STATE OF MICHIGAN

COURT OF APPEALS

RUSSELL MCKIE, Plaintiff-Appellant,	UNPUBLISHED December 20, 2024 10:03 AM
v	No. 364690 Monroe Circuit Court
CONSUMERS ENERGY COMPANY, Defendant-Appellee.	LC No. 2020-143029-NI

ON REMAND

Before: GADOLA, C.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

This case returns to this Court following our Supreme Court's order remanding this case for reconsideration in light of *El-Jamaly v Kirco Manix Constr, LLC*, ___ Mich ___; ___ NW3d ___ (2024) (Docket Nos. 164902, 164903, and 164904). Previously, we affirmed the trial court's order granting summary disposition in defendant's favor. Having reconsidered plaintiff's arguments in light of *El-Jamaly*, we again affirm.

I. BACKGROUND

This case stems from plaintiff's electrocution from nearby power lines while he was power washing the upper level of David Althaus's home near the roofline. Althaus hired plaintiff to paint the home, and plaintiff was cleaning the home's exterior with a power washer so that it could be painted. Plaintiff was a professional power washer with 20 years of experience. He used a 12-foot spray wand and was cognizant of the power lines behind him as he power washed the area near the roof. He testified that he kept his spray wand at least six feet from the power lines[1] at all times and that he "definitely knew that there was a huge amount of power behind [him]." He positioned his spray wand four to six inches away from the house and sprayed water at a 45-degree

[1] Plaintiff's testimony differed from that of his expert, Richard Buchanan, who estimated that plaintiff likely held the spray wand within six inches of the nearest power line.

angle toward the house. The water hit the gutter and then ricocheted toward the power lines. Because his power washer heated the water, steam was created when he sprayed the water. He claims that he was electrocuted when electricity traveled from the nearest power line—the "Z Phase line"—through water molecules in the air, to the gutter of the home, through the water spraying from the wand and the wand itself, and finally to him. Plaintiff filed this action against defendant, whose power lines were located within a utility easement that defendant held. Plaintiff alleged that defendant breached its duty to maintain its power lines and to position them in a location that ensured the safety of persons conducting reasonably foreseeable activities in the surrounding area.

Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff's claim sounded in premises liability rather than ordinary negligence. The trial court agreed and determined that defendant owed no duty to plaintiff. This Court held that the trial court erred by concluding that this case sounds in premises liability and by granting summary disposition on that basis. *McKie v Consumers Energy Co*, unpublished per curiam opinion of the Court of Appeals, issued September 1, 2022 (Docket No. 358845) (*McKie I*), p 7. Relying in part on *Schultz v Consumers Power Co*, 443 Mich 445; 506 NW2d 175 (1993), this Court opined that an electrical utility company's duty pertaining to overhead power lines is not imposed on the basis of the utility company's easement on real property, but rather, on the basis of "the inherently dangerous properties of electricity, the potentially high severity of injury that electricity can cause, and the utility company's possession of the specialized knowledge and expertise in dealing with electrical phenomena." *Id*. We therefore vacated the trial court's order and remanded for further proceedings. *Id*. at 8.

On remand, defendant again moved for summary disposition under MCR 2.116(C)(10). Defendant argued that it had no legal duty to move its power lines, which plaintiff admitted were not defective and which were installed approximately 30 years before Althaus's home was built. Defendant also argued that it did not proximately cause plaintiff's injuries. In response, plaintiff argued that defendant maintained the power lines in violation of National Electrical Safety Code (NESC), United States Occupational Safety and Health Administration (OSHA), and Michigan Occupational Safety and Health Administration (MIOSHA) regulations. He also argued that defendant failed to reasonably inspect the power lines and move them a safe distance from Althaus's home as NESC guidelines required. In addition, plaintiff likened this case to *Schultz* and asserted that defendant's negligence proximately caused his injuries.

