

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 REPLY BRIEF

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ARGUMENT

I. Introduction

As was argued in the Petitioner's Brief in this appeal, the Trial Court erred in its wholesale adoption of the Proposed Order that had been prepared and submitted by Respondent APCO ("Respondent," or "APCO" herein) before the Trial Court had heard any arguments at hearing on the motion for summary judgment, and which ignored facts in the record supporting Petitioner's claims, asserted facts that were not supported, or claimed they were undisputed, when they were not. APCO's *Response* Brief herein continues that same gameplan, unfortunately. Not only does that demonstrate why the Circuit Court's adoption of the Proposed Order was incorrect and should be overturned, but it further demonstrates the need for careful assessment of the propositions put forth in the *Response* Brief. Under that careful assessment, it is clear that contrary to its claims, Petitioner's state/common law claims were not preempted by federal law, the Petitioner has never waived such arguments and has consistently claimed a basis for relief under state/common law in this matter, and there are at the very least sufficient factual issues under both disputed and undisputed evidence in this case to require submission of the case, including with respect to the issue of foreseeability, to a jury. The Circuit Court's grant of summary judgment was contrary to the facts requiring assessment by a jury, deprived Petitioner of her day in front of a jury involving the death of her husband, and it should be reversed accordingly.

II. APCO's Response Brief Demonstrates Precisely Why The Trial Court Erred By Wholesale Adoption of APCO's Pre-Hearing Proposed Order.

APCO's *Response* Brief (the "*Response* Brief") reflects many of the same unsupported assertions of fact, incorrect references to disputed material facts as being undisputed, and incorrect assertions that this case and the companion case decided in Federal Court were decided on the same factual background. As such it demonstrates precisely why the Circuit Court erred in not

taking a careful and detailed look at the record and consideration of the arguments made at hearing, instead simply adopting APCO's Proposed Order, which had been submitted before the hearing on summary judgment had been held, with the addition of only two short sentences. Additionally, and perhaps even more importantly, it demonstrates why this Court's review on appeal requires a careful consideration of the purported factual assertions and legal claims made by APCO herein.

Indeed, APCO's Statement of the Case section of its brief sets forth facts it believes to be central and material to the case, and discusses them in large part as if they are simply proven fact without dispute. On the contrary, many of the purported facts are directly disputed, and to the extent the Circuit Court determined those facts established, it assumed the role of the jury, which is not the court's role in determining summary judgment. This alone demonstrates that the grant of summary judgment was improper.

A major example of this is APCO's attempt to set the tone in its "Introduction" section by claiming that the Federal Court decision in *Furnas v. Appalachian Power Co.*, 2024 WL 3996084 (S.D.W. Va. 2024) and Judge Butcher's inclination with respect to previous summary judgment brought in companion cases before the Circuit Court were "premised on identical facts and legal theories" as in this case when summary judgment was considered. Quite the contrary, the facts and legal theories had changed considerably as a result of the NTSB final report and its findings of mechanical failure.

The *Furnas* case was briefed and argued well before the NTSB final report was issued on August 14, 2024 [JA0472], and the *Furnas* decision issued just after that on August 29, 2024, reflects nothing about the NTSB final report or its findings regarding mechanical failure, nor does it discuss autorotation of the helicopter in any way. *Furnas v. Appalachian Power Co.*, 2024 WL 3996084 at *3-4.

Similarly, the prior companion cases before Judge Butcher in the Circuit Court were argued prior to additional discovery being conducted in this case as a result of the NTSB final report, which changed the nature of the underlying facts and source of common law duty/foreseeability—specifically that it is extremely foreseeable that helicopters, of any age or type, will have mechanical issues causing them to lose power, and then enter an autorotation maneuver to safely land; indeed, a situation so foreseeable that helicopter pilots are required to practice the autorotation maneuver. None of that discovery occurred before either the *Furnas* Court or arguments before Judge Butcher in the companion cases. Thus, this matter is a very different case than the others, and thus should have survived summary judgment and submitted to a jury for determination. That is precisely why APCO attempts so hard to say they are exactly the same, and why the Circuit Court erred in simply rubber-stamping APCO's Proposed Order which was crafted for that very purpose.

