IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2023 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 22-0292

EUGENE F. BOYCE and KIMBERLY D. BOYCE,
Petitioners

v.

MONONGAHELA POWER COMPANY,
FRONTIER COMMINCATIONS OF AMERICA, INC.,
FRONTIER COMMUNICATIONS ONLINE AND LONG DISTANCE, INC.,
FRONTIER COMMUNICATIONS CORPORATE SERVICES, INC.,
FRONTIER COMMUNICATIONS ILEC HOLDINGS, LLC,
ATLANTIC BROADBAND (PENN), LLC, &
ATLANTIC BROADBAND FINANCE, LLC,
Respondents

Appeal from the Circuit Court of Monongalia County
The Honorable Susan B. Tucker, Judge
Civil Action No. 16-C-219

AFFIRMED

Submitted: October 17, 2023
Filed: November 8, 2023

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JUSTICE ARMSTEAD delivered the Opinion of the Court.

JUSTICE HUTCHISON and JUSTICE WOOTON dissent and reserve the right to file dissenting Opinions.

SYLLABUS BY THE COURT

1. "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).

2. "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).

3. "In order to recover in an action based on negligence the plaintiff must prove that the defendant was guilty of negligence and that such negligence was the proximate cause of the injury of which the plaintiff complains." Syl. Pt. 1, *Matthews v. Cumberland & Allegheny Gas Co*., 138 W. Va. 639, 77 S.E.2d 180 (1953).

4. "One requisite of proximate cause is an act or an omission which a person of ordinary prudence could reasonably foresee might naturally or probably produce an injury, and the other requisite is that such act or omission did produce the injury." Syl. Pt. 4, *Matthews v. Cumberland & Allegheny Gas Co*., 138 W. Va. 639, 77 S.E.2d 180 (1953).

5. "The proximate cause of an injury is the last negligent act contributing to the injury and without which the injury would not have resulted." Syl. Pt. 5, *Matthews v. Cumberland & Allegheny Gas Co*., 138 W. Va. 639, 77 S.E.2d 180 (1953).

6. "'Those who operate and maintain wires charged with dangerous voltage of electricity are required to exercise a degree of care commensurate with the dangers to be reasonably apprehended therefrom; but they are not insurers against all injury therefrom.' Pt. 1, syllabus, *Maggard v. Appalachian Electric Power Co.*, 111 W.Va. 470, 163 S.E. 27." Syl. Pt. 7, *Sutton v. Monongahela Power Co.*, 151 W. Va. 961, 158 S.E.2d 98 (1967).

7. "'A person in charge of or maintaining an instrumentality inherently dangerous is not liable to one who is injured thereby in a manner which could not be reasonably anticipated.' Pt. 3, syllabus, *Musser v. N. & W. Ry. Co.*, 122 W.Va. 365, 9 S.E.2d 524." Syl. Pt. 8, *Sutton v. Monongahela Power Co.*, 151 W. Va. 961, 158 S.E.2d 98 (1967).

8. "The questions of negligence, contributory negligence, proximate cause, intervening cause and concurrent negligence are questions of fact for the jury where the evidence is conflicting or when the facts, though undisputed, are such that reasonable men draw different conclusions from them." Syl. Pt. 2, *Evans v. Farmer*, 148 W. Va. 142, 133 S.E.2d 710 (1963).

9. "When the material facts are undisputed and reasonable men can draw only one conclusion from them the question of negligence is a question of law for the court." Syl. Pt. 6, *Matthews v. Cumberland & Allegheny Gas Co.*, 138 W. Va. 639, 77 S.E.2d 180 (1953).

10. "An intervening cause, in order to relieve a person charged with negligence in connection with an injury, must be a negligent act, or omission, which

constitutes a new effective cause and operates independently of any other act, making it and it only, the proximate cause of the injury." Syl. Pt. 3, in part, *Wehner v. Weinstein*, 191 W. Va. 149, 444 S.E.2d 27 (1994).

