1, 1993. *See* J.A.0332-34. As part of that construction, the FAA was required to conduct an aeronautical study around the Airport to ascertain potential obstructions. *Id.* That study did not identify the presence of APCo’s wire as an obstruction. *Id.* Similarly, several new, unrelated construction projects around the Logan County Airport exceeded

200 feet and required notice under FAA regulations. J.A.0330. After reviewing the proposed construction, the FAA determined that most of those new construction projects did not need to be marked. *Id.*

The powerline was not located in an area with known helicopter traffic. The Logan County Airport testified that helicopter traffic was not common around the airport; indeed, the airport does not have a public helipad. J.A.0376-77. It also testified that it was not aware of any helicopter crashes in the area, and it had received no complaints related to wires from anyone. J.A.0371-74.

c. APCo's Policies Regarding FAA Notice and Line Removal

Two of APCo's policies have been examined in this case. First, APCo has policies regarding how it provides notice to the FAA. Those policies ensure that the FAA is given information regarding new or altered construction to determine whether marker balls or lighting must be placed on the new or altered construction. J.A.0256-57. This is normal in the power industry. One of Ms. Warren's own experts, Gary Colburn, testified that power companies are only required to provide the FAA notice that they plan to construct or alter a structure that might impact the airspace, and "then [the FAA] determines whether or not you meet the requirement to put the aircraft warning balls on the line." J.A.0283-84. Ms. Warren's other experts agree that APCo was not required to report existing structures to the FAA under the FAA's governing regulations. J.A.0294-95; J.A.0310-11.

Although the plaintiffs in this case and others have examined APCo's policy to provide notice to the FAA regarding new or altered construction, the powerlines at issue were built prior to any notice requirements. *See, e.g., Furnas*, 2024 WL 3996084, at *7 ("[T]here is no evidence that the powerline was constructed or altered, within the meaning of the FAA regulation, after the effective date of the first notice requirement."). Ms. Warren did not address this issue in her

summary judgment response, *see, e.g.*, J.A.0992-1011, nor did she address it in her appeal brief. Therefore, APCo's notice policy is no longer at issue because there is no evidence to suggest that APCo did not provide proper notice the FAA, and Ms. Warren has not argued otherwise.

Second, APCo's handling of retired powerlines has taken center stage in Ms. Warren's case. APCo does not have a written policy regarding the removal of retired powerlines. Instead, in 1998 or 1999 (at least two years after the powerline in this case was retired), APCo's corporate representative stated that it had an unwritten "best practice" that powerlines were generally removed when they were retired. J.A.0241; J.A.0248. That "practice" is not universal; instead, APCo looks to the circumstances surrounding each retired line, such as the governing easement, to determine what to do with the line. J.A.0245-47; J.A.0349-50.

APCo's unwritten "practices" exceed the requirements imposed by law. There is no requirement that a retired powerline be removed. The National Electrical Safety Code (NESC) permits retired lines to be left in place if they are NESC-compliant. *See* NESC § 214.B.3 ("Lines and equipment permanently abandoned shall be removed or maintained in a safe condition.").

After APCo retired the lines in place, it did not perform any specific maintenance on those lines. *See, e.g.*, J.A.1067. However, that alone is not an unsafe condition under the NESC. Ms. Warren retained Gary Colburn to serve as a NESC Expert, and Mr. Colburn could identify no unsafe condition with the powerlines beyond a failure to mark or light the lines—which he ultimately conceded was governed by the FAA. J.A.0163; J.A.0357; J.A. 0280-81 (testifying at deposition that "[t]here's nothing in the NESC that says anything about those lines not being in a safe condition. It's the FAA requirements with those lines not having aircraft warning balls on them that made that line unsafe.").

Because Ms. Warren brought the fourth case in the succession of cases based on this helicopter crash, she could have attempted to rehabilitate Mr. Colburn's testimony. Instead, she tendered an affidavit from him that stated, without identifying any specific unsafe condition related to the powerline or explaining how the powerline purportedly violated the NESC, "It's my 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." J.A.1119. At the hearing on the Motion for Summary Judgment, Ms. Warren's counsel still could not identify any unsafe condition beyond the fact that the FAA-compliant powerline was not marked, simply stating, "when they leave it up there for 24 years, Judge, something is going to happen." J.A.1284; J.A.1293 ("So let's look at the general nature of what these specific wires could have done. We know eventually they are going to fall."). The uncontested record, however, shows that this was the first ever incident in the powerline's nearly 100-year history.

d. The Helicopter Crash

On June 22, 2022, Kevin Warren, the decedent, rode on the Huey as part of an event called the Huey Reunion Tour hosted by MARPAT. J.A.0193-0211. The central premise of the Huey Reunion Tour is that civilians could ride along with volunteer pilots in an Experimental Aircraft from the Vietnam War era, the Huey. J.A.0465-70 Non-pilots were offered the opportunity to fly the helicopter. MARPAT's event advertisements stated, "you DO NOT need to be a pilot to make a reservation to fly." J.A.0467.

Early in the helicopter cases, it was unclear whether the helicopter crashed because of pilot error or mechanical error. On August 14, 2024, the National Transportation Safety Board (NTSB), the federal agency tasked with investigating the helicopter crash, issued a tranche of new evidence

and a report finding that the helicopter's engine failed before it contacted the powerline. *See generally* J.A.0472. After the NTSB report, experts from all parties examined the new evidence, re-examined the wreckage, and ultimately agreed with the NTSB's conclusion that the helicopter's engine failed before it fell into the powerline. J.A.0179 (Ms. Warren's own expert, Donald Sommer, concluding it is "obvious" the engine failed before the helicopter fell into the powerlines); J.A.0189 (APCo's expert, Doug Stimpson, concluding that the engine failed before the helicopter fell into the powerline).

After the helicopter's engine failed, it fell into the powerline before traveling 542 feet, striking the side of a mountain, and falling to the ground below. J.A.0189. The parties' experts disagree regarding whether the helicopter could have successfully performed an emergency maneuver known as an "autorotation" to land the helicopter; however, both experts noted that helicopter pilots generally train to perform autorotations—albeit not in emergency circumstances. *Compare* J.A.0179 *with* J.A.0189; *see* J.A.1095-96; J.A.1099-1100.

The engine failure is unsurprising. MARPAT failed to inspect and maintain the engine, which led to the "degradation of the engine's internal components" and ultimately caused the engine to fail mid-flight. J.A.0182-83. According to witness statements gathered by the NTSB, MARPAT ignored signs that the helicopter was failing. Witnesses state (1) that the helicopter made an emergency landing the day of the accident and (2) that passengers smelled a burning smell during the helicopter's operation. J.A.0552-53; J.A.0556-67. The burning smell is consistent with engine failure. J.A.0182-83.

When its engine failed, the helicopter was flying in an area that it should not have been. In its discovery responses, MARPAT produced a map of two flight routes. *See* J.A.0448-53. It stated in its interrogatory responses that the "two [flight] routes were selected because there were no

known obstacles in the flight path.” J.A.0457. Ryan Craddock, one of the Huey Reunion pilots, testified that the pilots were “supposed to stay . . . inside these boundaries.” J.A.0387-88. He also testified that the routes were covered during a safety briefing conducted by MARPAT on the morning of his flight. J.A.0390. Mr. Curtis, another Huey reunion pilot, testified that Mike Daughtry took over as the operations officer of the Huey Reunion. J.A.1125. When asked whether Mr. Daughtry implemented a flight path, Mr. Curtis stated, “Not to my knowledge, no.” *Id.* Contrary to MARPAT and the other pilots, Mr. Curtis stated that he flew wherever he wanted whenever he wanted in the Huey. J.A.1126. Regardless, the powerline into which the helicopter fell is located over 1.6 nautical miles off of what MARPAT represented as the approved routes. J.A.0461.