APCO likewise repeatedly presents its argument as “facts,” ignoring that the existence of contrary evidence is precisely what creates a genuine issue of material fact preventing summary judgment and requiring factual determination by a jury. For example, APCO attempts to counter direct evidence from its internal emails in 1998 that indicate removal of the lines at issue were inadvertently left out of the Capital Planning Proposal, and would have to be budgeted for and removed at a later date, by pointing to testimony from Mohammed Ahmed twenty-seven years later suggesting the email was incorrect. (*Response* Brief at 3). That, however, does not establish that the e-mail was incorrect, it simply creates an issue of fact for a jury to decide. The jury is the finder of fact to determine whether the email prepared shortly after the timeframe in question in the late 90's accurately sets forth that the lines should have been removed, and would now have to be budgeted to do so in the future, or whether the now former employee's memory about one

particular line out of 100s or 1000s of lines, almost 30 years ago is more accurate. This is a jury question, not an undisputed fact.

APCO likewise claims the powerline was not located in an area with known helicopter traffic, again stating that as fact while ignoring contrary evidence that makes it a question of fact for the jury. Indeed, the report of Plaintiff's expert Donald Sommer notes that less than a mile and a half northeast of Logan Airport is an active military training site where C-130s regularly take off and land, and where every two years training exercises are held, which included 2021 military exercises in 2021 involving aircraft from at least five different states. [JA0856-0857]. This specifically included Army and Navy helicopters, Medevac crews, and Civil Air Patrol also practice there. [JA0856-0857]. Moreover, information about these activities was reported by a local news station, making the foreseeability of helicopter activity in the area even that much more apparent. [JA0856-0857]. Once again, this at minimum creates a disputed issue of fact regarding foreseeability, which required submission to a jury.

APCO's *Response* Brief in this matter is replete with such examples, as was the pre-written, one-sided Proposed Order the Circuit Court simply adopted without any significant modification. That was error in and of itself as argued in Petitioner's Brief, and further demonstrates the need for careful assessment in this Appeal. Both demonstrate that the Circuit Court's grant of summary judgment was in error and should be reversed.

III. Petitioner's State Law Claims and Duties Are Not Preempted By Federal Law, And APCO's Attempt To Distinguish Authority Demonstrating The Circuit Court Erred With Respect To Preemption Is Without Merit.

APCO's attempt to distinguish caselaw cited by Petitioner that demonstrate Petitioner's state-law claims/duties are not pre-empted by federal law are likewise without merit. As Petitioner's Brief pointed out, there is **no** controlling authority setting forth that the FAA completely preempts any action having to do with aviation. The Third Circuit case cited by the

Circuit Court in its order for the proposition, *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999), was subsequently limited to its specific context by the Third Circuit. APCO's *Response Brief*, however, avoids language in that subsequent case, *Sikkilee v. Precision Airmotive Corp.*, 822 F.3d 680 (3d Cir. 2016) that demonstrates that *Abdullah* is limited and not applicable here, instead focusing on the fact *Sikkilee* was a products liability case, unlike this case. On the contrary, in limiting *Abdullah*, *Sikkilee* noted that the court in *Abdullah* "paid special heed to 14 C.F.R. § 91.13(a), which proscribes 'operat[ing] an aircraft in a careless or reckless manner so as to endanger the life or property of another,' and observed that it provided a catch-all standard of care." *Sikkilee*, 822 F.3d at 689. As such, the Court specifically limited application of the "catch all standard of care" in *Abdullah* to operating an aircraft. *Id.* The Court likewise stated that its post-*Abdullah* case law "cautions us against interpreting the scope of the preempted field too broadly" and it further noted that "aviation torts have been consistently governed by state law." *Id.* at 689, 690.

