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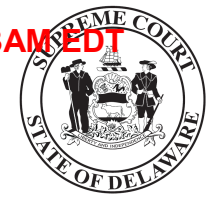

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RODNEY L. MACDOUGALL and DIANE M. MACDOUGALL,	:	
Plaintiffs Below/Appellants,	:	Case No. 44, 2013
v.	:	
MAHAFFY & ASSOCIATES, INC. and SCHNEIDER ELECTRIC USA, INC.	:	
Defendants Below/Appellees	:	

CORRECTED ANSWERING BRIEF OF DEFENDANT/APPELLEE SCHNEIDER ELECTRIC USA, INC.

Appeal from the Decision of the Superior Court in and for Sussex County, C.A. No. S10C-06-010 THG

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Dated: May 1, 2013

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NATURE OF THE PROCEEDINGS

On January 22, 2013, the Honorable T. Henley Graves decided a motion for summary judgment in favor of Mahaffy & Associates, Inc. ("Mahaffy") and Schneider Electric U.S.A., Inc. ("Schneider"), and against appellants. The written decision is referred to hereinafter as "Opinion."[1] Appellants' appeal ensued. Motions to dismiss this appeal pursuant to Supreme Court Rule 25(a) were denied by Order of this Court dated April 9, 2013.

[1] Appellants attached the Opinion as Exhibit A to the Opening Brief.

SUMMARY OF ARGUMENT

I. Denied. Under Delaware law, questions of duty are legal in nature and appropriately for the Court, not for the trier of fact. The Court appropriately precluded Roger Bybee, appellants' expert, finding his opinions to be of the "because I say so" variety, and found that there was no record, legal or other support for the imposition of the duties claimed by appellants against Schneider on these facts. Schneider owed no duty to anticipate the negligent work practices of Mr. MacDougall, which were objectively unforeseeable to Schneider.

II. Denied. The question of whether the mere furnishing of a condition for the happening of an accident is sufficient under a proximate cause analysis presents a question of law for the Court. This question was appropriately, as a matter of law, resolved against appellants.

STATEMENT OF FACTS

On June 14, 2008, Rodney MacDougall, a Tudor Electric employed, Delaware licensed and experienced Master Electrician, was injured at the Delaware Hospital for the Critically Injured ("DHCI"). (Opinion at 1, 3-4). An automatic transfer switch reenergized, sending power to the switchboard he was working on, causing his injuries. (Opinion at 1, 3-4).

Judge Graves in his Opinion captured MacDougall's task, and his understanding of that task, well:

> This job was not an assignment to deal with the unknown. Tudor and Plaintiff built the system. Robert Tudor expected Plaintiff knew how to perform the job. Plaintiff acknowledged he had done similar work, including "racking out" similar electrical equipment for safety purposes (about 20 times), but had not "racked out" this particular brand or model.

(Opinion at 3). Mr. MacDougall knew that electrical power needed to be isolated, locked out and tagged out, and opted to leave that job, and verification of that job, to Wesley Wolfe of DHCI. (B-000012). Mr. MacDougall had been the foreman for the installation of the subject equipment, and had worked at DHCI for at least a year prior to the incident. (B-000023, 000025; B-000091).

MacDougall was present at a Cummins[2] training session for the subject generator area where the transfer switch was located, as was Wesley Wolfe of DHCI. (A-132; B-000295).[3] MacDougall made no efforts to electrically isolate his work by himself, but could easily have done so as he had worked with similar transfer switches in the past (B-000042). At his deposition, MacDougall explained how to lock out breakers of the type used in the subject transfer switch; all that was required was physical removal of breakers (B-000048). He improperly relied on DHCI employee Wesley Wolfe to ensure his safety and did not verify the lock out himself (B-000042). Roger Bybee, plaintiffs' expert, testified: "Well, and he shouldn't. In the electrical business it is not de-energized unless you see it open or locked out and tagged and grounded." (A-236). Robert Tudor, MacDougall's employer, agreed that verification of lock out was required and expected (B-000092, 95, 101).

MacDougall argues that "but for" this work, designed to cure a "nuisance tripping problem" caused by a claimed faulty Schneider electrical study, he would not have been injured. Schneider neither selected nor had reason to know about

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2 Appellants elected to settle with and release all Cummins entities from this case.