In addition to being miles off the beaten path, four witnesses testified that the powerline is located where pilots should not fly. Ryan Craddock, one of the pilots for the Huey Reunion and a professional helicopter pilot, testified that he remains at least 1,000 feet above ground level and does not descend below ridge lines because of the danger of utility wires close to the ground. J.A.0389-90. Gordon Prescott, the owner of the helicopter, testified that he was instructed not to fly below the horizon because of the danger of utility wires. J.A.0405. Robert Curtis, another of the Huey pilots, testified that prudent pilots assume that when a road is present, a powerline is also present. J.A.0411-12. Doug Stimpson, APCo’s expert, testified that the pilots engaged in a dangerous flight pattern known as “nap of the earth flying,” where they flew very low and close to the contours of the natural terrain. J.A.0432-33. The powerline is in a valley that is cabined by mountainous terrain and trees. J.A.0441-46.

Finally, MARPAT’s pilots should have known to avoid the area where the crash occurred. MARPAT’s pilots were required to review maps and other data before flying the helicopter.

J.A.0298; J.A.0391-92. That preparation is not optional; it is an FAA requirement. 14 C.F.R § 91.103. One key map that pilots review is called an FAA sectional chart. J.A.0419-20; J.A.0435. FAA sectionals show key landmarks pilots should be aware of and avoid. *Id.* The powerline has appeared on sectional maps prepared by the FAA and its predecessors since 1944. *Id.*

MARPAT pilots had at least two opportunities to review the sectional that showed the powerline. First, the sectional was located on the wall of MARPAT's office at the airport. J.A.0392-94; J.A.0463. Second, the Sectional was in the Huey. *See, e.g.*, J.A.0419. A copy of the sectional showing the location of the powerline was found at the accident scene. *Id.*

e. The Circuit Court Grants Summary Judgment—Following Judge Berger's Precedent and its Prior Inclination.

Six people died after MARPAT's Huey failed. Prior to Ms. Warren's case, three of their estates sued APCo, and discovery in Ms. Warren's case proceeded in tandem with the other three cases. Ms. Warren used the same experts and expert reports used in the other cases.³ *Furnas v. Appalachian Power Co.*, No. 2:23-CV-00168 in the United States District Court for the Southern District of West Virginia was the first of the helicopter cases to be resolved. In that case, Judge Berger granted summary judgment in APCo's favor because she determined that the FAA's regulations establish the duty owed and plaintiff failed to show that the powerline violated FAA regulations. *Furnas*, 2024 WL 3996084, at *6-8. She also rejected the argument that the NESC established alternate standards of care related to aviation safety because "air safety hazards are regulated exclusively by the FAA and attendant regulations." *Id.* at *8. Shortly after Judge Berger

³ Donald Sommer, one of Ms. Warren's experts, produced a supplemental report that was only used in *Collins* and *Warren* because the report was produced after the other two cases resolved.

granted summary judgment in APCo's favor, *Bledsoe*, another of the cases pending before the Circuit Court, settled.

The Circuit Court set an October 14, 2024, trial date in *Collins*, another of the helicopter cases. However, it continued that trial date to allow the parties to conduct additional discovery following the August 14, 2024, NTSB Report. On January 9, 2025, the Circuit Court heard summary judgment arguments in *Collins*. *See, e.g.*, J.A.1187-91. After hearing that all parties agreed that the helicopter's engine failed, the Circuit Court indicated that it was inclined to grant APCo's Motion for Summary Judgment because the helicopter's engine failure "changes the foreseeability analysis in a great many ways. Not only was the helicopter off a flight path or perhaps driving in an area that it shouldn't have been as the defendants have argued at the prior hearing, but it was also falling in an unexpected descent due to the mechanical failure." *Id.* at 1191. The Circuit Court directed APCo to prepare a proposed order regarding the foreseeability issues related to the duty element of a negligence claim. *Id.* Within days, *Collins* settled.

Ms. Warren's case was then set for trial on June 23, 2025. The parties conducted limited additional discovery, re-deposing a few experts and deposing Mr. Ahmed, but the record remained largely the same as the prior cases. APCo moved for summary judgment on April 25, 2025, primarily arguing that (1) FAA regulations established the duty owed, and the undisputed evidence showed that those regulations were not violated; and (2) APCo owed no common law duty because it could not have foreseen the Huey's engine failing and causing it to fall into a powerline. J.A.0149-J.A.0173. The matter was fully briefed, and APCo submitted a proposed order with its Reply that reflected the reasoning in both *Furnas* and the Circuit Court's indication in *Collins* that it was inclined to grant summary judgment based on foreseeability. J.A.1223-39.

On May 21, 2025, the parties appeared before the Circuit Court to argue APCo’s Motion for Summary Judgment. *See* J.A.1260-1309. At the hearing, the Circuit Court again homed in on the foreseeability of the accident, asking whether it was “foreseeable to a power company that an autorotation emergency maneuver will be performed in the exact spot where they happen to have some power lines sitting?” J.A.1284. Ms. Warren’s counsel argued only that the incident was foreseeable because “when [APCo] leave[s powerlines] up there for 24 years, Judge, something is going to happen.” *Id.*

The Circuit Court then asked how Ms. Warren’s case was different than the *Collins* case. J.A.1294-95. Ms. Warren’s counsel only pointed to one fact—APCo’s expert agreed that helicopter pilots practice autorotation landings because pilots can anticipate something going wrong with a helicopter’s engine. *Id.* Throughout the hearing, the Circuit Court determined that fact was not relevant to this case, stating “I don’t think the question is how foreseeable is it that a helicopter would have to attempt this emergency removal. . . . Helicopters have to land in emergency fashion perhaps quite commonly. The question is more specific than that isn’t it?” J.A.1288.

Later, Ms. Warren’s counsel argued that the NESC required APCo to mark the powerlines (even though her NESC expert conceded that the FAA regulations and not the NESC govern marking). J.A.1296. The Circuit Court then noted that the marking issue is “very type of act that [APCo’s counsel] says should be preempted.” J.A.1297. Ms. Warren’s counsel then affirmatively abandoned her preemption arguments, stating, “[*W*]e abandoned preemption after the court made its ruling on Judge Berger’s ruling earlier.” *Id.* (emphasis added).

The Circuit Court took the matter under advisement, and after the parties submitted requested supplemental briefing, it granted APCo’s Motion for Summary Judgment on June 18, 2025. J.A.1482-1498. In its Order, the Circuit Court determined that the FAA regulations set the

standard of care, those regulations were not violated, and even assuming common law did apply, APCo could not have foreseen the helicopter's engine failing. *Id.* Ms. Warren timely appealed.

SUMMARY OF ARGUMENT

The Circuit Court correctly granted summary judgment in APCO's favor. Because this case involves aviation safety issues governed by the FAA—namely, whether a powerline is an obstruction to airspace that must be marked—FAA regulations establish the duty owed. The undisputed evidence shows that the powerlines in this case were not obstructions under governing FAA regulations, and APCo cannot be held liable for FAA-compliant powerlines.

Nor can the NESC supplant FAA regulations. The NESC is silent on when to mark powerlines, and Ms. Warren's attempts to use the NESC to suggest when powerlines must be marked or removed for aviation safety fail. Those issues are governed by the FAA alone.

Not only do FAA regulations establish the duty owed in this case, Ms. Warren's claims fail even if common law formulations of duty were to apply. Duty is moored to the concept of foreseeability, and there is no evidence showing that APCo should have foreseen that (1) in 2022, a helicopter company would offer joyrides to civilians; (2) the helicopter company would continue allowing joyrides after the half-century old aircraft made an unplanned emergency landing; (3) the helicopter company offering those joyrides would fail so spectacularly at maintaining a Vietnam-era aircraft that its engine fell apart mid-flight; (4) the failure of the helicopter (or the derring-do of its pilots) would take the helicopter, off the approved course, into an area with no known air traffic where a retired powerline that complied with all federal marking requirements stood for over a century; and (5) at some point in the failed helicopter's out-of-control descent it would come into contact with the FAA-compliant powerline. Therefore, the Circuit Court correctly held that APCo owed no duty in this case—regardless of whether duty is drawn from FAA regulations or common law.