Moreover, the *Sikkilee* court noted that the Federal Aviation Act has no express preemption provision, and that the language cited by APCO in its brief giving the FAA power to enact "minimum standards" has been held by the Supreme Court to be insufficient on its own to support a finding of clear and manifest congressional intent of preemption. *Id.* at 692. Similarly, the Court noted that the Federal Aviation Act contains a "savings clause" providing that remedies under the Act are "in addition" to other remedies provided by law, which likewise permits states to retain their traditional regulatory power over aspects of aviation and belies the argument that Congress demonstrated a clear and manifest intent to preempt state law. *Id.* at 692-693. Further, the *Sikkilee* analysis recognized that the product regulations prescribed procedural requirements for issuing and changing designs and products, did not set forth an actual comprehensive system of rules and

regulations like pilot pre-flight duties, specific pilot flight responsibilities, etc., and also did not supply a comprehensive standard of care as was provided in *Abdullah*. *Id.* at 694-695.

Those same considerations demonstrate there is no preemption in this matter, as supported by the case *Griswold v. Alabama Power Co.*, 2022 WL 37016 (M.D. Ala. 2022), discussion of which APCO relegates to a footnote, likely because it is completely contrary to their argument. (See Respondent's Brief at p. 24, n.8). Similar to this case, *Griswold* involves a helicopter that hit unmarked powerlines stretched above and across a river. *Id.* at *1. Similar factually to the instant case where a helicopter struck powerlines across a roadway. There, the Court found that the FAA obstruction standards are advisory, unenforceable, and entirely dependent on the FAA's case-by-case determination, and that the federal regulatory scheme of obstruction marking is not so pervasive as to preempt the duties under tort law. *Id.* at *4-5. The Court likewise found that applying state tort law would not conflict with the federal regulatory scheme. As the Court noted, the FAA's own regulatory scheme does not enforce uniformity, and in any event "common sense dictates that pilots would want to be more aware of their surroundings, not less. The value of marking more obstructions overshadows any minimal interest in uniformity." *Id.* at *6. The *Griswold* plaintiffs' claims, therefore, were not preempted and the defendant's motions for summary judgment denied, as should be the case here, and they were allowed to go forward with their cases.

Indeed, the *Griswold* case similarly aligns with established preemption doctrine as recognized by the West Virginia Supreme Court that preemption is not automatic, especially with respect to health and safety that have traditionally been regulated by the states, and that for preemption to occur there must be convincing evidence Congress intended federal law to supersede a state law. *Harrison v. Skyline Corp.*, 224 W. Va. 505, 510, 686 S.E.2d 735, 740 (W. Va. 2009)

(citing *Morgan v. Ford Motor Co.*, 224 W. Va. 62, 680 S.E.2d 77 (W. Va. 2009)). Moreover, in cases like this where there is no express preemption, preemption can only be implied where the federal law leaves no room for state regulation or where compliance with both federal and state law is impossible or is an obstacle to accomplishing congressional objectives. *Id.* As noted by *Griswold*, the federal law is in no way so pervasive that it could leave no room for state regulation—indeed, the obstruction standards are advisory, unenforceable, and entirely dependent on the FAA’s case-by-case determination. Likewise, applying West Virginia tort law would not conflict with the goals of the federal scheme; as *Griswold* noted, basic common sense dictates that pilots would want to be more aware of their surroundings, not less, which actually supports the goals of the federal scheme.

Another key distinction recognized by *Griswold* is between federal control over airspace management and state authority over ground-based safety hazards. *Griswold*, 2022 WL 37016 at *5. If APCO’s powerlines are viewed as abandoned infrastructure that created ground-based hazards, rather than as part of a federal airspace management system, the requirements set by the NESC related to removal or safe maintenance of abandoned lines represent the type of ground-based safety regulation that States, here West Virginia, retains enforcement authority.

Accordingly, preemption analysis in this matter demonstrates that there was neither express nor implied preemption of West Virginia’s state tort law, and West Virginia has a strong interest in its traditional powers and responsibilities to provide for the safety of its citizens and others within its boundaries. As such, the Trial Court erred in holding the opposite and erred in granting summary judgment herein.

IV. Petitioner Did Not Waive Or Abandon Arguments Regarding Preemption, Contrary To The Assertion In APCO's Respondent's Brief.

