



Joseph W. Weik, Esquire. Weik, Nitsche & Dougherty, 305 N. Union Street, Second Floor, P.O. Box 2324, Wilmington, DE 19804. Attorney for Plaintiffs Kelly A. Roache and Jacob J. Roache.

Timothy A. Dillon, Esquire. McCann, Schaible & Wall, LLC, 300 Delaware Avenue, Suite 805, Wilmington, DE 19801. Attorney for Plaintiffs Heather Baylis and Alexander N. Barber.

Thomas D. Walsh, Esquire. Pepco Holdings, Inc., 500 N. Wakefield Drive, Newark, DE 19702. Attorney for Defendant Pepco Holdings, Inc.

Lisa C. McLaughlin, Esquire. Phillips, Goldman & Spence, 1200 N. Broom Street, Wilmington, DE 19806. Attorney for Defendant Delmarva Power & Light Company.

**CARPENTER, J.**

Plaintiffs sustained electrical injuries when a gutter they upended allegedly contacted a power line operated by Defendant. Plaintiffs' electrical expert testified that Defendant negligently maintained the low-voltage line, but Defendant moves to exclude this testimony because it is based, in part, on third-party observations and conjecture. Furthermore, Defendant moves for summary judgment on the grounds that Plaintiffs have failed to establish a causal link between Plaintiffs' injuries and the power line that was allegedly defective.

This is the Court's decision resolving these motions.

## **BACKGROUND**

On November 2, 2008, ten-year olds Jacob Roache and Alexander Barber were playing in a neighbor's yard. Suspended over the yard were two utility lines owned by Defendant Delmarva Power: an uninsulated, high-voltage primary line and an insulated, low-voltage secondary line.<sup>1</sup> While playing, the boys found a 26-foot gutter section and upended the gutter until it touched one of Defendant's power lines. Both boys sustained second-degree electric burns, and the families have now brought suit against Defendant for negligence.<sup>2</sup>

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<sup>1</sup> Pepco Holdings, Inc. ("PHI") is also a defendant, but Delmarva Power and PHI have been referred to interchangeably in this lawsuit. PHI joins in all of Delmarva Power's motions before the Court.

<sup>2</sup> Kelly A. Roache brings suit on behalf of Jacob and Heather Baylis on behalf of Alexander. For the remainder of this Opinion, the Court will refer to the litigating Plaintiffs as Roache and Baylis, but will refer to the boys in their individual capacities as Jacob and Alexander, respectively. Where both Plaintiffs have taken the same position, the Court will address them as "Plaintiffs" collectively.

Plaintiffs rely on the conclusions of their electrical expert, George E. Page, to prove Defendant's negligence as to the maintenance and inspection of the secondary line.<sup>3</sup> Page concluded Defendant negligently maintained the secondary line's insulation after examining the secondary line himself and after speaking with Robert Gebhart, an electrician who lived near the site of the incident and who observed the secondary line just after the incident took place. Page also concluded Defendant was negligent in failing to inspect the secondary line because, according to Page, the incident would not have occurred if Defendant had conducted periodic inspections of the secondary line. Page's reliance on Gebhart's statements form the basis of Defendant's request to exclude Page's testimony. Plaintiffs also rely on medical experts to link Defendant's alleged negligence with their sons' injuries. Defendant seeks summary judgment because neither expert is able to associate the injuries with contact with the secondary line.

Since all parties acknowledge that Plaintiffs cannot proceed without Page's testimony, the Court will address Defendant's Motion to Exclude Page first. To the extent necessary, the Court will then address Defendant's Motions for Summary Judgment.

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<sup>3</sup> Both Plaintiffs offer Page as a liability expert in their respective cases.

## DISCUSSION

### 1. Motion to Exclude Expert Witness Testimony

Delaware Rules of Evidence 702 and 703 govern the admissibility of expert testimony.<sup>4</sup> D.R.E. 702 states that, when expert testimony will help the jury understand the evidence, it may be admissible if (1) the witness bases his testimony on sufficient facts; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied those principles and methods reliably to the facts. In short, this rule sets forth a “reasonable reliance” requirement.<sup>5</sup> On the other hand, D.R.E. 703 establishes a “sufficient basis” requirement and demands that the basis of information on which the expert reasonably relies is sufficient.<sup>6</sup> In other words, the testimony must be grounded in the principles and methods relied upon by other experts in the same general field as the witness.<sup>7</sup>

Page offered two expert opinions: First, that Defendant was negligent for failing to inspect the secondary line in violation of National Electrical Safety Code (NESC) Rule 214; and second, that Defendant negligently maintained the secondary line’s insulation, which caused the insulation to break or become brittle,

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<sup>4</sup> D.R.E. 702 and 703 are substantially similar to their federal counterparts.