11. "A tortfeasor whose negligence is a substantial factor in bringing about injuries is not relieved from liability by the intervening acts of third persons if those acts were reasonably foreseeable by the original tortfeasor at the time of his negligent conduct." Syl. Pt. 13, *Anderson v. Moulder*, 183 W. Va. 77, 394 S.E.2d 61 (1990).

ARMSTEAD, Justice:

Petitioner Eugene Boyce ("Petitioner") was attempting to make a residential delivery in the course of his employment for Lowe's when he encountered overhead communication lines that his truck could not clear. He attempted to move the communication lines by climbing on top of his delivery truck and wrapping shrink-wrap around the communication lines, which were in close proximity to an energized electrical line. Petitioner contacted the energized electrical line and was electrocuted. He suffered severe injuries.

Petitioner and his wife, Kimberly Boyce (collectively "Petitioners"), brought a negligence action against Respondents, the owners of the electrical and communication lines.[1] Following discovery, the Circuit Court of Monongalia County granted summary judgment in favor of Respondents. It found that Petitioner's "actions were negligent and serve as the only proximate cause" of the incident. The circuit court also found that even if a genuine issue of material fact existed as to Respondents' negligence, Petitioner's actions "constitute an intervening and superseding cause of the [i]ncident and alleged injuries." After the circuit court granted summary judgment in favor of Respondents,

[1] Respondents can be grouped into three categories: (1) Monongahela Power Company ("Respondent Mon. Power"); (2) Frontier Communications of America, Inc., Frontier Communications Online and Long Distance, Inc., Frontier Communications Corporate Services, Inc., and Frontier Communications ILEC Holdings LLC (collectively "Respondent Frontier"); and (3) Atlantic Broadband (Penn), LLC and Atlantic Broadband Finance, LLC (collectively "Respondent Atlantic").

Petitioners filed a motion to alter judgment pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure. The circuit court denied this motion on March 25, 2022.

On appeal, Petitioners mainly contend that proximate cause, foreseeability, and intervening cause involve questions of fact that should be decided by a jury. After review, we agree with the circuit court that Petitioner's actions were (1) the sole proximate cause of the incident and (2) "constitute an intervening cause." Therefore, we affirm the judgment of the circuit court.

I. FACTUAL AND PROCEDURAL BACKGROUND

On April 11, 2014, Petitioner was working as a boom truck operator for Lowe's. The incident at issue occurred when he was attempting to deliver construction materials to a residential customer, Brandon Tucker ("Mr. Tucker"), in Morgantown, West Virginia. When he arrived at Mr. Tucker's residence, Petitioner encountered low-hanging communication lines in Mr. Tucker's driveway that blocked the path of his boom truck. The communication lines were owned by Respondents Frontier and Atlantic. The lowest communication line was approximately 14'4" above the ground. Respondent Mon. Power owned two electrical lines, one energized and one neutral, that ran above the communication lines. The energized line was approximately 20'6" above the ground and the neutral line was approximately 23'7" above the ground.[2]

[2] Respondent Mon. Power owned the poles upon which the communication lines and the electrical lines were strung.

Petitioner initially had Mr. Tucker assist him by using a wooden board to push the communication lines upward. This did not solve the problem. Petitioner then climbed on top of his truck, wrapped shrink-wrap around the communication lines and contacted the energized electrical line with his hand. Petitioner was electrocuted upon contacting the energized electrical line and suffered serious injuries, including the amputation of his right hand.

Following this incident, Petitioners filed the instant lawsuit, asserting negligence claims against the three Respondents. Petitioners alleged that Respondents Frontier and Atlantic were negligent because their communication lines were below the height clearance requirements set forth in applicable laws and regulations, including the National Electric Safety Code ("NESC"). Further, Petitioners asserted that Respondent Mon. Power was negligent because the neutral electrical line was installed above the energized electrical line "in violation of applicable laws and regulations."