Petitioner did not waive or abandon preemption arguments. On the contrary, the Petitioner's brief in response to summary judgment 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 *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 Hearing Transcript at JA0945-0946, 0949-0951 for references to the *Raab* and *Brumfield* cases, as well as numerous references to the terms preempt/preemption as those cases dealt with preemption]. The brief specifically referenced those cases in the context of preemption, and it also noted that in the *Collins* case the Circuit Court found itself inclined to deny the motion regarding 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]. Indeed, this clearly demonstrates that Petitioner had not abandoned the argument that state law duties still applied and were not preempted by federal law. The only argument that was "abandoned" was that the federal regulations themselves required APCO to put marker balls on the lines, as Judge Butcher had previously ruled in the *Collins* case. The argument that the *State* source of duty provided the basis for the Petitioner's state law claim in this matter has *never* waived or been abandoned by Petitioner. And as discussed above, that *State* source of duty that Petitioner has always argued and which Judge Butcher had been inclined to allow in *Collins* is not preempted in this matter; as such, the Circuit Court's grant of summary judgment was in error.

V. **Contrary to APCO's Contention In The Respondent's Brief, APCO Had A Duty Under The NESC To Remove Lines Or Maintain Them In A Safe Condition, And Evidence Demonstrates APCO Did Neither Thereby Preventing Summary Judgment.**

Contrary to the claims in APCO's Reply Brief, APCO had a clear duty under the National Electric Safety Code ("NESC"), as adopted in West Virginia by W.V.C.S.R. 150-3-5.1, et seq. that it violated in this matter. NESC Section 214.B.3 specifically requires that lines and equipment permanently abandoned shall be removed or maintained in a safe condition. [JA0109]. Thus, when APCO abandoned the lines nearly thirty years ago, it had a duty to either remove those lines—which it admits it did **not** do—or it had a duty to actually maintain those lines in a safe condition. [JA0154-0155]. APCO attempts to avoid the clear ramification of its failure to remove the lines by claiming there is no evidence it did not maintain the lines in a safe condition. (*See* Respondent's Brief at p. 38). APCO conveniently ignores, however, that the evidence in the record reflects that it **did not maintain the lines at all**, despite the clear obligation that it do so. Indeed, the testimony of APCO's corporate representative, William Page Wilson, indicated that APCO had not removed or maintained the lines at all since it stopped using them in 1996. [JA0705-0706, 1067]. The failure to maintain the lines at all includes cutting back trees/brush around the lines that would make lines visible from the air. Moreover, Petitioner's expert Gary Colburn's Affidavit indicates that this was a violation of the NESC. [JA1119]. There is clearly a duty established by the NESC in this matter, and there are at least disputed facts concerning whether APCO violated that duty—the admission by APCO that it neither maintained the lines at all after abandoning them, nor took the lines down demonstrates violation of the duty. If it decided to simply abandon and take no action to maintain the lines, its only other option was to remove the lines. APCO admittedly did not do that. Summary judgment was therefore not appropriate, and the Trial Court's award of summary judgment should be reversed.

VI. APCO's Respondent Brief Attempts To Minimize The Significance Of The Evidence Of Its Own Best Practice To Remove Lines And Ignores West Virginia Precedent Making It Properly Considered With Regard To Duty And Foreseeability.

APCO's reply brief likewise misconstrues and attempts to minimize evidence of its "best practice" to remove lines when it retired them. APCO's designated corporate representative, William Page Wilson, Jr. testified 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]. However, APCO failed to follow their own best practice, resulting in the death of six people.

APCO's admitted "best practices" of removing deactivated/retired lines, such as the subject lines, is simply keeping in line with prevailing industry standards, as well as the duty under the NESC, which was adopted in West Virginia Code. *See* W.V.C.S.R. 150-3-5.1, *et seq.* The best practices therefore support not only the existence of the duty, but also APCO's recognition of appropriate safety measures, and their negligence in failing to adhere to that duty. APCO failed to do so in this case and instead left the crash lines in place, abandoned and unmarked, and not maintained in any way.

Likewise, APCO's best practices touch on and support violation of APCO's common law duties, as well. "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." 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.