<sup>5</sup> See *Perry v. Berkley*, 996 A.2d 1262, 1268 (Del. 2010) (examining the distinctions between F.R.E. 703 and 702).

<sup>6</sup> *Id.*

<sup>7</sup> *Minner v. Am. Mortgage & Guar. Co.*, 791 A.2d 826, 846 (Del. Super. 2000).

which in turn caused the boys' injuries.<sup>8</sup> Defendant does not take issue with Page's qualifications as a liability expert on electrical systems.<sup>9</sup> Therefore, the Court's inquiry will focus on whether Page's opinions meet the requirements of D.R.E. 702 and D.R.E. 703.

*a. Page's opinion that Defendant negligently failed to inspect the line*

Page first opines that Defendant negligently failed to inspect the secondary line. Page cites no facts in his report to support this opinion, but instead merely recites the NESC rule.<sup>10</sup> In his deposition, Page reasoned Defendant negligently failed to inspect the secondary line because, if there had been an inspection, Defendant would have observed and remedied the damaged insulation.<sup>11</sup> Essentially, Page asserted that the fact of damaged insulation compels the inference of negligence with regard to inspection. The Court finds this is simply insufficient.

From the Court's reading of Page's report and deposition it appears he has no personal expertise in this area nor has he based his findings on any unique

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<sup>8</sup> The expert's original opinion that the power line was too low has been abandoned by Plaintiffs and thus will not be addressed.

<sup>9</sup> Defendant does, however, contest any characterization of Page as a medical expert for purposes of its summary judgment motions against Plaintiffs.

<sup>10</sup> See Page's Report 5 ("NESC 214 requires utilities to 'inspect, record, and remedy' periodically. The subject Utility's failure to 'inspect, record, and remedy' clearly violates NESC Rule 214, causing these two boy's [sic] injuries.").

<sup>11</sup> Page Dep. 73.

training or experience. He has failed to articulate what is the reasonable period between inspections established either by code or by the standard practice of the industry, and he has not articulated any practical action that Defendant should have, but did not, take. Even with this information, Page could not testify to Defendant's negligence because he doesn't know if and when Defendant inspected the power lines or how their practices violate the standards required of this industry. Page's conclusion is nothing more than his personal opinion based on his observation of the secondary line and not based upon sufficient information or methods normally relied upon by experts in this field. As a result, this opinion must be excluded.

*b. Page's opinion that Defendant negligently maintained the line's insulation*

Page next asserts that Defendant negligently maintained the secondary line's insulation. He bases this opinion on his own inspection of the line, performed in December of 2011, and on observations made at the time of the incident by Robert Gebhart, the neighbor who happens to be an electrician. Certainly Page is allowed to render an opinion on the condition of the line based upon his own inspection and to state an opinion on whether it was properly maintained based upon his training and experience. The concern raised by

Defendant is that Page's observation occurred years after the event, and therefore he based his opinion that the line was defective in 2008 upon information provided by Gebhart, whose observations were made at dusk and were obviously incidental to the emergency situation that was occurring.

While an expert may base his conclusions on third party observations and data he did not personally collect, such observations and data must be of the type reasonably relied upon by other experts in the field.<sup>12</sup> It is not uncommon for experts to rely upon information given by first responders to an incident to establish the factual context of an event. Page's inspection of the line occurred more than three years after the incident; therefore, an expert in Page's position must reasonably rely upon observations by those who responded to the event as long as those observations are consistent with the expert's training and experience. Gebhart is a master electrician and thus he has the training to reliably describe the condition of the line and equally important, that description is consistent with what is now being observed by Page. As such, the Court believes Gebhart's physical description of the secondary line is relevant and reliable enough to be considered by Page in rendering his opinion.

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<sup>12</sup> 3 CRIM. PRAC. MANUAL § 86:14 (noting personal observation as a way to establish a basis for an expert opinion under F.R.E. 703).

In sum, Page is allowed to use Gebhart's description of the line as long as it relates back to Page's own opinions. Plaintiffs are not allowed, however, to solicit from Gebhart—directly or through Page—that Gebhart believes that the secondary line was not properly maintained by Defendant. Gebhart has not been identified as an expert. Therefore, only Gebhart's personal observations relied upon by Page, not his opinions, are relevant and admissible.