Ms. Warren’s final two arguments—that certain facts are disputed, and the Circuit Court erred by entering a proposed order—are meritless. The disputed facts identified by Ms. Warren are neither material nor disputed. And the proposed order APCo prepared accurately reflected the facts and law forming the basis of this case. Accordingly, this Court should affirm the Circuit Court’s order granting summary judgment in APCo’s favor.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

ARGUMENT

I. This Court reviews Assignments of Error One through Four de novo, and Assignment of Error Five for clear error.

Most of Ms. Warren’s appeal, *see* Assignments of Error One through Four, challenges an order granting summary judgment, and this Court reviews those orders de novo. Syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Assignment of Error Five deals with the entry of a proposed order, which this Court reviews for clear error. *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 214, 470 S.E.2d 162, 168 (1996) (“[E]ven when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous.”).

II. The Circuit Court correctly determined that FAA regulations establish the duty owed in negligence cases involving aviation safety and that Ms. Warren’s claim fails because the undisputed evidence shows those regulations were not violated.⁴

To proceed with a negligence claim, a plaintiff must first establish that a defendant owed a duty to the plaintiff. As Judge Copenhaver recognized, “Absent a legal duty, there is no cause for negligence.” *Ashworth v. Albers Med., Inc.*, 410 F. Supp. 2d 471, 478 (S.D. W. Va. 2005) (citing

⁴ This Section of APCo’s argument responds to Section IV of Ms. Warren’s Argument. APCo has attempted to organize its arguments to reflect the logical flow of a negligence claim. The starting point for any negligence claim is: what, if any, duty is owed? And in cases involving federal regulation, that question necessarily begins with an analysis of preemption.

Reed v. Phillips, 192 W.Va. 392, 452 S.E.2d 708, 712 (1994)). Duty is a legal issue determined by a court based on the facts of a particular case. *Aikens v. Debow*, 208 W. Va. 486, 491, 541 S.E.2d 576, 581 (2000) (holding that the determination of a duty is a legal question that requires a court to analyze “the scope of the risk which negligent conduct foreseeably entails”).

However, courts determine duty differently whenever the conduct at issue in a case is regulated by the federal government. Federal regulation involves preemption issues, and duties ascribed by state law cannot conflict with or alter requirements set by federal regulation. *Raab v. Smith & Nephew, Inc.*, 150 F. Supp. 3d 671, 684 (S.D. W. Va. 2015) (Johnston, J.) (“[S]tate law will be preempted to the extent it conflicts with federal law . . .”). For example, in medical device cases, the “parallel claims doctrine recognizes that a litigant may use state tort law as a mechanism for enforcing federal requirements.” *Id.* at 686. The parallel claims doctrine permits a litigant to ascribe liability for the violation of a federal law; however, it does not allow litigants to ascribe liability “notwithstanding [the defendant’s] compliance with federal law.” *Id.* Or, as the Fifth Circuit succinctly held, “[S]tate common law claims ‘are not preempted, provided that such claims are premised entirely on violation of the applicable federal requirements.’” *Bass v. Stryker Corp.*, 669 F.3d 501, 509 (5th Cir. 2012) (citation omitted).

Negligence claims involving aviation safety function similarly because those claims involve the intersection of intricate federal regulations with state tort law systems. *See, e.g.*, 8A Am. Jur. 2d Aviation § 25 (“The Federal Aviation Act impliedly preempts state-law aviation safety standards and establishes the standard of care in areas in which the federal government issues pervasive regulations.” (citation omitted)). As the Third Circuit noted, the “FAA and relevant federal regulations establish complete and thorough safety standards for interstate and international air transportation that are not subject to supplementation by, or variation among, jurisdictions.”

Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 367 (3d Cir. 1999). Therefore, the FAA’s regulations establish the duty owed in negligence cases involving aviation safety. *Id.* at 365 (“[T]here is an overarching general standard of care under the FAA and its regulations.”).⁵

That is true in cases, exactly like this one, involving marking obstructions to air traffic. Several courts have held federal law determines when an object is an obstruction that must be marked, and attempts to ascribe a duty beyond federal law fail.⁶ In fact, Judge Berger found, in a case premised on the exact same helicopter crash at issue in this case, that a plaintiff’s claim failed because she failed to adduce “evidence that would permit a jury to find that the Defendants violated a federal air safety regulation.” *Furnas*, 2024 WL 3996084, at *6. The Circuit Court correctly followed suit and held that Ms. Warren’s claim failed because the undisputed evidence shows the powerline was not an obstruction under governing FAA regulations. J.A.1520-1525.

In this appeal, it is telling what Ms. Warren does not contest. She does not dispute that the powerline complied with FAA regulations. Nor does she dispute that the powerline was not an obstruction that required marking under those regulations. That issue is dispositive—APCo cannot

⁵ See also, e.g., *Montalvo v. Spirit Airlines*, 508 F.3d 464, 474 (9th Cir. 2007); *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 795 (6th Cir. 2005) (“[F]ederal law establishes the standards of care in the field of aviation safety”); *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380, 385 (5th Cir. 2004) (finding that “federal regulatory requirements for passenger safety warnings and instructions are exclusive and preempt all state standards and requirements”); *In re Air Crash Near Clarence Ctr., New York, on Feb. 12, 2009*, 798 F. Supp. 2d 481, 486 (W.D.N.Y. 2011) (“Federal regulation of this field is extensive and exclusive: The [Aviation Act] and its corresponding regulations, in prescribing a standard of care for the safety of airline travel, has created an ‘overarching general standard of care.’” (cleaned up) (citation omitted)).

⁶ See *Furnas v. Appalachian Power Co.*, No. 2:23-CV-00168, 2024 WL 3996084, at *6 (S.D. W. Va. Aug. 29, 2024) (“The Court finds that the allegation in this case, that Defendants’ failure to mark a powerline contributed to a helicopter crash, falls squarely within the field of air safety, and the standard of care is established by federal regulations.”); *McMahon Helicopter Servs., Inc. v. United States*, No. 04-74133, 2006 WL 2130625, at *8 (E.D. Mich. July 28, 2006) (“[T]here are Part 77 regulations governing obstructions to navigable air space, and if the light pole is not an obstruction it need not be marked or identified on a map even if it is inoperative.”); *Big Stone Broad., Inc. v. Lindbloom*, 2001 DSD 22, ¶ 18, 161 F. Supp. 2d 1009, 1016 (D.S.D. 2001) (determining that FAA created “standards for determining obstructions in navigable airspace” and a state’s attempts to set different standards were preempted).

be held liable for failing to mark or remove powerlines that are not obstructions under the FAA's governing regulations.

To evade this dispositive issue, Ms. Warren argues, for the first time, that FAA regulations do not set the standard of care. But Ms. Warren waived, and then explicitly abandoned, her preemption arguments. Even if she did not, the authority she cites is inapposite. Ms. Warren's claims against APCo fail because the undisputed evidence shows the powerline was not an obstruction that required marking (or notice) under governing FAA regulations.

a. The powerlines were not obstructions under governing FAA regulations, and APCo owed no duty to mark them or provide notice to a regulatory authority.

The FAA determines when an object, such as a powerline, is an obstruction to airspace that must be marked. The FAA requires parties that build new structures or alter existing structures above a certain height or within a certain distance to an airport to provide the FAA notice under 14 C.F.R. § 77.9. The FAA then conducts a study to determine whether the object is an obstruction that must be marked. 14 C.F.R. § 77.29.⁷

The rules are different whenever an object, such as the pre-1940s powerline in this case, predates the FAA's notice requirements. The marking of "existing" structures is governed by 14 C.F.R. § 77.17 and its related regulations. Those regulations determine whether a structure is an "obstruction." "Objects that are considered obstructions under the standards described in this subpart are presumed hazards to air navigation unless further aeronautical study concludes that the

⁷ The FAA's regulations, which were promulgated in the 1950s, only require notice of new construction or the alteration of existing construction. *See* 14 C.F.R. § 77.9 (requiring notice for certain kinds of "construction or alteration"); The Civil Aeronautics Authority's predecessor regulations, which were promulgated in 1942, function the same. There is no evidence capable of showing that the powerline was constructed after 1942, which means it predates all relevant notice regulations. *See, e.g., Furnas*, 2024 WL 3996084, at *7. Therefore, to the extent Ms. Warren argues APCo failed to notify the relevant regulatory authority, the Circuit Court properly held those claims fail for lack of evidence, and Ms. Warren has never contested that issue.

object is not a hazard.” 14 C.F.R. § 77.15. The obstruction standard applies to “[a]n existing object, including a mobile object, . . . and a future object.” 14 C.F.R. § 77.17. An object close to an airport, is an obstruction if it is “[a] height that is 200 feet AGL, or above the established airport elevation, *whichever is higher*, within 3 nautical miles of the established reference point of an airport, excluding heliports, with its longest runway more than 3,200 feet in actual length, and that height increases in the proportion of 100 feet for each additional nautical mile from the airport up to a maximum of 499 feet.” *Id.* (emphasis added).