The trial court again granted defendant's motion. The court distinguished *Schultz* on the basis that the power line at issue in that case was frayed while the power lines at issue in this case were not in disrepair. The court also reasoned that plaintiff is a professional power washer who was aware of the danger of power washing near the power lines and that a label on his power washer in fact warned him of the danger. In addition, the court opined that public policy considerations weighed against imposing a duty on defendant to relocate or insulate its power lines because of the significant cost of doing so. Accordingly, the court granted defendant's motion.

On appeal, this Court again affirmed, holding that defendant did not owe plaintiff a duty to move the power lines and that it was not foreseeable that plaintiff, an experienced power washer, would continue to power wash the home despite seeing water ricochet off the house toward the energized power lines. *McKie v Consumers Energy Co*, unpublished per curiam opinion of the

Court of Appeals, issued September 21, 2023 (Docket No. 364690) (*McKie II*), p 6. We rejected plaintiff's argument that this case is factually similar to *Schultz* on the basis that the power line in *Schultz* was dilapidated and frayed while the power lines in this case were not in disrepair. We determined that, although it was foreseeable that a person performing maintenance on a home near a dilapidated power line could be injured by the power line, that situation is not presented in this case. *Id*. at 7. We therefore affirmed the trial court's order granting defendant's motion for summary disposition. *Id*. at 8.

Plaintiff filed an application for leave to appeal with our Supreme Court, which the Court held in abeyance pending a decision in *El-Jamaly*. *McKie v Consumers Energy Co*, ___ Mich ___; 1 NW3d 298 (2024). After the Court decided *El-Jamaly*, it vacated this Court's decision in *McKie II* and remanded this case for reconsideration in light of *El-Jamaly*. *McKie v Consumers Energy Co*, ___ Mich ___; 12 NW3d 401 (2024).

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *1373 Moulin, LLC v Wolf*, 341 Mich App 652, 663; 992 NW2d 314 (2022). "A motion under MCR 2.116(C)(10) tests the factual support of a complaint." *Hanlin v Saugatuck Twp*, 299 Mich App 233, 239; 829 NW2d 335 (2013). In reviewing a motion under subrule (C)(10), this Court considers the evidence that the parties submit in the light most favorable to the nonmoving party. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). Summary disposition is appropriate if "there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5; 890 NW2d 344 (2016). A genuine issue of material fact exists if "reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Kandil-Elsayed v F & E Oil, Inc*, 512 Mich 95, 110; 1 NW3d 44 (2023) (quotation marks and citation omitted).

III. LEGAL PRINCIPLES AND CASELAW

In order to establish a negligence claim, the plaintiff must show "that the defendant owed a legal duty to the plaintiff, that the defendant breached or violated the legal duty, that the plaintiff suffered damages, and that the breach was a proximate cause of the damages suffered." *Schultz*, 443 Mich at 449. A legal duty is the "obligation to conform one's conduct to a particular standard to avoid subjecting others to an unreasonable risk of harm." *El-Jamaly*, ___ Mich at ___; slip op at 24 (quotation marks and citation omitted). "When there are no facts in dispute as to duty, the analysis is a matter of law." *Id*. at ___; slip op at 28. Any disputed facts, however, "must be resolved by the jury." *Id*. at ___; slip op at 27-28. "In determining whether a duty exists, courts examine a wide variety of factors, including the relationship of the parties and the foreseeability and nature of the risk." *Schultz*, 443 Mich at 450.

Regarding the relationship of the parties, our Supreme Court in *Schultz*, 443 Mich at 451, stated, "compelling reasons mandate that a company that maintains and employs energized power lines must exercise reasonable care to reduce potential hazards as far as practicable." The Court recognized that "electrical energy possesses inherently dangerous properties" and that "electric utility companies possess expertise in dealing with electrical phenomena and delivering electricity." *Id*. The *Schultz* Court thus opined, "pursuant to its duty, a power company has an obligation to reasonably inspect and repair wires and other instrumentalities in order to discover and remedy hazards and defects." *Id*.