## **2. Motion for Summary Judgment**

Having determined that Page's electrical expert testimony is admissible, the Court will next turn to Defendant's Motions for Summary Judgment. The standard of review is the same for both motions, but because the motions hinge on Plaintiffs' medical expert testimony, and because that testimony is different for each plaintiff, the Court will analyze the motions separately.

### *a. Standard of review*

A party is entitled to summary judgment when there are no genuine issues of material fact.<sup>13</sup> The moving party bears the burden of showing that there are no genuine issues of material fact so that he is entitled to judgment as a matter of law.<sup>14</sup> The Court must view all factual inferences in the light most favorable to the

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<sup>13</sup> Super. Ct. R. 56(c); *Wilmington Trust Co. v. Aetna*, 690 A.2d 914, 916 (Del. 1996).

<sup>14</sup> *Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).

non-moving party.<sup>15</sup> Summary judgment will not be granted if it appears that there is a material fact in dispute or that further inquiry into the facts would be appropriate.<sup>16</sup> Before addressing the Motion further, the Court notes that for the purposes of this Motion, Defendant agrees that the gutter made contact with one of the power lines that they maintained. In addition, the parties appear to agree that the high-voltage line was maintained in proper condition and no negligence is asserted as to that power line.

*b. Proving the causal relationship between negligence and injury*

Issues of negligence are not generally susceptible to summary adjudication because questions of proximate cause are usually questions of fact for the jury to decide.<sup>17</sup> However, the non-moving party—here, Plaintiffs—must produce sufficient proof of all essential elements of their case to survive a summary judgment motion.<sup>18</sup> Proximate cause is an essential element of a negligence claim.

Delaware courts follow a traditional “but for” definition of proximate cause. Proximate cause exists if, but for a defendant’s negligence, a plaintiff’s injury

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<sup>15</sup> *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. 1990).

<sup>16</sup> *Ebersole v. Lowengrub*, 180 A.2d 467, 570 (Del. Super. 1962), rev’d in part on proc. grounds and aff’d in part, 208 A.2d 495 (1965).

<sup>17</sup> *Manerchia v. Kirkwood Fitness and Racquetball Clubs, Inc.*, 2010 WL 1114927, at \*2 (Del. Mar. 25, 2010) (TABLE).

<sup>18</sup> *Hart v. Resort Investigations & Patrol*, 2004 WL 2050511 (Del. Super. Sept. 9, 2004) (“[I]f the Plaintiffs are unable to prove the essential elements of their case . . . then summary judgment is appropriate.”).

would not have occurred.<sup>19</sup> When causation is not a matter of common knowledge, it must be proven by the testimony of a competent expert witness.<sup>20</sup> Here, the Court has no trouble concluding that the causal relationship between being electrocuted and the injuries associated with the electrical event is not a matter of common knowledge. Further, because these are negligence cases involving personal injuries, a *medical* expert is required to testify to causation.<sup>21</sup>

To that end, Plaintiffs, for some unexplained reason, are using different medical experts to show that the boys' contact with the power line produced their injuries. As such, the Court will address each medical expert separately.

*c. Roache's medical expert*

Roache's medical expert is Dr. Alan J. Fink, a board certified neurologist. He has very limited experience treating burn patients and has had no specialized education or training treating electrical injuries. In fact, while the Court does not have the benefit of medical records, it appears that Dr. Fink has had very little contact with Jacob Roache and is not his treating physician. After examining Jacob, Dr. Fink concluded that his injuries were caused by an electrical source, but he could not say whether that source was high- or low-voltage. Defendant insists

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<sup>19</sup> *Wilmington Country Club v. Cowee*, 747 A.2d 1087, 1097 (Del. 2000).

<sup>20</sup> *Money v. Manville Corp. Asbestos Disease Compensation Trust Fund*, 596 A.2d 1372, 1377 (Del. 1991).