Multiple witnesses were deposed during discovery. Mr. Tucker, the residential customer who witnessed the incident, described the sequence of events leading up to Petitioner's electrocution as follows:

> Q. [T]ake us through from the time you saw him with the shrink wrap[,] what you witnessed.
>
> A. Well, like I said, I was walking around the side of the truck and he had already had some of it [the shrink-wrap] wrapped around the wire.
>
> Q. That is the lowest wire?

A. Yes, sir. By the time that I was – I came over around, he grabbed that bottom wire to lift it up and as soon as he did, it started electrocuting him.

Q. So he grabbed the lowest wire?

A. Yeah, the wire that has the shrink wrap around it is the wire that he grabbed.

. . . .

Q. Prior to him starting to do that [shrink-wrapping the wires], did he tell you he was going to do that?

A. Yeah, he did. He said he was going to try something else with this shrink wrap, he did it before. That was as I was walking around. By the time I got around, he already had it wrapped up and grabbed it and it electrocuted him.

. . . .

Q. So you think he was trying to push the wires up?

A. I thought he was pushing them up to the next wires up in the air. I don't know what he was trying to do, honestly. I don't know. He said he did it before, so I figured that he knew what the heck he was doing.

. . . .

Q. So when he was pushing these up, it was to get them closer to the next wire in order to have those hold up the lower wires?

A. Correct.

Petitioner was also deposed. He testified that he did not remember the accident or the events leading up to it. However, he stated that during the time he has driven a boom truck, he had occasionally moved utility lines to allow his truck to pass under them by shrink-wrapping the lines in the same manner that he used in the instant

case.[3] He stated that he was "self-taught" in this regard. When asked to describe his shrink-wrapping method, Petitioner replied, "Wrap shrink-wrap around the other ones [lines] to get -- to lift the bottom one up to where I could clear my truck." Additionally, Petitioner testified that he never received any training to identify or handle electrical or communication lines, but stated that he "had the understanding that the power line was always on top." He also testified, "I would never touch a power line knowing that it was power."

Both parties retained expert witnesses who were deposed. Petitioners' expert witness, James Orosz, testified during his deposition that the communication lines, owned by Respondents Frontier and Atlantic, were too low and were in violation of the NESC. Regarding the Mon. Power lines, Mr. Orosz was not critical of their height. Instead, he found that the configuration of the lines, the neutral line on top and the energized line below it, was "a violation of the standard of care and the standard of installation and maintenance of those lines." Mr. Orosz did not foreclose the possibility that there could be an instance where having the neutral line above the energized line would be appropriate, but in this case, he found no reason why the energized line was below the neutral line. Finally, Mr. Orosz conceded that the electrical lines met all NESC clearance requirements and admitted that attempting to shrink-wrap utility lines together was not a safe practice.

[3] Petitioner had previously driven a boom truck for a drywall supply company but he did not state the amount of time he worked for this company.

Respondent Mon. Power's expert witness, Russell Simmons, testified that "the construction of the overhead lines was consistent with the [NESC]." Mr. Simmons opined that the NESC was silent as to whether the energized line should be placed above or below the neutral line under the circumstances of the present case.[4] He also testified that it is not uncommon for the energized line to be placed below the neutral line, explaining that the geography and environment in which the lines are strung affects their height on the pole. He stated that a common reason for placing the energized line below the neutral line "was to minimize the dropping of limbs from above down onto the lines and not tripping the circuit so that it isn't in close proximity."

At the close of discovery, Respondents filed motions for summary judgment. During the hearing on these motions, counsel for Respondent Atlantic stated that the main issue underlying the motions for summary judgment was proximate cause. He explained:

> It is uncontested that [Petitioner] arrived on the scene in his boom truck from Lowe's. It is uncontested that the boom truck could not pass under the wires from Frontier and Atlantic. . . . It's uncontested that [Petitioner] climbed out of his truck, climbed up on to the uninsulated boom without any personal protective equipment whatsoever, and on his own tried to raise these wires by wrapping them in saran wrap and attaching them to the energized Mon. Power wire. . . . When stretching wires across, whether it be Atlantic, Frontier or Mon. Power, it is not reasonably foreseeable on the part of any of us that [Petitioner] is going to climb out of his truck and do the things that he did on the day of the accident[.] . . . And since there are no . . .