3 Pursuant to Delaware Supreme Court Rule 14(e), and for the convenience of the Court, whenever possible we cite to Appellants' Appendix as "A-__". Citations to "B-___" refer to Appellees' Joint Appendix.

MacDougall's work practices. Despite appellants' argument that someone other than Tudor should have done this work, it is undisputed that at the time the work was accepted as being within the contract and without protest by Tudor (B-000102, 116). Further, the resident engineer, Mahaffy, testified that Schneider did everything that was asked of it (A-83). No one asked Schneider to do the work.[4] The Opinion below therefore properly held: "There is nothing whatsoever offered to support Plaintiff's expert's opinion that Mahaffy and Schneider should have been physically present at the time of the replacement on June 14, 2008." (Opinion at 10).

Moreover, even assuming a duty, the record is bereft of even a hint of why Schneider (or anyone else) should have known that Mr. MacDougall, a Delaware licensed Master Electrician, was going to violate fundamental work safety practices of general application to all electricians, not merely Master Electricians like the

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[4] MacDougall never asked safe work practice questions of either Cummins or Schneider. If he had had a question to ask of Mahaffy relating to simple questions of safe work practice, it would have been a fairly comfortable conversation to have by MacDougall's own admission (B-000017). Notably, MacDougall, even post incident, cannot say that even Mahaffy should have been there at the scene of the accident, much less Schneider, an entity he had no relationship with (B-000019). He never even called Mahaffy to ask such a question (B-000046-47).

appellant. It was up to MacDougall and his employer, Tudor, to direct the means and methods of the work; therefore, as the Court below properly held, the proximate cause of the accident was MacDougall's own failings. (Opinion at 8, footnote 1).

The evidence provided to the Court below made it clear that MacDougall's accident occurred because he followed work protocols that were contrary to requirements he was admittedly aware of under OSHA, NFPA Standard 70E and his own employer's safety manual (B-000027; B-000206-269). Had he followed these requirements, all agree, including Mr. MacDougall (B-000056) and Roger Bybee (A-241), appellant would not have been injured. The rules he admittedly knew about and violated include: failure to create a written work plan; purposefully "working live" (B-000033); delegating his safety without verification that would have taken under 45 seconds (B-000012, 29, 35, 42); no lock out/tag out (B-000037); no use of personal protective equipment (B-000043); and no grounding (*Id*.).

The facts as pertinent to this appeal are otherwise fully and accurately recited in the Opinion at pages 2 through 4.

ARGUMENT

I. Schneider Owed No Duty to Appellant

A. Question Presented

Where a plaintiff's theory of duty sounds in nonfeasance, and plaintiff lacks any relationship to the defendant, can an affirmative duty to act be argued based solely on the unfounded "say so" of a retained expert, unencumbered by any standard, trade or industry code or contractual requirement?

B. Standard and Scope of Review

Summary judgment decisions are reviewed *de novo*. *Jones v. Crawford*, 1 A.D.3d 299 (Del. 2010).

C. Merits of Argument

Appellants have not fully addressed the determinations reached by the lower Court. Appellants argue, for example, that the Court below "ignore[d] competent expert testimony" in awarding Summary Judgment to Schneider (as well as Mahaffy).[5] (Appellants' Brief at 17). The Court below, however, did not "ignore"

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[5] Many of the supposedly factual statements set forth in appellants' brief are wrong and provided without supporting citations. As but a single example, appellants' counsel argues on pages 5 and 6 that no work was to be done by Tudor after January 2, 2008. Tudor

…Continued

the "expert testimony." To the contrary, the Court reached specific determinations that Mr. Bybee's opinions[6] as to questions of duty were of the "because I say so" variety, and were unencumbered by any "trade industry standards or codes" and also directly contradicted by the contract. (Opinion at 10). A "because I say so" opinion is inadmissible, and not "competent." *General Electric Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997). Appellants have not appealed from this determination, which effectively forecloses all of their arguments against Schneider on questions of duty (all of which are premised on their inadmissible "expert"). On

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Electric, however, lodged no protest to doing the job, and deemed it part of the contract. (B-000016).