<sup>21</sup> *Bailey v. Acme*, 2008 WL 1810236, at \*1 (Del. Apr. 23, 2008) (“[T]he causal connection between the defendant's alleged negligent conduct and the plaintiff's alleged injury must be proven by the direct testimony of a competent medical expert.”).

that summary judgment is appropriate because Dr. Fink must be able to relate Jacob's injuries to a low-voltage electrical source since only the low-voltage power line is alleged to have been negligently maintained.<sup>22</sup>

The Court disagrees for several reasons. First, Defendant, for the purpose of this motion, concedes that the electrical event here was precipitated by contact between one of their power lines and the gutter being held by the boys. So this is not a situation where there may be multiple explanations for the boys' injuries. Their contact with an electric line maintained by Defendant caused their injuries. Second, to establish proximate cause, the medical experts in this case need only testify that the injuries were caused by an electrical event and not something else. There is no requirement that they particularize that event by the voltage involved. This would force the experts to testify beyond the expertise normally associated with medical training and experience, and the Court has not been presented any evidence that there is a reasonable medical means to precisely gauge the voltage necessary to cause a particular injury. When the injuries are catastrophic, some

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<sup>22</sup> During oral argument on this matter, Defendant listed a number of cases to support this proposition. However, no causal connection was established in *Bailey v. Acme/Asco/Albertson's Inc.*, 947 A.2d 1120 (Del. 2008), *Collins v. African Methodist Episcopal Zion Church*, 2006 WL 1579718 (Del. Super. Mar. 31, 2006), and *Kelly v. McHaddon*, 2002 WL 388120 (Del. Super. Mar. 4, 2002) because plaintiffs presented, respectively, no expert, a psychologist, and a biomechanical engineer. Here, the parties do not contest Dr. Fink or Dr. Haith's statuses as medical experts. As such, the cited cases are unhelpful in determining whether causation has been shown.

medical experts may speculate based upon their experiences, but speculation is all they can offer.

The cases cited by Defendant in support of its position are factually distinguishable. In *Bell v. Sheryl Winsby Associates*, a slip-and-fall case, this Court held that expert testimony on the issue of causation was necessary because there was evidence that several medical procedures may not have resulted from the fall, but rather from a previous automobile accident.<sup>23</sup> In *Manerchia v. Kirkwood Fitness and Racquetball Clubs, Inc.*, the Supreme Court affirmed this Court's grant of summary judgment because the plaintiff could not prove that the defendant's hot tub was the source of the bacteria that caused his cellulitis; his medical expert testified that the cellulitis could just have likely come from anywhere else.<sup>24</sup> Finally, in *Money v. Manville Corp. Asbestos Disease Compensation Trust Fund*, the plaintiff established both that he suffered from an asbestos-related disease and that the defendant was one of several who manufactured asbestos-containing products with which the plaintiff worked.<sup>25</sup> However, the Supreme Court upheld a directed verdict in favor of the defendant because the plaintiff could not prove that that specific defendant's product caused

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<sup>23</sup> 2010 WL 2179880, at \*3 (Del. Super. May 28, 2010).

<sup>24</sup> 992 A.2d 1237 (Del. 2010).

<sup>25</sup> 596 A.2d 1372 (Del. 1991).

the plaintiff's disease.<sup>26</sup> All of these cases cited by Defendant present the possibility of multiple causes for the injury. That is simply not the case here.

When the Court considers the facts in the light most favorable to Plaintiff Roache, there is no dispute that the gutter the boys were holding contacted a power line of the Defendant and caused injuries consistent with those associated with an electrical event. Whether the gutter made contact with the secondary line or the high voltage line is a factual dispute for the jury to resolve.<sup>27</sup> The Court does note that the case law the Court has reviewed associated with such high-voltage events reflect injuries significantly greater than the boys' injuries here.<sup>28</sup> But whether the Plaintiff is able to establish a reasonable inference of contact with the negligently maintained line will have to await the presentation by the parties before being resolved. As such, the Court finds the medical testimony of Dr. Fink to be sufficient to allow this case to proceed to trial and the summary judgment motion relating to Roache's case is hereby denied.

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<sup>26</sup> *Id.* at 1377.

<sup>27</sup> In Roache's case, counsel for the Plaintiff failed to request a jury trial and therefore the case will proceed as a bench trial.

<sup>28</sup> See *Allen v. Florida Power Corp.*, 253 So.2d 401 (Fla. 1971) (describing plaintiff's contact with 7,200-volt power line as "resulting in grievous burns and injuries . . . including amputation of one leg, part of the other, and amputation of both arms above the hands").

*d. Baylis' medical expert*

Baylis' medical expert is Dr. Linwood Haith. Dr. Haith is the director of the Burn Center at the Crozer-Chester Medical Center in Chester, Pennsylvania and he was the Plaintiffs' treating physician after the boys were transferred from their initial hospitalization at the Nemours/Alfred I. duPont Hospital for Children. He testified that about 5% of the patients he sees have sustained electrical burns and he has taken at least one course specifically related to electrical burns. Like Dr. Fink, Dr. Haith had no trouble concluding that Alexander's injuries were caused by contact with an electrical source. However, when asked whether that electrical source was high- or low-voltage, Dr. Haith identified it as high-voltage. Once again, Defendant insists that summary judgment is appropriate because Dr. Haith could not relate Alexander's injuries to a low-voltage electrical source, and therefore Baylis cannot prove that the secondary line, allegedly negligently maintained by Defendant, proximately caused Alexander's injuries.