The powerline was not an “obstruction” that requires marking, aeronautical study, or removal under 14 C.F.R. § 77.17. Although the line was roughly 231 feet above the roadway, *see* J.A.0261-64, it was well below the elevation of either of the two nearby locations that arguably qualify as “airports” under FAA regulations: Logan County Airport and the Camp Branch Landing Zone. *Id.* Accordingly, it is the airport elevation—not the 200-foot threshold—that determines whether the powerline was an obstruction. Because the powerline is undisputedly below the airports’ elevation—by over two hundred feet—it is not an “obstruction” under the FAA’s clear regulations on this point. APCo, therefore, had no duty to have an aeronautical study conducted on the powerline or to mark the line under the plain language of 14 C.F.R. § 77.17.

Despite this, Ms. Warren contended, from the beginning of her case through the end, that APCo owed a duty to mark or remove the powerlines because they were obstructions to airspace. *See* J.A.0030 (alleging that APCo “owed . . . duties of reasonable care, relating to the marking of the power lines”); J.A.1008 (arguing in response to summary judgment that APCo owed a duty to mark or remove the powerlines because “unmarked power lines pose a danger”). But FAA regulations are clear—APCo owed no such duty. To the extent Ms. Warren argued otherwise, she asked the lower court to hold APCo liable “notwithstanding [APCo’s] compliance with federal

law” and create a duty under state law that materially differed from federal law. *Raab*, 150 F. Supp. at 686. The lower court correctly refused to do so for two reasons.

- i. First, Ms. Warren waived and then affirmatively abandoned her arguments regarding preemption.*

When a party moves for summary judgment, the burden shifts to the opposing party, who must then produce grounds showing that summary judgment is not warranted. Syl. Pt. 3, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995). If the opposing party fails to respond to an argument, then summary judgment should be entered in the moving party’s favor. *See Griffith v. BCBank, Inc.*, No. 16-0460, 2017 WL 1347703, at *7 (W. Va. Apr. 7, 2017) (affirming an order granting summary judgment in moving party’s favor when the non-moving party failed to respond to an argument raised by the moving party); *see also Staley v. McDonough*, No. 1:22CV317, 2025 WL 1014738, at *4 (M.D.N.C. Apr. 4, 2025) (“A plaintiff’s failure to respond to a defendant’s argument regarding one of its claims in a motion for summary judgment, is in effect, plaintiff’s abandonment of said claim.”).

In its Motion for Summary Judgment, APCo argued that the FAA’s regulations regarding obstructions and marking established the duty owed for Ms. Warren’s negligence claims. J.A.0160-64. It also argued that the undisputed evidence showed that the lines were not obstructions to airspace under the FAA’s regulations and therefore did not need to be marked or removed. *Id.* In her Response, Ms. Warren did not respond to either of these arguments nor did she adduce evidence to create an issue of fact regarding whether the lines constituted obstructions under the FAA’s regulations. *See, e.g.*, J.A.1002 (responding to APCo’s arguments regarding duty under common law but failing to address the applicability APCo’s arguments that FAA regulations establish the duty owed). Then, at the hearing on APCo’s Motion for Summary Judgment, Ms. Warren’s counsel affirmatively abandoned Ms. Warren’s arguments regarding preemption, stating, “[W]e abandoned

preemption after the court made its ruling on Judge Berger’s ruling earlier.” J.A.1297. Therefore, Ms. Warren not only waived her arguments regarding preemption, *she affirmatively abandoned those arguments*. And abandoning preemption effectively abandons Ms. Warren’s case—the undisputed evidence shows the powerlines complied with FAA regulations.

A party cannot “abandon” an argument and later complain about the Court’s ruling on that argument on appeal. *See* Syl. Pt. 1, *Maples v. W. Va. Dep’t of Com.*, 197 W. Va. 318, 475 S.E.2d 410 (1996) (“A litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal.”). Therefore, this Court should uphold the Circuit Court’s determination that Ms. Warren waived her opposition to APCo’s preemption arguments.

In an attempt to salvage her preemption argument, Ms. Warren contends that she did not waive her arguments against preemption because her response to APCo’s summary judgment motion quoted a portion of the transcript in *Collins* that referenced *Raab v. Smith & Nephew, Inc.* 150 F.Supp.3d 671 (S.D. W.Va. 2015) and *Brumfield v. Medtronics, Inc.*, 2021 WL 933869 (S.D. W.Va. 2021). *See* Pet’r’s Br. 30. But merely quoting the transcript is not the same thing as responding to an argument. At no point in Ms. Warren’s Response to APCo’s Motion for Summary Judgment did she affirmatively respond to APCo’s arguments regarding preemption.

Moreover, the invocation of *Raab* and *Brumfield* does not save Ms. Warren’s case. In fact, those cases stand for the very proposition that APCo advanced. In both cases, the court determined that state law tort claims involving federally regulated conduct could proceed *only* if the plaintiff established a federal regulation was violated. *See Raab*, 150 F. Supp. 3d at 695 (determining plaintiffs could proceed on defective product claims “alleging the violation of federal safety standards designed to promote public safety”); *Brumfield*, 2021 WL 933869, at *5 (“Plaintiff’s

manufacturing defect and breach of implied warranty claims are not preempted to the extent that he has premised the claims on violations of federal requirements”). Therefore, the cases Ms. Warren cited undermine her contention that she challenged preemption—they simply show that the FAA regulations establish the duty owed. This Court should hold the same and affirm the Circuit Court’s order granting summary judgment because Ms. Warren adduced no evidence showing the powerlines violated FAA regulations.

ii. Second, Ms. Warren’s newfound arguments regarding preemption are unavailing.

To evade the fact that the FAA’s regulations establish the duty owed in this case, Ms. Warren cites a host of cases she did not rely on below for a proposition she never argued below—that FAA regulations do not set the standard of care in this case. Pet’r’s Br. 29-30. The very fact that these arguments are newfound shows this Court should not consider them. *State v. Costello*, 245 W. Va. 19, 26, 857 S.E.2d 51, 58 (2021) (“In general, a party who has not raised a particular issue or defense below may not raise it for the first time on appeal.”). Not only were those arguments not preserved—they’re also wrong.

Ms. Warren contends that “*Abdullah* . . . addressed only in-air safety regulations regarding what an airline must do to notify and warn passengers of turbulence and the need to wear their seatbelts.” Pet’r’s Br. 29. She then argues that two later Third Circuit decisions, *Sikkilee v. Precision Airmotive Corp.*, 822 F.3d 680 (3d Cir. 2016) and *Elassaad v. Indep. Air, Inc.*, 613 F.3d 119, 127 (3d Cir.2010), “limited *Abdullah* to only [in-air safety regulations].” *Id.* Ms. Warren grossly mischaracterizes *Sikkilee* and *Elassaad*. In fact, this is an issue of in-air safety, and the reasoning from those cases show that this is the very sort of case where the FAA’s regulations establish the governing standard of care.

In *Sikkilee*, the Third Circuit determined only that “[t]he field of aviation safety we identified as preempted in *Abdullah* does not include product manufacture and design, which continues to be governed by state tort law.” 822 F.3d at 709. Nowhere did the Third Circuit determine that *Abdullah* is limited to in-air regulations. In fact, the Third Circuit’s reasoning for exempting products liability cases from *Abdullah* shows exactly why *Abdullah* extends to the marking regulations at issue in this case.

First, the Third Circuit noted that the language of the FAA’s enacting statutes did not show that Congress intended the FAA’s authority to occupy the entire field of aircraft manufacture and design. *Id.* at 692-93. In fact, the language of the Federal Aviation Act suggests the opposite, stating that the FAA is empowered to “promote safety of flight of civil aircraft in air commerce by prescribing . . . *minimum standards* governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety.” *Id.* (quoting 49 U.S.C. § 44701). The fact that the FAA is only delegated the authority to set “minimum standards” indicates that Congress empowered states and their common law to create standards that exceed the standards set by the FAA in product liability cases aimed at aircraft manufacture and design.