[4] Mr. Simmons explained that one circuit was present on the poles where Petitioner was injured. According to Mr. Simmons, the NESC is silent as to whether the energized line should be placed above or below the neutral line when only one circuit is present.

> genuine issues of material fact here, that proximate cause rests entirely with [Petitioner] and his actions.

In response, Petitioners' counsel highlighted Mr. Orosz's expert opinions that were critical of Respondents. Further, Petitioners' counsel asserted that the issues of proximate cause and Respondents' alleged negligence should be resolved by a jury.

The circuit court granted Respondents' motions for summary judgment. It found that Respondents

> could not have reasonably anticipated that a truck driver without any training and/or experience in the electrical field would: 1) climb on top of a truck into imminent danger with contact from utility wires; 2) apply shrink-wrap around the communication lines; and 3) grab a live electrical line with his bare hand.
>
> [Petitioner's] actions were negligent and serve as the only proximate cause of the [i]ncident as his actions, unlike [Respondents'] alleged actions, were reasonably expected to produce an injury and the specific type of incident that unfortunately occurred.

Additionally, the circuit court's order provides that even if it "determined that a genuine issue of material fact existed as to whether [Respondents] were negligent . . . [Petitioner's] actions constitute an intervening and superseding cause of the [i]ncident and alleged injuries." The circuit court noted that this Court has stated that "[g]enerally, a willful . . . act breaks the chain of causation." *Yourtee v. Hubbard*, 196 W. Va. 683, 690, 474 S.E.2d 613, 620 (1996). Relying on *Yourtree*, the circuit court found that there was no genuine issue of material fact "as to whether [Petitioner] willfully contacted the communications lines and power line. The fact that [Petitioner] may have believed that

the power line was a neutral line and that he may have lacked intent to electrocute himself is irrelevant." According to the circuit court, Petitioner's actions "were voluntary and operate wholly independently of any of [Respondents'] actions. [Petitioner's] acts break the causal chain and relieve [Respondents] of any liability in this matter."

Petitioners filed a motion to alter the judgment pursuant to Rule 59(e). By order entered on March 25, 2022, the circuit court denied Petitioners' motion, finding that Petitioners did not present a change in law or new evidence that would entitle them to relief under Rule 59(e).[5] Following entry of the circuit court's order, Petitioners filed the instant appeal.

II. STANDARD OF REVIEW

This appeal requires us to examine the circuit court's ruling granting summary judgment in favor of Respondents. We have held that "[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). Further,

> [s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

[5] *See* Syl. Pt. 2, *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W. Va. 48, 717 S.E.2d 235 (2011) ("A motion under Rule 59(e) of the *West Virginia Rules of Civil Procedure* should be granted where: (1) there is an intervening change in controlling law; (2) new evidence not previously available comes to light; (3) it becomes necessary to remedy a clear error of law or (4) to prevent obvious injustice.").

Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).

III. ANALYSIS

On appeal, Petitioners have raised multiple assignments of error[6] that can be distilled into two main categories. First, Petitioners contend that the circuit court erred by finding that Petitioner's actions "were negligent and serve as the only proximate cause" of the incident. Second, Petitioners argue that the circuit court erred by ruling that even if a genuine issue of material fact exists as to Respondents' negligence, Petitioner's actions constitute an intervening and superseding cause of the incident. We address each of these issues in turn.