As previously discussed, Plaintiffs needn't present such specific medical expert testimony to survive these motions for summary judgment. It is enough that Dr. Haith related Alexander's injuries to an electrical source. But in Baylis' case, it is worth noting that Dr. Haith based his opinion on an incomplete understanding of the facts. Dr. Haith was made aware that the boys were playing

around low-voltage and high-voltage power lines, and Dr. Haith understood that low-voltage electrical sources typically carry less than 1000 volts and high-voltage sources typically carry more than 1000 volts. But it is not clear that Dr. Haith realized the drastic difference in voltage between the low- and high-voltage lines in this case. The uninsulated high-voltage primary line carried 7,200 volts, about thirty times the voltage of the low-voltage secondary line.

When asked how he discerned that Alexander was burned by the high-voltage line, Dr. Haith said he based his opinion on Alexander's injury pattern and on Alexander's history. By "history," Dr. Haith was referring to what the witness or patient says.<sup>29</sup> In other words, "because all the people had said it was a high-voltage injury," and the injuries were not necessarily inconsistent with such an event, Dr. Haith came to the same conclusion.<sup>30</sup> Dr. Haith's reliance on Alexander's history is not misplaced from an evidentiary standpoint: a medical expert may rely on a patient's history to diagnose a patient and testify as to that diagnosis.<sup>31</sup> But as the Court has already pointed out, the causal relationship between electrical sources of various voltages and bodily injuries is beyond the general knowledge of the patient. Neither a 10-year old boy nor his parents would

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<sup>29</sup> Dr. Haith Dep. 19.

<sup>30</sup> Dr. Haith Dep. 20.

<sup>31</sup> See *Jones v. Astrazeneca, LP*, 2010 WL 1267114, at \*8-9 (Del. Super. Mar. 31, 2010) (finding medical expert's testimony reliable to the extent that it was based on patient history).

have understood the difference in voltage between the two lines, and the doctor's assumption that the line Alexander contacted was a high-voltage electrical source based upon their comments is simply not reliable.

A few aspects of Dr. Haith's testimony suggest he may have drawn a different conclusion as to which power line Alexander contacted if he knew about the voltage difference between the two power lines. First, Dr. Haith recognized that Alexander's injuries, while not trivial, were not so severe that they required amputation like some high-voltage electric injuries. By this testimony, it seems that Dr. Haith connected Alexander's injuries to a lower-voltage high-voltage source; for example a source carrying over 1000 volts but less than 7,200 volts. Second, Dr. Haith testified that low-voltage electrical injuries are more common because it is "easy to come in contact with a household current."<sup>32</sup> This comment evinces an association of low-voltage electric sources with, for example, domestic electrical power outlets rather than power lines. Finally, Dr. Haith acknowledged that direct current injuries may have more significant injury patterns than alternating current injuries. Defendant's high-voltage primary line carried a direct current, whereas the low-voltage secondary line carried an alternating current. Nothing in Dr. Haith's deposition demonstrates he understood the significant

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<sup>32</sup> Dr. Haith Dep. 7.

difference between the voltage of the lines, a difference that might have impacted his conclusion that Alexander's injuries, which were not extremely severe, stemmed from the high-voltage primary line.

Even though Dr. Haith's testimony is based on an incomplete understanding of the facts, it is not baseless and is far more precise than is required for Baylis to show proximate cause. Dr. Haith's medical expert opinion that Alexander was injured upon contact with an electrical source is sufficient. For this reason, Defendant's Motion for Summary Judgment is denied as to Baylis.

### **CONCLUSION**

This case exemplifies the criticality of precise, accurate expert testimony in negligence cases. Defense counsel's questioning of Baylis' medical expert created a perception which, if accepted, could have prevented Baylis from recovering for Alexander's injuries. The Court will expect a better presentation by counsel of their experts at trial. As to both Plaintiffs, Defendant's Motions for Summary Judgment are denied and the Motion to Exclude Expert Witness is granted only to the extent set forth in this Opinion.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.  
Judge William C. Carpenter, Jr.