And Congress did not leave that latitude for the states when it comes to the use of airspace. Instead, “The United States Government has *exclusive sovereignty* of airspace of the United States.” 49 U.S.C. § 40103(a)(1) (emphasis added). Consistent with that exclusive sovereignty over airspace, Congress empowered “[t]he Administrator of the Federal Aviation Administration [to] develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace.” *Id.* at § 40103(b)(1). Indeed, there is little doubt that it is the FAA’s job alone to determine what

constitutes an obstruction to airspace—Congress mandated that the agency review all new or altered construction that impacts airspace and render a determination as to whether the construction adversely affects airspace. 49 U.S.C. § 44718. The plain language of the FAA’s enacting statutes shows that Congress empowered it alone to determine whether an object obstructs air traffic. Conflicting state laws, be they common law or statutory, undermine the “exclusive sovereignty” of the United States.

Second, the Third Circuit noted that the FAA’s aircraft certificating program related to aircraft design did not “suppl[y] a comprehensive standard of care” and did not evince an intent to occupy the field of aircraft design. *Sikkelee*, 822 F.3d at 695. The FAA’s obstruction regulations, however, do the opposite. 14 C.F.R. § 77.17 sets a clear standard: if objects are above a certain height, they are presumed hazards to air navigation. Put simply, the FAA’s marking regulations do not create the amorphous standard that the design certificates in *Sikkelee*; instead, the FAA designates what is and is not a hazard to airspace, creating a clear, comprehensive standard of care.

Finally, the Third Circuit noted that other federal circuits all determined whether the federal standard of care preempted the state standard of care “by examining the pervasiveness of the regulations in a particular area rather than simply determining whether the area implicated by the lawsuit concerns an aspect of air safety.” *Sikkelee*, 822 F.3d at 705. In *Sikkelee*, the court wrestled with aircraft design—which is not an area that the FAA extensively regulates beyond issuing certain certificates for parts. The FAA’s obstruction system, however, is extensively regulated by the FAA. That system requires every entity building new construction or altering existing structures to provide documentation to the FAA so the FAA itself can determine whether it presents a risk. For everything that predates the FAA’s jurisdiction, it created height thresholds to

ascertain what amounts to an obstruction. This sort of pervasive regulation shows that the FAA alone sets the standard of care in airspace obstruction.

Elassaad v. Indep. Air, Inc., 613 F.3d 119, 131 (3d Cir. 2010) is even less helpful for Ms. Warren’s position. In that case, the plaintiff brought a case alleging negligence by an airline when he was disembarking a grounded plane. The Third Circuit determined, somewhat obviously, that “the Aviation Act thus provides no evidence of any intent—much less a ‘clear and manifest’ intent—to regulate safety during disembarkation.” *Id.* at 131. Put simply, what happened after a plane landed did not implicate the FAA’s exclusive control over aviation safety.⁸

Ms. Warren’s proposition—that she can supplant the FAA’s rules with a common law standard—is simply wrong. When it comes to airspace, “Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands.” *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633–34 (1973). Ms. Warren asks this Court to displace the FAA’s “intricate system of federal commands” with an amorphous state common law standard. *Id.* This Court should refuse that ask.

⁸ Plaintiff also cites, without explaining, *Eiserman v. Kentucky Fuel Corp.*, No. CV 5: 14-444-DCR, 2016 WL 1732728 (E.D. Ky. Apr. 29, 2016) and *Griswold v. Alabama Power Co.*, No. 2:20-CV-149-WKW, 2022 WL 37016 (M.D. Ala. Jan. 4, 2022). Both are inapposite. *Eiserman* involved new construction that required notice to the FAA, and the defendant did not provide notice under the FAA’s regulations. The court allowed the plaintiff to proceed on the theory that the defendant “should have reported the utility line to the FAA and allowed the FAA to determine whether marking was appropriate.” *Id.* at *4. That is not the case here.

Griswold is an outlier. So far as APCo can tell, it is the only court to disregard the FAA’s obstruction regulations and determine they do not set the standard of care. It noted that its decision conflicted with other courts. *Griswold*, at *5. More importantly, *Griswold* involved airspace that fell outside of the FAA’s purview because the powerline was under two hundred feet and “not near airports or other special air routes.” *Id.* at *2. That’s not the case here. The powerline was near two airports, and it is therefore subject to 14 C.F.R. § 77.17—with which it complied.

III. The Circuit Court correctly held that Ms. Warren could not supplant FAA regulations with the NESC.⁹

FAA regulations establish the duty owed in this case, and the Circuit Court correctly denied Ms. Warren's effort to supplant those regulations with the NESC. The NESC is a nationally recognized standard that establishes engineering rules and guidelines for the operation and maintenance of powerlines (among other electricity infrastructure), and the West Virginia Public Service Commission promulgated rules adopting the engineering requirements in the NESC. *See* W. Va. C.S.R. § 150-3-5.1.2. For example, the NESC Rule 232 establishes vertical clearances that show how high a conductor must be hung above various surfaces.

While the NESC establishes standard rules regarding how powerlines should be constructed or maintained, it does not govern or establish rules regarding marking powerlines for aviation safety. As the NESC Handbook—a resource specifically relied upon by Ms. Warren's expert Gary Colburn—recognizes, “There is one agency that gets involved if too much clearance exists above ground or near an airport. That agency is the . . . FAA. *The NESC does not address placing marker balls on conductors or marking of tall structures.*” JA0163; JA0590-95 (emphasis added). Nevertheless, Ms. Warren and Gary Colburn contended below that APCo violated the NESC because “[t]he line over the valley was not maintained by Appalachian Power Company and/or UAC in a safe manner. Photographic evidence indicates that there were no aircraft warning systems in place on the three conductors that make up the line that crosses the valley.” J.A.0357.

In support of that mistaken argument, Mr. Colburn cited to NESC–IEEE C2-2017-Section 214.B.3, which states, “Lines and equipment permanently abandoned shall be removed or maintained in a safe condition.” JA0163; JA0355. APCo does not dispute the fact that the

⁹ This Section of APCo's argument responds to Section II of Ms. Warren's Argument.

powerlines were not removed; however, Section 214.B.3 allows the powerlines to remain if they are “maintained in a safe condition.” *Id.* Mr. Colburn identified only one unsafe condition—the lines weren’t marked or lit. Ms. Warren doubles down on that argument in her appeal, arguing that she “submitted evidence that a way to properly maintain abandoned lines is to mark them with marker balls.”¹⁰ Pet’r’s Br. 15.

But that runs headlong into FAA regulations. FAA regulations establish what is and is not an obstruction to air traffic that must be marked, and the NESC cannot supplant them. Mr. Colburn and his sources concede that. J.A.0163; J.A.0357; J.A.590-95. And Judge Berger rejected that argument, holding, that the plaintiff in that case was “not within the class of persons protected by the [NESC], given that air safety hazards are regulated exclusively by the FAA and attendant regulations.” *Furnas*, 2024 WL 3996084, at *8. The Circuit Court correctly rejected Ms. Warren’s attempts to supplant FAA regulations with the NESC, and this Court should affirm that ruling.

The remainder of Ms. Warren’s arguments under her NESC heading aren’t NESC-related at all. Instead, she presents a miscellany of facts and arguments that do not advance any particular point. Each of them fail.

West Virginia Code § 24-3-7 is a cessation-of-service statute that is irrelevant to this case. Ms. Warren argues that “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.” Pet’r’s Br. 16. That’s wrong. In footnote 2, the Circuit Court correctly rejected that argument and noted that West Virginia Code § 24-3-7(a) “simply requires a utility to provide notice when it stops providing service to customers. It is inapplicable here, as Judge Berger noted, because “[t]here is no indication that abandonment of the crash line

¹⁰ The cited “evidence” is simply Mr. Colburn’s expert report attempting to replace FAA marking requirements with non-existent NESC marking requirements.

in this case impacted service to the public.” J.A.1497; *see also* *Preston Cnty. Light & Power Co. v. Renick*, 145 W. Va. 115, 125–26, 113 S.E.2d 378, 385 (1960) (recognizing that W. Va. Code § 24-3-7 prevents a utility company from “discontinu[ing] its generation and sale to the power company of the electricity which that company distributes and furnishes to the public or, by discontinuing such generation and sale, divest itself of its status of a public utility, unless the [company] obtains authority from the commission”). A cessation-of-service statute has nothing to do with this dispute.