Regarding the foreseeability of the risk, the *Schultz* Court stated as follows:

> Those engaged in transmitting electricity are bound to anticipate ordinary use of the area surrounding the lines and to appropriately safeguard the attendant risks. The test to determine whether a duty was owed is not whether the company should have anticipated the particular act from which the injury resulted, but whether it should have foreseen the probability that injury might result from any reasonable activity done on the premises for business, work, or pleasure. [Footnote omitted.] Here, Consumers Power should have realized that homeowners generally maintain their homes. This may include washing windows, cleaning troughs, repairing the roof, cleaning gutters, and, certainly, painting. Considering the proximity of the uninsulated primary wire to the house (roughly fifteen horizontal feet and twenty-four vertical feet from the ground), it was foreseeable that someone making repairs could be injured by a dilapidated wire. [*Id*. at 452-453.]

Finally, the *Schultz* Court stated as follows regarding an electric power company's duty:

> Where service wires erected and maintained by an electric utility company carry a powerful electric current, so that persons coming into contact with or proximity to them are likely to suffer serious injury or death, the company must exercise reasonable care to protect the public from danger. The degree of care required is that used by prudent persons in the industry, under like conditions and proportionate to the dangers involved, to guard against reasonably foreseeable or anticipated contingencies. Electric companies must exercise ordinary care to guarantee that equipment is kept in a reasonably safe condition. Although we do not follow a rule of absolute liability, the defendant's duties to inspect and repair involve more than merely remedying defective conditions actually brought to its attention. [*Id*. at 453-454 (internal citation and footnote omitted).]

Three years after our Supreme Court decided *Schultz*, it decided *Groncki v Detroit Edison Co*, 443 Mich 644; 557 NW2d 289 (1996), in which it stated that "[t]he scope of the duty owed by electrical companies to move, insulate or deenergize overhead power lines is a question of foreseeability." *Id*. at 654 (opinion by BRICKLEY, C.J.). In *Groncki*, the Court discussed the foreseeability of injury in the three companion cases at issue. In *Parcher v Detroit Edison Co.*, the injured plaintiff was electrocuted when a 29-foot-high scaffold that he transported on his forklift came into contact with power lines. *Id*. at 650. In *Groncki v Detroit Edison Co.*, the injured plaintiff was electrocuted while attempting to move a 24-foot aluminum ladder that fell onto power lines. *Id*. at 651. In *Bohnert v Detroit Edison Co.*, the plaintiff's decedent was electrocuted when the boom of his truck came into contact with power lines. *Id*. at 652. In all three cases, our Supreme Court determined that the injuries were not foreseeable and that, accordingly, defendant Detroit Edison Co. (Edison) did not owe the injured persons a duty. The Court reasoned that the injured persons were skilled and experienced workers who were either aware of the nearby power lines or aware of the danger of operating equipment near power lines. *Id*. at 657-660. Regarding

Groncki in particular, the Court opined that that case was distinguishable from *Schultz* on the basis that there was no evidence that the power line at issue in *Groncki* was in disrepair or was not properly maintained. *Id*. at 658.

The *Groncki* Court also discussed public policy considerations of imposing liability on Edison. The Court stated that "[s]ound public policy is a factor in deciding duty" and opined that public policy weighed against the imposition of a duty in all three cases. *Id*. at 661 (opinion by BRICKLEY, C.J.). The Court explained as follows:

> The social policy at issue is the public's need for electric power at a reasonable cost. To impose a duty to relocate, insulate, or de-energize power lines whenever third parties construct buildings near power lines would interfere with this policy. The costs of insulating or moving these lines would be significant. Edison alone has over 35,000 miles of power lines in this state. To impose the duty the plaintiffs request would certainly amount to a huge cost that would be passed on to the consuming public. Further, it may often be impossible for Edison and other power companies to move power lines away from new construction without moving them closer to preexisting structures. In any event, the costs of injuries such as those suffered by these plaintiffs will have to be met in another societal forum. [*Id*. at 661-662.]

