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# Exhibit A

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2007 FEB 23 AM 11:19

WILLIAM T. SMOOT, II,  
by his next of friend, KARI MAJOR,

Plaintiff,

v.

Civil Action No.: 04-C-1198  
(Judge Jennifer Bailey Walker)

AMERICAN ELECTRIC POWER,  
VERIZON OF WEST VIRGINIA, INC.  
and CHARTER COMMUNICATIONS, INC.,

Defendants.

## Order Granting Defendants' Joint Motion for Summary Judgment

On February 1, 2007, Verizon West Virginia Inc., by counsel, Bowles Rice McDavid Graff & Love LLP and Ronda L. Harvey, American Electric Power, by counsel, Robinson & McElwee PLLC and Mark H. Hayes, and Charter Communications, Inc., by counsel, Martin & Seibert and George A. Halkies ("Defendants"), as well as Cynthia M. Ranson of Ranson Law Offices on behalf of Plaintiff, appeared before the Court on *Defendants' Joint Motion for Summary Judgment*. Having reviewed the record in this case and heard the presentations of counsel, the COURT HEREBY FINDS:

1. On August 12, 2003, 13-year-old William T. Smoot, II, (Smoot), was riding his bicycle with several of his friends on Embassy Drive in Cross Lanes, West Virginia. Smoot approached a left-hand curve in the roadway but was unable to negotiate the curve. At that point, Smoot and his bicycle veered off the roadway and struck a rock barrier located at the edge of Anna Jane Farley's driveway. As a result of hitting the rock barrier, Will Smoot entered

*[Handwritten signature]*

Anna Jane Farley's yard, where he rolled down a hill and allegedly struck guy wires before coming to rest.

2. Subsequently, Smoot filed suit against Defendants alleging that Defendants owed Smoot a duty to place guy markers on the guy wires supporting the utility pole in Anna Jane Farley's yard. Smoot also alleges that the absence of guy markers caused his accident and injuries.

3. Defendants filed their *Joint Motion for Summary Judgment* arguing that no genuine issue of material fact existed, specifically as to whether Defendants owed a duty to Smoot and whether Defendants caused the damages in question.

4. Rule 56 of the West Virginia Rules of Civil Procedure provides the standard for considering a summary judgment motion, in pertinent part, as follows:

[Summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavit, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law.

\* \* \* \* \*

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of its pleadings, but as a response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

W. Va.R.Civ.P. 56(c) and (e).

5. Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is proper where there are no genuine issues of material fact and the moving

party is entitled to judgment as a matter of law. See, *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329, 194 W. Va. 52 (W. Va. 1995); *Painter v. Peavy*, 451 S.E.2d 755, 192 W. Va. 189 (1994). Rule 56 is "designed to 'effect a prompt disposition of controversies on their merits without resort to a lengthy trial' if there essentially 'is no real dispute as to salient facts' or if it only involves a question of law." *Precision Coil*, 459 S.E.2d at 335, 194 W. Va. at 58, quoting *Painter*, 451 S.E.2d at 758 n. 5, 192 W. Va. at 192 n.5. Summary judgment is not a remedy to be exercised at the circuit court's option; it must be granted when there is no genuine dispute over a material fact. See, *Payne v. Weston*, 466 S.E.2d 161, 165, 195 W. Va. 502, 506 (1995).

6. A prima facie case of negligence requires that the defendant violated a duty owed to the plaintiff. Syl. Pt. 4, *Jack v. Frütz*, 193 W. Va. 494 (1995) (citation omitted). No action for negligence will lie without a duty broken. *Id.* (citation omitted). The court determines whether the defendant owes a plaintiff a duty of care. *Id.* at 498.

7. It is well established that to prevail in a negligence suit, a plaintiff must prove by a preponderance of the evidence that the defendant owed a legal duty to the plaintiff and that by breaching that duty the defendant proximately caused the injuries of the plaintiff. *McMillion v. Selman*, 456 S.E.2d 28, 193 W. Va. 301 (W. Va. 1995) ("before the owner or occupier of premises may be held legally liable, it must be shown that he or she owed a duty to the person injured, that he or she breached that duty, and that the breach of duty was the proximate cause of the injury.").

8. The West Virginia Supreme Court of Appeals recognized in *Strahin v. Cleavenger*, 2004 W. Va. LEXIS 96 (2004), that "unquestionably, courts bear the sole responsibility for deciding whether a legal duty is owed in a given case."