[6] Bybee's opinions are not merely of the "because I say so variety," but are also rendered without even reading the transcript of Edward Fayda, who served as Managing Engineer at Mahaffy. (A-232). Obviously this failure to read impairs his ability to render testimony against Mahaffy, but it is equally problematic as to Schneider. His opinion as to what he would have asked Schneider to do (the entire basis of his "duty" argument), were he in Mahaffy's shoes, is not grounded in what Mahaffy actually knew, information he has deprived himself of by not reading the transcript.

this basis alone, even if this Court goes no further, the decision below must be affirmed as to Schneider.[7]

Appellants cite to no case law in their entire discussion of the question of Schneider's duty. Contrary to the arguments set forth by appellants on page 17 of their brief, questions of duty are for the Court, not a jury. *Naidu v. Laird*, 539 A.2d 1064 (Del. 1988). Appellants cite no case law authority supporting their position that Schneider owed a duty (none exists), and their reliance on "expert" Bybee is foreclosed by a portion of the decision below which they have not appealed from.

There was nothing unique about the nature of the work Mr. MacDougall was doing with respect to the need to follow the mandatory safe electrical work practice

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[7] Appellants' counsel argues in a footnote that there was "no challenge to the reliability or scientific basis supporting [Bybee's] conclusions" lodged below. (Appellants' Brief at 10, fn. 1). With due respect to appellants' counsel, we direct him to our two separate submissions below, each of which totaled but four pages consistent with Court rules. The lack of basis of Bybee's opinions was squarely before the Court both initially and on reply (and expressly responded to in appellants' counsel's opposition to the motion). Bybee's opinions were precluded as "ipse dixit," and not ignored. To claim otherwise is to miss a primary point of the briefing below, as well as the Opinion that appropriately issued thereafter.

rules. The Opinion below properly held the work "was not an assignment to deal with the unknown." (Opinion at 3). The rules of practice MacDougall had to follow are rules of general applicability (A-243), and Mr. MacDougall[8] expressly admitted to knowing them and generally to following them (except, obviously, for this accident). (B-000033). These rules facially apply to the work Mr. MacDougall has done for his entire working life. Electricians (including, particularly, Master Electricians) do not work on live equipment. They do not ignore lock out/tag out. They do not place their safety into the hands of others. They ground the equipment they are working on. They wear personal protective equipment. (A-240-241). His decision to disregard those rules had serious consequences—but there was nothing unique about the job itself that caused those consequences. The Court below

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[8] For reasons we cannot fathom, appellants' counsel has chosen to make no mention of the transcripts of both appellant and his employer, Robert Tudor, in an appeal turning on whether Mr. MacDougall, a Delaware licensed Master Electrician, should have been expected to follow basic workplace safety rules that even an apprentice should know and follow. Both transcripts were before Judge Graves whose opinion is currently being attacked by appellants as erroneous, and were fully considered by him. Mr. Tudor explicitly testified that Mr. MacDougall's work practices at the time of the incident violated company policy. (B-000109-110).

properly recognized this. The failure to follow safety rules applicable to all electrical work caused those consequences.

Much of appellants' argument concerning NFPA 70E would be logically applicable to Mr. MacDougall's employer, Tudor Electric but not to Schneider. (Appellants' Brief at 7-8). Appellants try to argue that the accident occurred on a "multi-employer" work-site. (Appellants' Brief at 8). If true, we note that there is no evidentiary basis to claim that any Schneider employee[9] was asked to be present for the work that caused the incident or that Schneider ever actually performed physical work on that site. All we have is Mr. Bybee's precluded "say so" that he would have asked Schneider to be there were he in Mr. Fayda's (whose transcript he never even read) shoes. The evidence, as the Court below properly recognized (Opinion at 10), is that Schneider was not there and was not asked to be there, and that it did everything that was asked of it. If the accident scene was, as claimed, a multi-employer work site, Schneider was not one of the employers on site.

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[9] Bybee engages in ungrounded speculation about a Schneider salesman, but he admittedly bases his entire opinion in this regard on his speculative reading of an email and not on Mr. Fayda's testimony which he never read. (A-232). Mr. Fayda's testimony that Schneider did everything that was asked of it remains both undisputed and unrebutted in the record. (A-83; A-232).

Negligence is not to be presumed from the happening of an accident. *Levine v. Lam*, 226 A.2d 925, 926-27 (Del. 1967); Delaware Pattern Jury Instruction ("Del. PJI") §5.4. While Bybee has theories that Schneider owed some generalized duty to "train" or "do the work itself" flowing from the "mistake" in the coordination study, Bybee points to no standard that so requires, and when asked says, in essence, that he would have asked Schneider to train and do the work itself.