Indeed, it is significant that Defendant no longer relies upon West Virginia authority *Butner v. Highlawn Memorial Park Co.*, 247 W. Va. 479, 881 S.E.2d 390 (W.Va. 2022), for its argument

against consideration of “best practices” as it did in its *Motion for Summary Judgment*, and instead cites to Federal Court decisions from Circuits and jurisdictions outside West Virginia in its *Response Brief*. That is because the *Butner* case in fact actually supports the admission of such evidence to demonstrate whether a Defendant acted prudently under the circumstances. Importantly, the Supreme Court in *Butner* did not rule that this potential evidence was irrelevant and should have been excluded on that ground. *Id.* at 400. On the contrary, the Court concluded that “**the circuit court erred** in finding that the anticipated testimony of Mr. Lambert and Mr. Brooks would be irrelevant to the petitioner’s negligence claims.” *Id.* (emphasis added). Here, the evidence concerning what the Defendant knew or should have known with respect to the lines and removing them includes not only the Defendant’s own “best practices,” but also the best practices of another power company as testified in deposition by Plaintiff’s expert Gary Colburn. Further, it likewise includes internal APCO documents that reflect the line at issue was supposed to be removed, but that the cost to do so had not been included in the budget when shutting down the line, as well as evidence that APCO’s own best practices was in fact reflected in the NESC standards that had been codified by West Virginia law.

Evidence showing APCO knew it should have removed the lines when it shut down the lines, but did not do so for budgetary reasons, and then failed to follow up and do so in 27 years, on top of the NESC reflecting this best practice as an actual requirement under West Virginia law, and the testimony regarding best practices employed by the Seattle Power Company all go to showing what APCO knew or should have known, and whether it acted as a prudent person. This evidence is directly relevant to and demonstrates that APCO not only should have known the lines should have been taken down, but that it actually did know it should have taken the lines down but failed to do so, all of which should have been decided by a jury, not the Court.

VII. Respondent's Brief Misconstrues Caselaw And Ignores Facts In This Matter Sufficient To Send The Question Of Foreseeability And A Common Law Duty Of Care To A Jury, Thereby Preventing Summary Judgment.

Indeed, the above discussion regarding APCO's best practices, 1998 internal e-mail regarding APCO's failure to remove the lines and need to budget to do so in the future, and additional expert testimony regarding the common occurrence and foreseeability of helicopters losing power and needing to enter an autorotation to safely land all factor into the foreseeability analysis, demonstrating that sufficient facts exist that a jury could find that the incident was foreseeable and APCO negligent for failing to remove the lines.

As noted by Petitioner, under *Strahin v. Cleavenger*, 216 W. Va. 175, S.E. 2d 197 (W. Va. 2004), the Circuit Court did have a role in assessing foreseeability...but the nature of that assessment was only to determine whether the type of harm was generally foreseeable, not to determine under all the particular facts of this particular instance that it was...that is left for the jury to decide. *Id.* at 216. W. Va. at 180.

When 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.

(emphasis added) *Id.* at Syl. Pts. 11 and 12.

In applying this test, the Trial Court in *Strahin* determined that there were sufficient facts for a jury to determine the kind of harm was foreseeable and it therefore allowed the case to go to

a jury, which determined it was foreseeable and awarded damages. *Id.* at 182. Contrary to APCO's contention, the facts of *Strahin* support that the facts at issue herein are sufficient to find foreseeability, thereby warranting submission to a jury. Indeed, *Strahin* involved an outlandish story which, if sufficiently foreseeable to go to a jury, certainly demonstrates the incident in this matter was foreseeable. The underlying plaintiff in *Strahin* was helping the defendant help lay brick at a house the defendant was building with a girl he was dating. *Id.* at 181. While there, a neighbor came by and said he had discovered gun shell casings on his property. *Id.* Vandalism had occurred at defendant's house involving someone shooting a hot water tank, propane tank, and windows of the house and a vehicle in the past month while no one was home, so defendant decided to get in the car with the plaintiff and his girlfriend to drive over to the neighbor's house to compare the casings. *Id.* at 181-182. At the same time as this was happening, a co-defendant was hiding in the woods watching them get into the car through the scope of a rifle, and shot into the car as it began moving. *Id.* at 182. The co-defendant had previously dated the defendant's girlfriend and a rivalry had emerged, that included one incident of the co-defendant playing a game of "chicken" with the girlfriend's vehicle before turning away. *Id.* at 181. The plaintiff brought suit against both the defendant and the co-defendant, and the Trial Court allowed the matter to go to trial, where the jury assigned thirty percent fault to the defendant. *Id.* at 182. On appeal, the Court upheld the Trial Court's determination that, under the facts most favorable to the plaintiff, the jury could find foreseeability and properly sent the matter to the jury for its determination. *Id.* at 186-187. Certainly, if these facts are sufficient for a jury to find foreseeability, the facts of this case are sufficient to send the matter to a jury for that same determination of foreseeability.