In *Valcaniant v Detroit Edison Co*, 470 Mich 82; 679 NW2d 689 (2004), our Supreme Court again addressed Edison's duty regarding its power lines. In that case, the plaintiff was injured when a dump truck delivering fill dirt rose upward toward overhead power lines as the weight of its load decreased. The highest edge of the truck severed a power line, and electricity flowed through the truck and through the wet ground to the plaintiff, who was standing nearby. *Id*. at 84. A sensor detected the fault in the severed line and momentarily stopped the electrical current flow. Because many electrical faults are temporary, however, the sensor was designed to restart the flow three times within a six-second period to determine whether the fault remained. If the fault remained, the sensor would completely deenergize the power line. *Id*. The use of the sensor was intended to avoid unnecessary power outages for Edison's customers. *Id*. at 84-85. The plaintiff suffered second-degree burns as a result of the sensor restarting the electrical current three times and filed suit against Edison. *Id*. at 85.

Edison moved for summary disposition on the basis that it owed no duty to the plaintiff, and the plaintiff responded that it owed him a legal duty to immediately deenergize the severed power line and that it was foreseeable that the use of the sensor could cause injury. *Id*. The plaintiff did not assert that Edison failed to inspect the power lines or that they were in disrepair. *Id*. at 86. Our Supreme Court held that the plaintiff's injuries were not foreseeable, stating as follows:

> Edison had no obligation to anticipate that the dump truck operated under plaintiff's direction would sever an overhead power line that was suspended more than twenty-five feet above the ground, much less that plaintiff would be standing on wet ground several feet away. As a result, Edison had no legal duty to anticipate that plaintiff might be injured when the sensor device briefly re-energized the line,

as it was designed to do, or to take other steps to prevent plaintiff's injury. [*Id*. at 87-88.]

In *El-Jamaly*, ___ Mich at ___; slip op at 3-4, the plaintiff was electrocuted when a bull float—a long-handled metal tool—that he was carrying touched, or nearly touched, a power line at a construction site where he was working. He filed suit against several defendants, including DTE Energy Company (DTE), which owned and maintained the power lines. The plaintiff alleged negligence against DTE, asserting that DTE was aware of the danger that its high-voltage power lines presented to construction workers and failed to remediate the danger after being asked to do so. *Id*. at ___; slip op at 9-10. The trial court denied DTE's motion for summary disposition, and, on appeal, this Court reversed on the basis that DTE did not owe the plaintiff a duty, primarily because the evidence showed that the power lines were not defective. *Id*. at ___; slip op at 10-11.

On appeal to our Supreme Court, the Court discussed its previous decisions in *Schultz*, *Groncki*, and *Valcaniant* before it determined that the plaintiff's injury was foreseeable. *Id*. at ___; slip op at 24-27. The Court opined that there existed genuine issues of material fact regarding the condition of the power lines and whether they were hanging at a safe height. *Id*. at ___; slip op at 27-28. The Court also opined that the record demonstrated that DTE was aware of the danger that the power lines posed and knew that high-reaching tools could possibly come into contact with the power lines. The Court thus concluded that it was foreseeable that a bull float could come into contact with the power lines. *Id*. at ___; slip op at 28-30. The Court further stated, however, that the precise manner of injury need not be foreseeable. Rather, in determining whether a duty existed, all that is required is that some injury to the plaintiff was foreseeable. *Id*. at ___; slip op at 30. The Court reversed this Court's decision and remanded the case to the trial court for the jury to determine whether DTE improperly maintained the power lines by allowing them to sag too close to the ground. The Court stated that, if the jury determines that the power lines were improperly maintained, then the record evidence indicated that the plaintiff's injury was foreseeable such that DTE had a duty to ensure that the power lines were safe. The Court further stated that the jury would then need to determine whether DTE breached that duty. *Id*. at ___; slip op at 31-32.