“Best practices” or company policies do not establish a duty owed. Ms. Warren also argues that APCo’s unwritten “best practices” establish a duty owed, *see* Pet’r’s Br. 16, but unwritten “best practices” standing alone do not establish the duty owed in a case.¹¹ That’s doubly true here because the “best practice” in question only arose *after* the powerline was retired. Instead, courts look “to the conduct of the industry or profession in similar circumstances as of that date.” *McKee v. Miles Laboratories, Inc.*, 675 F. Supp. 1060, 1064 (E.D. Ky. 1987).

Even if this Court were to construe APCo’s “best practice” as a company policy, Ms. Warren’s arguments still fail. Courts across the country are unanimous—a policy alone “cannot . . . set the standard for a . . . duty of ordinary care.” *Weaver v. Speedway, LLC*, 28 F.4th 816, 824 (7th Cir. 2022).¹²

¹¹ *Mendoza v. PGT Trucking Inc.*, No. 1:18-CV-432-LY-ML, 2020 WL 1902562, at *5 (W.D. Tex. Jan. 27, 2020) (“[B]est practices are not synonymous with legal duties.”); *Archer v. Bond*, 2020 WL 4931397, at *2 (noting that evidence of “best practices” is not relevant in a malpractice case because the standard of care does not require use of “best” practices); *S. Minnesota Beet Sugar Coop. v. Agri Sys.*, No. 17-CV-5552 (WMW/BRT), 2020 WL 5105763, at *5 (D. Minn. Aug. 31, 2020) (“[I]ndustry best practices are aspirational and generally prescribe a higher standard of care than the industry standard of care.”).

¹² *See also* *Wal-Mart Stores, Inc. v. Wright*, 774 N.E.2d 891, 894 (Ind. 2002) (“The law has long recognized that failure to follow a party’s precautionary steps or procedures is not necessarily failure to exercise ordinary care.”); *Sherman v. Robinson*, 80 N.Y.2d 483, 591 N.Y.S.2d 974, 606 N.E.2d 1365, 1369 n.3 (1992) (holding that defendant’s company manual did not create a separate duty of care because where internal “rules require a standard that transcends reasonable care[the] breach [of those rules] cannot be considered

In *Weaver*, for example, the Seventh Circuit upheld the district court’s order granting summary judgment in favor of the defendant where the plaintiff alleged that the defendants should have painted a curb and the only evidence that the curb should have been painted was the defendant’s policy to generally paint curbs. *Weaver*, 28 F.4th at 824-825. The Seventh Circuit determined that a failure to follow the policy alone could not establish breach because the plaintiff submitted “no evidence from which a jury could conclude that the curb from the parking area posed any unusual danger to those (like her) entering the store in the normal course of doing business.” *Id.* at 825. Absent some additional evidence, the Seventh Circuit held the violation of the policy standing alone could not prove negligence. That is equally true here. Ms. Warren adduced no evidence pertaining to the appropriate standard of care regarding line removal. All Ms. Warren has is her contention that APCo failed to follow an unwritten, internal “best practice” or “policy.” But courts across the nation have recognized that this is not sufficient evidence to establish a duty owed. This Court should affirm the lower court’s order recognizing the same.

Ms. Warren misrepresents the budgeting emails, and in any event, they are irrelevant.

Ms. Warren makes much ado about a series of APCo emails related to budgeting and removal of lines, *see* Pet’r’s Br. 15-16, but her arguments related to those emails have been debunked. Unlike the plaintiffs in the earlier-filed helicopter cases, she deposed Mr. Ahmed, the engineer who put together the project discussed in the budgeting emails. Mr. Ahmed made it clear that the powerline was not omitted from his project for budgetary reasons. J.A.1197-1203. Instead, the powerline was not within the scope of Mr. Ahmed’s budgeting project. *Id.* In any event, the budgeting emails

evidence of negligence”); *Metropolitan Dade County v. Zapata*, 601 So.2d 239, 244 (Fla. 3rd DCA 1992) (“[A]n internal rule does not . . . fix the standard of care” because public policy favors “encouraging the voluntary setting of standards higher than those customarily employed in the community”); *Boutilier ex rel. Boutilier v. Chrysler Ins. Co.*, No. 8:99-CV-2270T26MAP, 2001 WL 220159, at *1 (M.D. Fla. Jan. 31, 2001) (“The mere fact that Cherokee had an internal corporate policy does not create a legal duty or cause a breach of that duty.”).

neither establish a standard of care nor show that one was breached. Nothing about the 1998 emails shows that APCo should have foreseen that a helicopter would fall out of the sky in 2022 into a powerline that was retired in 1996.¹³

Ms. Warren’s “visibility” arguments ignore FAA regulations and improperly ask the Court to impose strict liability. Ms. Warren repeatedly contends that APCo owed a duty to mark or remove the powerline because certain witnesses testified that powerlines are “invisible” or hard to see and that APCo has marked other powerlines. Pet’r’s Br. 18, 20. The problem with her visibility argument is twofold. *First*, whether a powerline must be marked is not determined by APCo; instead, the FAA has created a comprehensive regulatory scheme that determines when a powerline must be marked. Both the Circuit Court and the United States District Court for the Southern District of West Virginia correctly recognized that the FAA’s regulations set the standard of care regarding marking in this case, and Ms. Warren’s claims are preempted in that regard because the uncontested evidence shows that the powerlines were not required to be marked under the FAA’s regulations. J.A.1482-98; *Furnas*, 2024 WL 3996084. Ms. Warren’s visibility arguments are yet another request that this Court ignore governing federal law and supplant it with West Virginia common law. It shouldn’t.

Second, Ms. Warren’s visibility argument suffers from a larger root problem: it asks this Court to impose strict liability. Ms. Warren’s position is simple: lines are hard to see, and whenever one is struck, liability may be ascribed because they are hard to see. But that is just strict liability. The mere existence of a powerline—let alone a powerline that complies with FAA regulations—does not impose a duty to mark or remove the powerline. Instead, there must be some evidence

¹³ Similarly irrelevant are the news articles referenced by Ms. Warren. The fact that a 2023 MetroNews article states, “Appalachian Power Company will be removing 17 miles of transmission line in a remote part of Lincoln and Cabell County in the months ahead” and certain wooden structures will be replaced with steel ones as part of that project does not bear on this case. *See* Pet’r’s Br. 16.

that the injury was foreseeable. Ms. Warren has none—and the visibility of the line does not change that fact. Accordingly, this Court should affirm the Circuit Court’s order.

IV. The Circuit Court correctly held that APCo owed no common law duty to protect against a helicopter falling out of the sky into a powerline.¹⁴

Not only did the Circuit Court correctly hold that FAA regulations establish the duty owed in this case, it also correctly held that Ms. Warren could not show that APCo owed a duty under common law assuming those regulations did not set the standard of care. In Syllabus Point 5 of *Aikens v. Debow*, 208 W. Va. 486, 541 S.E.2d 576 (2000), the Supreme Court of Appeals held that trial courts bear the ultimate responsibility for assessing whether a duty exists in common law negligence claims. It stated, “The determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law.” *Id.* To determine whether a duty exists, courts must weigh two factors: foreseeability and “policy considerations underlying the core issue of the scope of the legal system’s protection.” *Id.* Both factors show APCo owed no duty here.