In fact, a case decided by the Fourth Circuit just a matter of days before the Hearing on APCO's *Motion for Summary Judgment*, which was provided to Judge Butcher and argued at the

hearing, actually involved a similar case of a helicopter that hit a wire and crashed, and similarly demonstrates that foreseeability is sufficient to send to the jury. *Kritter v. Mooring*, 2025 U.S. App. LEXIS 12066 (4th Cir., decided May 19, 2025) [a copy is included at JA1245-JA1253]. The Court applied North Carolina negligence law, noting that it was sufficient for the Plaintiff to put forward evidence that a reasonable jury should have foreseen the hazard, and that the defendants “need not have been able to foresee the ‘exact form’ of [plaintiff’s] injury to have had a duty of care.” *Id.* at *11. As the Court further stated, “[w]here, as here, either the facts are in dispute or more than one inference can be drawn from the evidence, these issues of fact must be resolved by the jury.” *Id.* at *12. Because there were sufficient facts that a jury could determine either that it was or was not foreseeable, summary judgment was inappropriate for either party and required resolution by a jury. *Id.* at *11-12. The Trial Court here should have taken a similar position in *Warren*.

Indeed, applying to this case the same standard as *Strahin*—i.e. merely looking at the facts to see if a jury could find foreseeability, with all facts viewed in the light most favorable to the Petitioner—demonstrates that there are sufficient facts that a jury could make that finding, and therefore summary judgment should have been denied to allow the jury to make that ultimate determination. Under the facts herein—again, considered in the light most favorable to the Petitioner—it was reasonably foreseeable that a helicopter would lose engine power and be forced into an autorotation to land safely.

The record reflects that both Petitioner’s and Respondent’s experts agree that loss of engine power and use of autorotation maneuvers to safely land are foreseeable. Petitioner’s expert Donald Sommer specifically 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]. Sommer further

indicates that “loss of helicopter engine power is the reason all pilots are trained and practice autorotations before they are certified to conduct flights as pilots in command.” [JA1096 at 17]. Defense expert Richard Lee also testified that he had participated in “**probably tens of thousands**” of autorotations and survived all of them. [JA1102] (emphasis added). APCO’s own expert likewise noted during his 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]. Lastly, and perhaps most significantly, APCO’s Expert, Mr. Stimpson 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).

Indeed, this is direct evidence contrary to APCO’s contention that there is no evidence that it should have known that one day the powerlines would be contacted by a helicopter hitting unmarked powerlines extending over a roadway during an emergency landing in a wooded area. As the experts specifically stated, mechanical failure and the need for autorotation are foreseeable and the very reason autorotations are needed and required to be practiced by helicopter pilots. Similarly, as discussed above, APCO’s own best practices to remove lines when retired, its internal emails indicating the lines were supposed to be removed but were not and would have to be budgeted for in the future, as well as the existence of the NESC’s requirement to take down lines also are evidence that APCO knew or should have known of the danger of a helicopter or some

other aircraft losing power and needing to use the stretch of road over which the lines were strung as a safe place to land.