A. Proximate Cause

Petitioners assert that proximate cause and foreseeability are issues that should have been decided by a jury. They posit that "Respondents should have reasonably foreseen that their failure to abide by the professional standards set forth in the NESC

[6] Petitioners contend that the circuit court erred by: (1) finding that Respondents were not the proximate cause of Petitioner's injuries because foreseeability and proximate cause should be resolved by a jury; (2) failing to find Respondents negligent as a matter of law based on Petitioners' claim that Respondents violated the NESC; (3) relying upon *Maggard v. Appalachian Electric Power Co.*, 111 W. Va. 470, 163 S.E. 27 (1932), because the facts of *Maggard* are not "nearly identical" to the facts of this case, as stated by the circuit court; (4) finding that it was undisputed that Petitioner intentionally grabbed the primary wire because there is no evidence to that effect; (5) relying on irrelevant OSHA regulations; (6) finding that Petitioner's actions were an intervening and superseding cause; (7) relying on Petitioners' expert's testimony that Petitioner was a trespasser because Petitioners' counsel objected to the question at the deposition and there was no admissible testimony that Petitioner was a trespasser; and (8) finding that Petitioner assumed the risk and that his claims were therefore barred from recovery.

would cause harm to persons." Further, Petitioners contend that the circuit court erred by concluding that the operative facts as to how the incident occurred are undisputed. According to Petitioners, the facts are disputed or susceptible to more than one interpretation, therefore, resolving the issue of proximate cause by summary judgment was improper.

By contrast, Respondents assert that the operative facts are undisputed and demonstrate that Petitioner's actions were the sole proximate cause of his injuries. According to Respondents, it was not reasonably foreseeable that when confronted with low-hanging wires, a delivery truck driver without any training in the electrical field would climb on top of his truck, shrink-wrap communication lines, and contact the electrical line with his bare hand.

After review, we agree with Respondents. As explained below, we find that the issue of proximate cause was properly resolved by the circuit court because the operative facts are undisputed and susceptible to only one conclusion. Similarly, we agree with the circuit court's conclusion that Respondents could not reasonably foresee that a truck driver without any training in the electrical field would climb on top of a truck, shrink-wrap communication lines, and contact an energized electrical line. Our analysis explaining these conclusions includes: (1) a discussion of our law on proximate cause, foreseeability, and the degree of care a utility provider must exercise to prevent injury; (2) whether the issue of proximate cause may be resolved as a matter of law; and (3) application of the law in the foregoing categories to the facts of this case.

This Court has held that "[i]n order to recover in an action based on negligence the plaintiff must prove that the defendant was guilty of negligence and that such negligence was the proximate cause of the injury of which the plaintiff complains." Syl. Pt. 1, *Matthews v. Cumberland & Allegheny Gas Co*., 138 W. Va. 639, 77 S.E.2d 180 (1953). In *Evans v. Farmer*, 148 W. Va. 142, 133 S.E.2d 710 (1963), we noted that proximate cause can generally be defined as

> that cause, which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. . . . The overall factual situation must be taken into consideration and the solution of problems presented thereby must be based on logic, common sense, justice and precedent. Each case, therefore, in relation to the determination of proximate cause, necessarily must be decided upon its own peculiar facts.

Id. at 149, 133 S.E.2d at 715.

Additionally, the Court in *Matthews* recognized the intertwined nature of foreseeability and proximate cause:

> *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*. *If an occurrence is one that could not reasonably have been expected the defendant is not liable*. Foreseeableness or reasonable anticipation of the consequences of an act is determinative of defendant's negligence. . . . The law only requires reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, the party whose conduct is under investigation is not answerable therefor. *Foreseeable injury is a requisite of proximate cause*, and proximate cause is a requisite for actionable negligence, and actionable negligence is a requisite for recovery in an action for personal injury negligently inflicted.

138 W. Va. at 653-654, 77 S.E.2d at 188-189 (internal citation and quotation omitted, emphasis added).[7]

Based on this discussion, the Court in *Matthews* held in syllabus points four and five that:

> 4. One requisite of proximate cause is an act or an omission which a person of ordinary prudence could reasonably foresee might naturally or probably produce an injury, and the other requisite is that such act or omission did produce the injury.
>
> 5. The proximate cause of an injury is the last negligent act contributing to the injury and without which the injury would not have resulted.