9. American National Standards Institute (ANSI) Standard C2 of the National Electric Safety Code (NESEC) is compiled by the Institute of Electrical Engineers (IEEE) Accredited Standards Committee, which develops and publishes the NESEC. The NESEC contains the standards that cover the basic provisions for safeguarding persons from hazards which may arise from the installation, operation, and maintenance of electrical supply and communication systems. Included within the ANSI C2 are provisions which apply to the marking of guy wires, specifically section 264E of the NESEC.

10. The 2002 edition of Section 264E.1 provides that "[t]he ground end of anchor guys exposed to pedestrian traffic shall be provided with a substantial and conspicuous marker." (emphasis added). The Court finds that the guy wires at issue are open and obvious and not exposed to pedestrian traffic. Thus, the NESEC does not require that the guy wires in question be marked or guarded.

11. Therefore, Defendants did not owe Smoot a duty to mark or guard the guy wires at issue.

12. In addition, Smoot was trespassing when the bicycle accident occurred. If Defendants owed Smoot any duty, it was only to refrain from imposing willful and wanton injury because Smoot was trespassing when the bicycle accident occurred. *See Brown v. Carvill*, 527 S.E.2d 149, 153, 206 W. Va. 605, 609 (W. Va. 1998) ("The owner or possessor of property does not owe trespassers a duty of ordinary care... a possessor of property only need refrain from willful or wanton injury."); *McMillion*, 456 S.E.2d 28, 193 W. Va. 301 (W. Va. 1995) (holding that because the plaintiff entered the defendant's property for her own benefit, the defendant had

no duty to provide protection against existing dangers on the property). The definition of trespasser is also well established:

A trespasser is one who goes upon the property or premises of another without invitation, express or implied, and does so out of curiosity, or for his own purpose or convenience, and not in the performance of any duty to the owner.

*Brown*, 527 S.E.2d 149, 153, 206 W. Va. 605, 609 (W. Va. 1998).

13. *Huffman v. Appalachian Power Co.*, 415 S.E.2d 145, 187 W. Va. 1 (W. Va. 1991) is similar to the situation in this case. In *Huffman*, the Court held that a power company owed no duty to a child who went uninvited onto the power company's property and climbed a high voltage wire. Specifically, the Court found that the plaintiff could not argue that he had a right to be where he was. Instead, "[h]e intentionally climbed the tower, which he knew to be the property of another, without invitation, for his own purposes or convenience." *Id.* at 150, 187 W. Va. at 6.

14. The guy wire at issue is also on private property. Smoot, similar to the plaintiff in *Huffman*, was trespassing on Anna Jane Farley's property.

15. Plaintiff has argued that Smoot's entry onto Ms. Farley's property was "inadvertent" and, thus, that Smoot did not commit a trespass. However, the evidence before this Court indicates that Smoot intended to enter the property owned by Ms. Farley. Indeed, Plaintiff's Complaint states that Smoot "decided to steer his bicycle to the right of [the telephone pole and...] ride his bicycle down the mowed hill that was in front of him." Complaint, ¶¶ 13 and 14. Smoot left the public roadway and travelled through Ms. Farley's property. Specifically,

he crossed Ms. Farley's driveway, struck a rock barrier, hurled into the air over Ms. Farley's yard, and finally came to rest on her property.

16. Defendants owed Smoot, a trespasser, the duty to refrain from willful and wanton injury. *Brown*, 527 S.E.2d 149, 153, 206 W. Va. 605, 609 (W. Va. 1998). As Defendants had no premeditation, knowledge or consciousness that injury was likely to result from the placement of the guy wires, Defendants did not breach the duty to refrain from willful and wanton injury. *Stone v. Rudolph*, 32 S.E.2d 742, 748 (W.Va. 1944).

Based upon the above findings of facts and conclusions of law, the Court hereby

**ORDERS** that:

1. *Defendants' Joint Motion for Summary Judgment* is hereby **GRANTED**;
2. This action is hereby **DISMISSED** with prejudice as a final judgment;
3. Upon entry, the Clerk is directed to send certified copies to counsel listed

below.

The Court notes the objections and exceptions of plaintiff.

Entered this 22<sup>nd</sup> day of February, 2007.

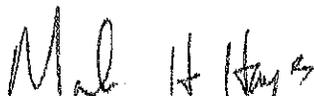
**RECORDED**

  
Honorable Jennifer Bailey Walker

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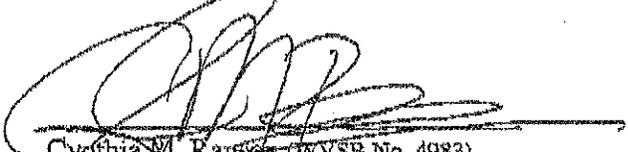


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