The Circuit Court correctly determined that APCo owed no duty to protect against the unforeseeable. Contrary to Ms. Warren’s assertions, *Strahin* did not relieve courts of their legal role in determining duty. Instead, *Strahin* made it abundantly clear that courts are still charged with determining duty by “discern[ing] 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.” Syl. Pt. 12, *Strahin*, 216 W. Va. at 180. To do so, courts have the “responsibility of reviewing the evidence to see if it is sufficient for a jury to make a determination of whether or not it was

¹⁴ This Section of APCo’s argument responds to Section III of Ms. Warren’s Argument.

foreseeable that the acts of the [defendant] could have under the facts of the case, *disputed or not*, created an unreasonable high risk of harm to the victim under the circumstances.” *Id.* at 185 (emphasis added). Put simply, under *Strahin*, courts are still required to review the evidence—regardless of whether it is disputed—and assess whether it was foreseeable that the defendant’s act were “sufficiently likely to result in the kind of harm experienced based on the evidence presented.” *Id.*

A jury becomes involved only when “facts about foreseeability as an element of duty are disputed and reasonable persons may draw different conclusions from them.” *Id.* at 180, Syl. Pt. 11. When those contested facts are present, a jury assesses “the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant’s conduct was negligent in the first place.” *Id.* at 185. However, contested facts do not automatically pass the issue along to the jury. Instead, a jury reaches the issue *only if* the court first determines that “the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced.” *Id.* Put simply, the predicate test created by *Aiken* remains in the wake of *Strahin*, and courts are still required to assess whether the harm at issue in a case is a foreseeable outcome of the alleged wrongful conduct. Or, as Judge Copenhaver succinctly put it, “*Strahin* does not eviscerate the role of the court as a gatekeeper in a negligence action.” *Ashworth v. Albers Med., Inc.*, 410 F. Supp. 2d 471, 480 (S.D.W. Va. 2005).

In that regard, *Strahin* itself is instructive. In *Strahin*, the Supreme Court determined the issue of foreseeability was reserved for the jury because the plaintiff produced evidence capable of showing that the alleged harm was foreseeable. 216 W. Va. at 185. The plaintiff in that case alleged that the defendant should have taken steps to protect him from being shot after he entered defendant’s property. To support his case, the plaintiff adduced evidence capable of showing,

among other things, that the defendant “knew that acts of vandalism were occurring on his property and that at least one law enforcement officer suggested that the damage caused by gunshots to the physical structure of the house, a vehicle and other personal property at the house.” *Id.* at 187. Put simply, *Strahin* passed the issue of foreseeability along to the jury because the plaintiff produced evidence capable of showing that the defendant should have foreseen the plaintiff being shot at on defendant’s property.

The Supreme Court recently reaffirmed trial courts’ role as the “gatekeeper” in assessing whether sufficient evidence of foreseeability exists to create a duty. In *Orso v. City of Logan*, 249 W. Va. 602, 608, 900 S.E.2d 28, 34 (2024), the Supreme Court upheld a trial court’s order granting summary judgment in favor of a defendant on the grounds that no duty existed because the plaintiff did not produce evidence capable of showing that the defendant “knew or should have known” the risk presented by the allegedly dangerous condition. Specifically, a plaintiff sued the City of Logan after she tripped on a wire and fell onto the City’s sidewalk and alleged the city failed to maintain its sidewalk in a safe condition. *Id.* The evidence, however, established that the wire stood next to the sidewalk for ten years, and during those ten years there was never a report that the wire posed a risk to pedestrians on the sidewalk. *Id.* Based on that, the Supreme Court determined that the trial court correctly held that no duty existed because the city did not know that the wire presented a hazard to those walking on the City’s sidewalk. *Id.*

This case is akin to *Orso*. There is no evidence APCo should have known that one day the powerline would be contacted by a falling helicopter. The powerline was in a low- to no-air traffic area. J.A.0332; 0334; 0371-77. The powerline complied with FAA regulations. J.A.0261-64. No one indicated that this line posed a risk. J.A.0332; 0334; 0371-77. Those are undisputed facts.

Ms. Warren’s two primary pieces of evidence regarding foreseeability—that helicopter pilots generally practice autorotation and that the powerline was located over a flat stretch of road—do not show that APCo should have foreseen that a helicopter would fall out of the sky into an FAA-compliant powerline regardless of whether the powerline was retired.¹⁵ See Pet’r’s Br. 20-24. Indeed, while it is true that *pilots* practice emergency landings in aircraft because *pilots* can anticipate the aircrafts they pilot failing, whether pilots can reasonably foresee their aircraft failing is not the question the Circuit Court was tasked with answering. It recognized as much. J.A.1288. Instead, the question it faced—and resolved correctly—was whether APCo should have foreseen a helicopter’s engine failing, leading to that helicopter falling into a powerline that complied with all relevant FAA regulations in a low- to no-air traffic area. See *Aikens* at 208 W. Va. at 491, 541 S.E.2d at 581.

Ms. Warren’s counsel could identify no facts showing that APCo should have foreseen this accident. Indeed, when pressed at a hearing, her counsel could only state, “when they leave it up there for 24 years, Judge, something is going to happen.” J.A.1284; J.A.1293 (“So let’s look at the general nature of what these specific wires could have done. We know eventually they are going to fall.”). Entropy alone, however, ascribes no duty. Cf. *Aikens v. Debow*, 208 W. Va. 486, 493, 541 S.E.2d 576, 583 (2000) (“The temptation is to accede to the arguments of logical connection in every instance of resulting harm while, in fact, the consequences of pure logic would be socially and economically ruinous.”). Instead, Ms. Warren bore the burden to produce some evidence to show that APCo should have foreseen a helicopter falling into the powerline. She did not. The Circuit Court correctly determined that APCo owed no duty to protect against that unforeseeable event, and this Court should affirm.

¹⁵ Indeed, if that were the case, then *every* powerline located over a flat road creates a duty, which again is functionally strict liability.

The Circuit Court correctly held that the legal system’s protections did not extend to the unusual circumstances presented by this case. At bottom, negligence is the act of “not foreseeing and guarding against that which is probable and likely to happen, not against that which is only remotely and slightly possible.” *Keen v. Coleman*, No. 21-0144, 2022 WL 1744509, at *7 (W. Va. May 31, 2022). In *Keen*, the Supreme Court reaffirmed the lower court’s finding that a bingo hall owed no duty to protect its patrons from a runaway vehicle that collided with the building. *Id.* at *6. The plaintiff in that case contended that the bingo hall owed the patrons a duty to, among other things, “construct fortifying structures to prevent vehicles from crashing into the building.” *Id.* at *1. The Supreme Court, like the trial court, rejected that assertion. It noted that expanding liability to “only remotely and slightly possible” events like a car unexpectedly crashing into a building would effectively render defendants “insurers.”¹⁶ *Id.* at *6-7.

This case is functionally the same as *Keen*. Like the runaway car that crashed into the building in *Keen*, this case features a helicopter with a failed engine that fell into a powerline. There is no evidence to indicate that this occurrence is the sort of “probable and likely” result that APCo was required to guard against. Instead, it is the very sort of “remotely and slightly possible” event that the Supreme Court determined entailed no duty in *Keen*.

Not only does policy preclude courts from finding a duty to protect against “remotely and slightly possible events,” the Supreme Court has repeatedly stated that public policy concerns give it “reluctance to impose liability on a party in a heavily regulated industry.” *McNair v. Johnson & Johnson*, 241 W. Va. 26, 41, 818 S.E.2d 852, 867 (2018). For example, in a case involving generic

¹⁶ Like any defendant, the Supreme Court recognized that power companies are not “insurers against all injury” related to their powerlines. *Sutton v. Monongahela Power Co.*, 151 W. Va. 961, 974, 158 S.E.2d 98, 105 (1967). “In cases of this kind it may be held that recovery would be denied where the accident was of such unusual nature that the parties responsible for the existence of the dangerous condition could not have reasonably anticipated and provided against it.” *Id.* (citations omitted).

drugs, which are heavily regulated by the federal government, the Supreme Court “refuse[d] to interfere in the delicate calculus of Congress in crafting the Hatch-Waxman Act, which is consistent with our traditional reluctance to impose liability on a party in a heavily regulated industry.” *McNair v. Johnson & Johnson*, 241 W. Va. 26, 40–41, 818 S.E.2d 852, 866–67 (2018); *see also Stevens v. MTR Gaming Grp., Inc.*, 237 W. Va. 531, 788 S.E.2d 59 (2016) (finding that casino and manufacturer of video lottery terminals have no duty to protect customers from compulsive gambling because gambling industry is heavily regulated in this State). Ms. Warren’s claims are governed by FAA regulations, and they are plainly preempted. But even if they were not, the Supreme Court has repeatedly refused to impose duties beyond those created by regulators in regulated fields. The Circuit Court correctly followed suit. This Court should affirm.¹⁷

V. This Circuit Court correctly determined there were no disputed issues of material fact.¹⁸

To survive summary judgment, it is not enough to point to the “mere existence of a factual dispute.” *Reed v. Orme*, 221 W. Va. 337, 344, 655 S.E.2d 83, 90 (2007). Instead, a party must “point to specific facts demonstrating a genuine issue of material fact worthy of being tried.” *Id.* In Section I of her Argument, Ms. Warren does not identify specific material facts worthy of being tried; instead, she simply identifies a series of immaterial facts that she contends are contested. Not only are the facts she identifies irrelevant in the grand scheme of this case, they are not even contested.