In addition to our general law on proximate cause, this case requires us to specifically examine the degree of care Respondents were required to undertake. This Court has explained that those who operate inherently dangerous instrumentalities, such as utility providers, must exercise care commensurate with such dangers. However, we have cautioned that such entities are not liable for unforeseeable injuries that result therefrom.

[7] Similarly, one treatise addressing foreseeability and proximate cause noted: "The foreseeability factor is vital to establishing proximate cause and the negligence claim overall; if an injury was not foreseeable, then there was no negligence." Vicki Lawrence MacDougall, *Negligence: Purpose, Elements and Evidence: The Role of Foreseeability in the Law of Each State*, 389-90 (2018). *See also* Syl. Pt. 2, *McCoy v. Cohen*, 149 W. Va. 197, 140 S.E.2d 427 (1965) ("A fundamental legal principle is that negligence to be actionable must be the proximate cause of the injury complained of and must be such as might have been reasonably expected to produce an injury.").

In syllabus points seven and eight of *Sutton v. Monongahela Power Co.*, 151 W. Va. 961, 158 S.E.2d 98 (1967), we held:

> 7. "Those who operate and maintain wires charged with dangerous voltage of electricity are required to exercise a degree of care commensurate with the dangers to be reasonably apprehended therefrom; but they are not insurers against all injury therefrom." Pt. 1, syllabus, *Maggard v. Appalachian Electric Power Co.*, 111 W.Va. 470, 163 S.E. 27.[8]
>
> 8. "A person in charge of or maintaining an instrumentality inherently dangerous is not liable to one who is injured thereby in a manner which could not be *reasonably anticipated*." Pt. 3, syllabus, *Musser v. N. & W. Ry. Co.*, 122 W.Va. 365, 9 S.E.2d 524.

(Emphasis added).

Finally, we note that this Court has held that, "[t]he questions of negligence, contributory negligence, proximate cause, intervening cause and concurrent negligence are questions of fact for the jury where the evidence is conflicting or when the facts, though undisputed, are such that reasonable men draw different conclusions from them." Syl. Pt. 2, *Evans v. Farmer*, 148 W. Va. 142, 133 S.E.2d 710. However, when "all the evidence relied upon by a party is undisputed and susceptible to only one inference, the question of

[8] We reject Petitioners argument that the circuit court erred by relying on *Maggard v. Appalachian Electric Power Co.*, 111 W. Va. 470, 163 S.E. 27. In *Maggard*, the plaintiff was injured after contacting a live electrical wire while working for a construction company. The construction company contacted the power company prior to the incident and requested that it move its power lines to accommodate the construction project. While the facts of *Maggard* are not "nearly identical" to the instant case, the main takeaway from *Maggard* is applicable herein, namely that a utility provider "is not chargeable with negligence where someone, doing an act which [it] had no reason to expect or anticipate, suffers an injury[.]" *Id.* at 477, 163 S.E. at 30.

proximate cause becomes a question of law." *Harbaugh v. Coffinbarger*, 209 W. Va. 57, 65, 543 S.E.2d 338, 346 (2000) (citation omitted). *See also* Syl. Pt. 6, *Matthews*, 138 W. Va. 639, 77 S.E.2d 180 ("When the material facts are undisputed and reasonable men can draw only one conclusion from them the question of negligence is a question of law for the court.").

Applying the foregoing to the instant case, we first conclude that the operative facts as to how the incident occurred are not in dispute. It is undisputed that Petitioner climbed on top of his truck, shrink-wrapped the communication lines, and contacted the energized electrical line that was approximately 20'6" above the ground. In Petitioner's deposition, he admitted that he had previously used this shrink-wrapping method. Further, Mr. Tucker testified to this sequence of events and stated that Petitioner told him that he had previously used this same shrink-wrapping method. The fact that Petitioner testified that he would not intentionally grab an energized electrical line does not create a question of fact. The circuit court did not find, nor do Respondents argue, that Petitioner specifically intended to grab an energized electrical line. Instead, the undisputed facts demonstrate that all of the actions that Petitioner took that culminated in his contact with the energized electrical line were intentional and that these intentional actions resulted in his injuries.