IV. ANALYSIS

We first address whether the power lines hanging above Althaus's property were in disrepair. Plaintiff asserts that the power line at issue—the Z Phase line—was in disrepair because it had previously fallen onto Althaus's back patio. Althaus executed an affidavit averring that "some time before" the incident giving rise to this case, the power line fell down onto a blanket on which his daughter had previously been lying, burning the blanket. Althaus also averred that he, his wife, and his neighbors had complained to defendant that they wanted the power lines moved farther away from their homes. Although Althaus did not indicate in his affidavit when the power line fell onto his back patio, he told Jeffrey Chonko, defendant's electric field leader, that the power line fell on the patio "years ago." No evidence indicates that the Z Phase line was in disrepair around the time that plaintiff was electrocuted. In addition, in plaintiff's answers to defendant's requests for admission, plaintiff admitted that the power lines were not defective.[2] Accordingly, there is no genuine issue of material fact that the power lines were not defective.

We next address whether defendant had a duty to move the power lines. Chonko measured the height of the Z Phase line at 18 feet and 4 inches and the distance of that line from the house at 9 to 10 horizontal feet. Peter Mulhearn, defendant's principal lead engineer for high-voltage distribution lines, testified that the power lines were installed in 1949 and met NESC standards at that time. He also testified that before the incident giving rise to this case, defendant had planned to relocate the power lines farther away from Althaus's home and neighboring homes to comply with defendant's current internal standard of maintaining a 20-foot separation between power lines and buildings, although Mulhearn maintained that defendant is not *required* to move power lines when a structure is built after power lines are installed. Defendant's forensic engineering expert, James Heyl, P.E., opined that the location of the power lines complied with NESC standards. Further, plaintiff's expert, Buchanan, testified that the location of the power lines did not violate NESC distance standards, but he opined that it violated NESC Rule 12C, which "essentially . . . states that if a circumstance that involves a safety hazard arises that may not be covered under the existing code, then the utility has a standard of care to ameliorate that safety hazard."

Viewing the evidence in the light most favorable to plaintiff, we conclude that the trial court properly determined that defendant owed no duty to move the power lines. As our Supreme Court determined in *Groncki*, "impos[ing] a duty to relocate, insulate, or de-energize power lines whenever third parties construct buildings near power lines would interfere with" the public policy of providing necessary electrical power at a reasonable cost. *Groncki*, 453 Mich at 661 (opinion by BRICKLEY, C.J.). The power lines at issue in this case were installed in 1949, and Althaus's home was built in 1977, almost 30 years later. In addition, although the record indicates that the power lines previously required repair or replacement, the record fails to indicate any previous hazardous situations involving the mere *location* of the power lines. Further, in *Groncki*, our Supreme Court acknowledged that a person's skill, experience, and knowledge of the danger of operating equipment near power lines are relevant factors in determining the foreseeability of injury. *Id*. at 657-660. In this case, plaintiff was a professional power washer with 20 years of experience who was aware of the power lines behind him. In fact, he testified that the power lines "[l]ooked concerning." Considering plaintiff's experience and knowledge of the risks involved, it was not foreseeable that he would continue to power wash the home near the roofline after seeing water ricochet off the gutter toward the power lines. Accordingly, the trial court did not err by determining that defendant owed no duty to plaintiff.

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[2] Plaintiff responded "[a]dmit" to #4 of defendant's first request for admissions, which stated as follows:

> Does Plaintiff admit that, at all pertinent times hereto, including the day of the subject accident, there were no defects in Defendant Consumers Energy Company's electrical equipment and power lines in the vicinity of the home located at 8104 Bonnie Glen, Lambertville, Michigan, where the subject incident took place?

V. CONCLUSION

Having reconsidered plaintiff's arguments and the evidence in light of *El-Jamaly*, we again conclude that the trial court properly determined that defendant owed no duty to plaintiff. We therefore affirm the trial court's order granting defendant's motion for summary disposition.

Affirmed.

/s/ Michael F. Gadola
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly