

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Kendall K. Richards and Kendall Enterprises, Inc.,
a West Virginia corporation,
Plaintiffs Below, Petitioners**

FILED

November 28, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs) **No. 11-1301** (Wood County 06-C-621)

**Monongahela Power Company, an Ohio corporation,
Allegheny Energy Service Corporation, a Maryland
corporation, James R. Peters, James R. Peters d/b/a
Chore Masters, and Frederick E. Weaver,
Defendants Below, Respondents**

MEMORANDUM DECISION

Kendall K. Richards, plaintiff below and petitioner herein, and his company appeal the circuit court's order denying their motion to alter or amend an adverse summary judgment order in his negligence suit. Defendants/Respondents Monongahela Power Company and Allegheny Energy Service Corporation filed a response brief. Defendants/Respondents James R. Peters, James R. Peters d/b/a Chore Masters, and Frederick E. Weaver filed a separate response brief.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Petitioner Richards owns property in Parkersburg on which he operated a used car lot and automobile towing business. On the morning of May 25, 2005, Respondent Weaver was operating a dump truck owned by his employer Respondent Peters d/b/a Chore Masters. At approximately 9:50 a.m., Weaver exited petitioner's property while the dump truck's bed was still raised. The raised bed hit and became entangled in overhead utility lines, pulling down electric lines and poles and causing a surge of electricity through the power lines.

According to Respondent Monongahela Power, a reclosure device at its Larkmead Substation quickly activated and opened the circuit, thus shutting off power to this area and approximately 900 customers. However, according to petitioner, the circuit was open for only a brief period of time and then re-closed, causing power to course through the downed lines. Petitioner asserts that the lines exploded and there were blue fireballs. Petitioner asserts that the power arced on the downed lines for twenty to thirty minutes after the truck became entangled. Monongahela Power denies that the power was still on. Monongahela Power asserts that, if the power had been on for this long of a time period, there would have been extensive damage to its distribution system, which damage is not present. Monongahela Power asserts that the information about the blue fireballs and arcing is not in the record, rather, it is based solely upon petitioner's proffer. Petitioner also proffered that, during that same day and the next morning, structures in his immediate neighborhood suffered damage and fires as a result of the power surge. Petitioner proffered that for twenty-four to forty-eight hours after the dump truck incident, the property across the street experienced intermittent power losses.

Six days after the dump truck accident, on the morning of May 31, 2005, a fire started in a building on petitioner's property. The building was a total loss. Petitioner filed suit asserting that the fire in his building was caused by damage received from the electrical fault that had occurred during the dump truck incident. He sued the dump truck driver and owner (Respondents Peters and Weaver) for negligent operation of the truck, and he sued the power company (Respondents Monongahela Power and its affiliate Allegheny Energy) asserting that it had faulty equipment.

By order of August 4, 2009, the circuit court granted summary judgment in favor of these respondents on all claims of Petitioner Kendall Richards and his company, finding that petitioner had not presented evidence to establish a material issue of fact on the element of causation.¹ The circuit court noted that petitioner had two experts. John Sandy, an expert in fire causes and origins, identified the location of the ignition point and the heaviest fire damage, and concluded that the fire was electrical in nature. Dr. Charles Pickering, a licensed electrical engineer, testified that an overvoltage was experienced in the building causing degradation of the PVC wiring that, in turn, caused high-impedance arcing faults and ignited the fire. However, the circuit court found that neither of petitioner's experts gave an explanation or provided a factual basis for how the dump truck incident caused the fire in petitioner's building.

¹ Claims by co-plaintiffs were not addressed in the August 4, 2009, order and are not the subject of this appeal.

Additionally, the circuit court found that the experts cannot testify to any negligence, defects, or problems with the power company's power distribution system and, therefore, cannot establish that the power company breached a duty to petitioner. The circuit court found that Dr. Pickering did not examine the power company's distribution system, thus could not form any opinion as to what (if anything) went wrong with the facilities. Dr. Pickering testified that he did not have an opinion to a reasonable degree of engineering probability that the power company caused the overvoltage condition that caused the fire.

The circuit court found that, although Dr. Pickering attributed petitioner's fire to the dump truck incident, Pickering's deposition testimony also established that there are other causes of an overvoltage condition, and Pickering could not opine to a reasonable degree of engineering probability that the fault that occurred on the distribution system directly after the dump truck hit the power lines was the cause of the overvoltage condition experienced in plaintiff's building. The circuit court concluded that Dr. Pickering's opinion that the dump truck's contact with the power lines and the resulting operation of the power company's distribution system caused the fire in petitioner's building was speculation not supported by a factual basis. The circuit court noted that it had previously provided petitioner with additional time to identify additional experts who could provide the needed opinions, but none had been identified.

Thereafter, petitioner filed a motion to alter or amend judgement pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure, which the circuit court denied. The circuit court found that the motion did not raise any new issue or evidence.

In this petition for appeal, petitioner asserts that the circuit court erred in granting summary judgment on the basis of Dr. Pickering's deposition testimony. "The standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed." Syl. Pt. 1, *Wickland v. American Travellers Life Ins. Co.*, 204 W.Va. 430, 513 S.E.2d 657 (1998). "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Upon a review of the record and argument of the parties, we conclude that the circuit court correctly granted summary judgment for respondents. Accordingly, we affirm.

Affirmed.

ISSUED: November 28, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh

DISSENTING:

Justice Robin Jean Davis