Next, we find that the circuit court did not err by concluding that these undisputed facts "are such that reasonable persons can draw only one conclusion with respect to proximate cause[.]" Again, the undisputed facts are that Petitioner was

confronted with low-hanging communication wires. He then intentionally climbed on top of his truck, applied shrink-wrap around the communication wires, and contacted an energized electrical line that was approximately 20'6" above the ground. Further, it is undisputed that Petitioner did not have any training with electrical or communication lines and that he was "self-taught" in regard to shrink-wrapping utility lines. Under syllabus point four of *Matthews*, "[o]ne requisite of proximate cause is an act . . . which a person of ordinary prudence could reasonably foresee might naturally or probably produce an injury[.]" 138 W. Va. 639, 77 S.E.2d 180. We find that Petitioner's intentional actions are such that a person of "ordinary prudence could reasonably foresee" would produce an injury. Based on these undisputed facts, we agree with the circuit court that the only inference that can be drawn is that Petitioner's actions were the sole proximate cause of the incident and his injuries.[9]

Additionally, we agree with the circuit court's conclusion that Respondents could not reasonably have anticipated Petitioner's actions. We find that it is not reasonably foreseeable that when confronted with low-hanging communication lines, Petitioner would undertake a sequence of actions that resulted in him contacting an energized electrical line that was 20'6" above the ground. We emphasize that there has been no claim that the height of this electrical line was improper. "A person in charge of or maintaining an

[9] Because Petitioner's actions were intentional and operate as the sole proximate cause of the incident and his injuries, it is unnecessary to determine whether Petitioner was a trespasser at the time the injuries occurred.

instrumentality inherently dangerous is not liable to one who is injured thereby in a manner which could not be *reasonably* anticipated." Syl. Pt. 8, *Sutton*, 151 W. Va. 961, 158 S.E.2d 98 (emphasis added). We conclude that Petitioner's intentional actions that resulted in his injuries could not have been *reasonably* anticipated by Respondents.[10]

Accordingly, we find that the circuit court properly resolved the issue of proximate cause in its summary judgment order based on the undisputed facts of this matter. Further, we find that Respondents could not have reasonably anticipated Petitioner's actions that led to his injuries. In so ruling, we echo this Court's statement in *Matthews* that, "[i]f an occurrence is one that could not reasonably have been expected the defendant is not liable." 138 W. Va. at 653, 77 S.E.2d at 188. A scenario in which a

[10] Petitioner's intentional actions distinguish this case from a number of previous cases in which we have found that a utility provider may be liable if a victim's contact with a power line was accidental or inadvertent. *See Grillis v. Monongahela Power Co*., 176 W. Va. 662, 346 S.E.2d 812 (1986) (painter hired to paint railroad bridge injured when his equipment came in contact with transmission wire under bridge); *Gault v. Monongahela Power Co*., 159 W. Va. 318, 223 S.E.2d 421 (1976) (landowner looking for lost livestock on own property came into contact with sagging high voltage wire); *Lancaster v. Potomac Edison Co.*, 156 W. Va. 218, 192 S.E.2d 234 (1972) (house painter on ladder came in contact with high voltage wires close to house).

Further, we note that Petitioners assert that an employee of Respondent Mon. Power who was deposed in this matter, Paul Corbin, testified that he had seen wires strung together prior to the instant case. Based on this testimony, Petitioners assert that Respondents could reasonably have foreseen Petitioner's actions in the instant case. We find that Mr. Corbin's *general* testimony about seeing wires strung together in the past does not create a question of fact as to whether Respondents could have reasonably foreseen Petitioner's *specific* actions in the instant case. Mr. Corbin did not testify that he had witnessed a delivery truck driver with no training in the electrical field (1) climb on top of a truck; (2) apply shrink-wrap around communication lines; and (3) contact an energized electrical line that was 20'6" above the ground with his bare hand.

delivery truck driver climbs on top of his truck and uses shrink-wrap to secure utility lines together and in the process grabs an energized electrical line is simply not *reasonably* foreseeable. Therefore, we find no error in the circuit court's determination that Petitioner's actions were the sole proximate cause of his injuries.