Similarly, contrary to APCO's contention, there is very real evidence in the record indicating helicopters do fly in the area, making the real possibility of mechanical failure and necessary autorotation all the more foreseeable. Indeed, as noted above, less than a mile and a half northeast of Logan Airport is an active military training site where C-130s regularly take off and land, and where occasional training exercises are held, which included in 2021 exercises involving aircraft from at least five different states, specifically including Army and Navy helicopters, and that Medevac crews and Civil Air Patrol also practice there. [JA0856-0857]. Information about these activities was reported by a local news station, making the foreseeability of helicopter activity in the area even that much more apparent. [JA0856-0857]. Quite simply, there is sufficient evidence of foreseeability that this matter should have been given to a jury for the ultimate determination.

Respondent's citation to *Orso v. City of Logan*, 249 W. Va. 602, 900 S.E.2d 28 (W. Va. 2024) does not change that assessment, as *Orso* is clearly distinguishable. Of significance in *Orso* was the fact that the City of Logan did not own or control the wire on a sidewalk that the plaintiff tripped over, had no notice of any sort that the wire was even on the sidewalk, much less that it was causing a hazard, and the plaintiff herself had walked past the same wire numerous times with no issue before. *Id.* at 607-608. That is a very different case from this one. Here, APCO had been the owner of the lines before abandoning them, and actively chose to leave them up rather than remove them as required by the NESC. Further, APCO's own internal emails showed that APCO expressly recognized that the lines should have been removed 27 years prior to this crash, and expressly recognized that their removal would need to be budgeted for in the future. Despite this

recognition, APCO did neither. This is not the *Orso* case where the City neither owned nor even knew about the wire—here, APCO was the owner, knew about them, and nonetheless chose to abandon these lines, failed to remove them, and left them unmaintained for at least 27 years.

Similarly, APCO’s attempt to cast this case as “functionally the same” as *Keen v. Coleman*, 2022 WL 1744509 (W. Va. 2022), is likewise without merit and is distinguishable. It is first important to note that *Keen* was decided on a motion to dismiss, assessing the allegations, and thus the Court did not weight issues of material fact developed in the case. *Id.* at *1-2. Here, the facts developed demonstrate a statutory basis of duty from West Virginia’s adoption of the NESC and its requirement that utilities like APCO remove lines or maintain them in a safe condition following abandonment. *See* W. Va. CSR 150-3-5.1, *et seq.* The plaintiff’s complaint in *Keen* alleged no such violation of any statute or regulation. *Id.* at *5. Likewise, the allegations did not set forth anything comparable to the evidence at issue here with regard to foreseeability. Here, there has been expert testimony as to the foreseeability of helicopters losing power and entering an autorotation, testimony that helicopter pilots have to practice autorotations because they are so common, and testimony that the Respondent’s own business practice was to remove the very lines that caused the crash located in an area representing the only nearby location to safely land in a highly wooded area. Evidence in this case demonstrates the reasonable foreseeability of what happened in this action, and that evidence must be construed in favor of the Petitioner on summary judgment. Additionally, the burden of removing abandoned powerlines or maintaining the powerlines appropriately is extremely minimal compared to the catastrophic consequences of leaving “invisible” “helicopter killer” lines in place for over 27 years. *Morrison v. Appalachian Power Co.*, 84 S.E. 506, 508 (W. Va. 1915) (“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"). Thus, policy considerations also strongly favor imposing a duty on APCO to either have removed the abandoned lines or maintained them safely, particularly given APCO's own recognition that removal was necessary and appropriate. As such, the Circuit Court's grant of summary judgment should be reversed and Petitioner allowed her day in court to have her claims decided by a jury.

CONCLUSION

For all the reasons set forth above, set forth in the Petitioner's Brief, and as may be further argued at hearing of this matter, Petitioner respectfully requests that this Honorable Court reverse the Circuit Court's grant of summary judgment and, instead, allow Petitioner the opportunity to present the facts of this case to a jury to demonstrate the negligence of APCO's conduct in admittedly failing to remove or in any way maintain the powerlines that ultimately took the life of her husband.

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, III, counsel for Petitioner, do hereby certify that I have filed the
Petitioner's Reply Brief on this 4th day of November 2025, using the File & ServeXpress system,
which will send notification of such filing to the following counsel of record:

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