¹⁷ In Section III.B of her brief, Ms. Warren simply restates the same arguments regarding visibility, budgeting emails, NESC code provisions, West Virginia Code § 24-3-7, and “best practices” that she raises in Section II of her brief. For the sake of brevity, APCo refers this Court to Section II of its Argument, which addresses each of those issues.

¹⁸ This Section of APCo’s argument responds to Section I of Ms. Warren’s Argument.

First, she claims that paragraph thirteen contains disputed facts because it states that “the only improper maintenance Plaintiff’s NESC expert identifies is failure to place a marker on the powerlines.” Pet’r’s Br. 13. According to Ms. Warren, Mr. Colburn also concluded that APCo failed to install warning lights or other “aircraft warning systems” on the powerline in addition to marker balls. Marking and lighting are treated in tandem under FAA regulations. 14 C.F.R. § 77.31 (discussing “Marking *and* lighting recommendations”). Paragraph 13’s language is broad enough to sweep in both the marking and lighting issues (which, again, are functionally the same thing) to which Mr. Colburn attempts to moor liability. Ms. Warren continues to ignore the larger issue with Mr. Colburn’s opinion—the NESC has nothing to do with lighting or marking powerlines.

Ms. Warren further argues that the Circuit Court did not include reference to Mr. Colburn’s affidavit or “cutting back trees/brush around the lines that would make the lines visible from the air.” Pet’r’s Br. 13. The Circuit Court didn’t reference Mr. Colburn’s affidavit for good reason—it says absolutely nothing of substance. Instead, it concludes, with no analysis, 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.” J.A.1119. The Circuit Court did not err by ignoring that conclusory statement. Nor did it err by failing to reference cutting back trees or brush. As far as APCo can tell, there aren’t any arguments in this case related to brush management in the record.¹⁹ And Judge Berger rejected last-ditch efforts to invoke vegetation management in *Furnas*. 2024 WL 3996084, at *8 (“Even if allowing vegetation to grow around an abandoned, out-of-service, de-energized line could constitute a failure to maintain the line in a safe condition, the Court finds

¹⁹ The plaintiff in *Collins* fleetingly—very fleetingly—argued about vegetation management at the hearing where the Circuit Court indicated it was inclined to grant APCo’s Motion for Summary Judgment, but it does not appear that was ever raised in this case. J.A.1190. For good reason. There is no evidence that vegetation management caused or contributed to the accident.

that the Plaintiff is not within the class of persons protected by the regulation, given that air safety hazards are regulated exclusively by the FAA and attendant regulations.”). This Court should too.

Next, Ms. Warren contends that the Circuit Court’s conclusion in paragraph 18 that pilots were “instructed to fly two approved routes” is contested. Pet’r’s Br. 13. She contends that Mr. Curtis’s testimony creates an issue of fact on that issue because he testified that he flew where he wanted, when he wanted. But Mr. Curtis answered, “Not to my knowledge,” when asked whether MARPAT implemented an approved route system—which is synonymous to “I don’t know.” J.A.1125. The approved route maps, testimony from other pilots, and interrogatory responses from MARPAT stating it implemented approved routes outweigh a noncommittal “Not to my knowledge.” And, in any event, the fact is immaterial to this dispute. Even assuming MARPAT did not have approved routes, nothing about that fact leads to the conclusion that APCo should have foreseen a helicopter falling into its powerline.

Finally, Ms. Warren argues that *Furnas* is no longer applicable because the parties now agree the crash occurred because of engine failure instead of pilot error (*Furnas* was issued before the NTSB report). But the preemption arguments in *Furnas* do not hinge on the cause of the accident. They hinge on the FAA regulations, which are applicable regardless of the cause of accident. Accordingly, Ms. Warren has identified no disputed material facts, and this Court should affirm the Circuit Court’s order.

VI. The Circuit Court properly entered APCo’s proposed order.²⁰

West Virginia Trial Court Rule 24.01 permits parties to prepare and submit proposed orders. The mere fact that a party disagrees with an order does not mean it was entered in error. The Supreme Court of Appeals has explicitly “recognize[d] the common practice of requesting

²⁰ This Section of APCo’s argument responds to Section V of Ms. Warren’s Argument.

attorneys to prepare proposed orders for consideration by the court while a matter is under advisement and, in general, find nothing untoward about this process.” *Taylor v. W. Virginia Dep’t of Health & Hum. Res.*, 237 W. Va. 549, 558, 788 S.E.2d 295, 304 (2016). Proposed orders are problematic only whenever they are “over-reaching orders which fail to succinctly identify and address the critical factual and legal issues.” *Id.* For example, in *Taylor*, the Supreme Court determined a circuit court erred by entering a party’s proposed order that consisted “entirely of their version of the disputed facts and advocated inferences.” *Id.* At bottom, appellate courts “concern [them]selves not with who prepared the findings for the circuit court, but with whether the findings adopted by the circuit court accurately reflect the existing law and the trial record.” *Cooper*, 196 W. Va. at 214, 470 S.E.2d at 168.

The order entered by the Circuit Court accurately reflects both the law that governs this case and the facts of the case. In this case, APCo provided support for each of the conclusions of fact and law included in the proposed order. Although Ms. Warren quibbles with certain facts, that makes them no less true. For example, in her brief, Ms. Warren argues that the finding of law in paragraph 43—that she “adduced no evidence that APCo failed to maintain the line in a safe condition”—is disputed. But she omits the very next paragraph, which specifically identifies the unsafe condition she asserted in her brief and explained why that purported unsafe condition was legally insufficient to state a claim—namely, FAA regulations and not the NESC govern line marking. J.A. 1492 at ¶ 44 (“Indeed, the only unsafe condition identified by Plaintiff’s expert is that the line was not marked. But the FAA—not the NESC—governs the marking of lines and the undisputed facts show that APCo complied with the governing FAA regulations.”). There is nothing unfair or one-sided about that characterization—it simply identifies why Ms. Warren’s positions are legally insufficient.

And APCo had ample basis to prepare its proposed order the way that it did. Cases based on the helicopter crash at issue here have been presented for summary judgment no fewer than four times. In fact, in the previous helicopter crash case before the Circuit Court, the Circuit Court directed APCo's counsel to prepare a proposed order granting summary judgment on foreseeability grounds. *See* J.A. 0547. APCo specifically limited its proposed order in this case to the preemption and foreseeability grounds that both the Circuit Court and Judge Berger considered. J.A. 1308. The order was not the sort of one-sided "kitchen sink" that the Supreme Court derided in *Taylor*; instead, it was tailored to the facts and circumstances of this case, and the Circuit Court's specific rationale. And if it wasn't, APCo's counsel specifically indicated it could tailor the order to the Judge's rationale. J.A. 1308. The Circuit Court did not commit clear error when it used APCo's proposed order that accurately reflected the law and facts, and this Court should affirm the lower court's order granting summary judgment in APCo's favor.

CONCLUSION

For the foregoing reasons, this Court should affirm the Circuit Court's order granting summary judgment in APCo's favor.

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CERTIFICATE OF SERVICE

I, Christopher D. Smith, Counsel for Defendant Appalachian Power Company, do hereby certify that on this **20th** day of **October 2025**, I served the foregoing document titled *Respondent Appalachian Power Company Brief to Petitioner's Appeal* via electronic mail and File & Serve Express which will notify the following:

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