B. Intervening/Superseding Cause

Next, Petitioners assert that the circuit court erred when it determined that even if a genuine issue of material fact existed as to Respondents' negligence, Petitioner's actions were an intervening or superseding cause of his injuries. Petitioners claim that to be an intervening or superseding act, the person "must be acting independently of the originally negligent parties' actions." Petitioners assert that in the instant case, Petitioner was on top of the truck, attempting to fix the dangerous situation created by Respondents' negligence. Based on their argument that Petitioner's alleged negligence was not independent of Respondents' negligence, Petitioners argue that intervening cause is an issue that should have been decided by a jury.

Conversely, Respondents assert that the circuit court correctly determined that Petitioner's actions were voluntary, willful, and operate independently of any potential negligent act committed by Respondents. Because Petitioner's willful and intentional actions were the sole cause of his injuries, Respondents assert that the causal chain is broken and that they are relieved of any potential liability. We agree.

This Court has explained the concept of intervening cause as follows:

> An intervening cause, in order to relieve a person charged with negligence in connection with an injury, must be

> a negligent act, or omission, which constitutes a new effective cause and operates independently of any other act, making it and it only, the proximate cause of the injury.

Syl. Pt. 3, in part, *Wehner v. Weinstein*, 191 W. Va. 149, 444 S.E.2d 27 (1994) (internal quotation and citation omitted).

Further, we have noted that "the function of an intervening cause [is that of] severing the causal connection between the original improper action and the damages." *Harbaugh*, 209 W.Va. at 64, 543 S.E.2d at 345. This Court has emphasized that foreseeability is a key factor in deciding whether intervening cause applies: "A tortfeasor whose negligence is a substantial factor in bringing about injuries is not relieved from liability by the intervening acts of third persons if those acts were *reasonably foreseeable* by the original tortfeasor at the time of his negligent conduct." Syl. Pt. 13, *Anderson v. Moulder*, 183 W. Va. 77, 394 S.E.2d 61 (1990) (emphasis added).[11] In *Yourtee v. Hubbard*, this Court recognized the instances in which an intervening cause can sever the causal connection, providing that "[g]enerally, a *willful*, malicious, or criminal act breaks the chain of causation." 196 W. Va. at 690, 474 S.E.2d at 620 (emphasis added). Finally, we note that as with proximate cause, intervening cause is normally a jury question, except in instances where only one inference can be drawn from the undisputed facts. *See* Syl. Pt. 2, *Evans*, 148 W. Va. 142, 133 S.E.2d 710.

[11] *See also Hairston v. Alexander Tank and Equipment Co.*, 311 S.E.2d 559, 567 (N.C. 1984) ("The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury.").

After review, we find that the circuit court properly concluded that Petitioner's actions were an intervening cause of the incident and his injuries. While there is a dispute as to Respondents' negligence, the parties' expert witnesses offered differing conclusions in this regard, we have determined that the operative facts regarding how the incident occurred are not in dispute. All of Petitioner's actions were intentional and willful: he climbed on top of his truck, applied shrink-wrap to the communication lines, and contacted the energized electrical line that was approximately 20'6" above the ground. Therefore, consistent with *Yourtee* and with our previous conclusion that Respondents could not reasonably have foreseen the actions that Petitioner took upon being confronted with the low-hanging communication lines, we agree with the circuit court that Petitioner's actions constitute intervening acts; thereby breaking the chain of causation.

IV. CONCLUSION

We agree with the circuit court's conclusion that Respondents are entitled to summary judgment. Therefore, we affirm the circuit court's March 25, 2022, order.

Affirmed.