In Delaware, liability for supposedly negligent nonfeasance may be found to exist only where there is some already existing and definite relationship between the parties "of such a character that social policy justifies the imposition of a duty to act." *Hassan v. Hartford Ins. Group,* 373 F.Supp. 1385, 1389 n.12 (D.De. 1974); *Candelora v. Clouser*, 621 F.Supp. 335 (D.De. 1985). Schneider is not alleged to have had any pre-existing relationship to Mr. MacDougall, therefore an essential element of a nonfeasance case is clearly absent. *Friendly Ice Cream Corp. v. Andrew E. Mitchell & Sons, Inc.*, 340 A.2d 168 (Del. Sup. Ct. 1975).

Certainly the hazard encountered by Mr. MacDougall, that of contact with an energized electrical source, is inherent in his work, and is in no manner referable to the supposed "mistake" in the coordination study. Indeed, Mr. MacDougall had already removed the breaker that was the supposed "problem" before he was injured (the path of electricity did not even go through this supposedly "bad" breaker). (B-000053). As to what Bybee would have asked of Schneider (were he in Mahaffy's

shoes), it is wholly immaterial. No one asked Schneider for anything that Schneider did not provide. **(**A-83; A-232).

In any event, as this Court held in *Levine*, even where there is a duty, there is no notice without evidence of a reason to perceive risk (a record appellant has not developed and does not exist). Delaware law is clear that there is no generalized duty to anticipate the negligence of someone else, a concept so fundamental to the law that it is contained in Del. PJI §5.3. "The failure to anticipate another's negligence is not negligence. . ." *Levine*, 226 A.2d at 926-27.

On the facts of this case, before we even get to questions of duty, breach and causation, there would have to be some basis for appellants to argue that Schneider either knew or should have known that Rodney MacDougall, a Master Electrician, was going to personally do the breaker swap and do it while the equipment was electrically subject to being energized and in a manner contrary to all safe work practices including, but not limited to, OSHA, NFPA 70E, his training, his education, his employer's safety manual, and common sense. No such evidence is extant in the record. *Bullock v. State*, 775 A.2d 1043, 1052 (Del. 2001) ("[h]e had no duty to anticipate Alleger's negligence nor to be aware or conscious of it"). Judge Graves soundly held that under the circumstances presented by the record, "defendants did not have a duty to anticipate that Plaintiff would negligently and possibly recklessly begin to work on a major piece of the electrical system without following standard

work rules and protecting himself by making sure the equipment was locked out." (Opinion at 8).[10]

Appellants' fundamental theory against Schneider is that if Schneider had realized the breaker coordination issue earlier, no swap of breakers would have ever had to occur, therefore Mr. MacDougall would not have been injured. That is a deficient theory on causation, as the Court below correctly concluded, and not a theory of duty in the least. Through their "expert," Roger Bybee, they also argue that Schneider's "error" in the coordination study means:

1. That Schneider, not plaintiff, should have swapped the breaker, and

2. That Schneider should have provided training.

Judge Graves observed, and appellants have not challenged, that no specific standard supports such opinions. Bybee's basis for these opinions, rather, is that this is what he claims he would have asked Schneider to do. (A-231). The testimony is undisputed that Schneider was never asked to swap the breaker itself, or to be present

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[10] As Schneider owed no duty, it is not relevant to the outcome of appellants' appeal as to Schneider that the Court found that Mr. MacDougall was negligent and possibly reckless. Nevertheless, the record amply supports Judge Graves' determination in this regard, as even Mr. MacDougall's own "expert" admits.

when the work was done. (B-000102). It is equally undisputed that Schneider was never asked to provide training. (B-000102).

Despite all of appellants' arguments about "substantial completion of the work,"[11] it is undisputed that Tudor deemed the work of swapping breakers to be done pursuant to, and as part of, the contract (B-000102, 115-116). Tudor held MacDougall out to be a "qualified person"[12] to do the work. (B-200).

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[11] Such arguments hardly help appellants' case against Schneider as it is undisputed that Schneider did everything that was asked of it. "Substantial completion of the work," as the prism through which to view the question of duty, clearly demonstrates that Schneider owed no duty. Schneider's work was done, and nothing more was asked of it. In contrast, MacDougall had over six weeks after Schneider's involvement ceased to assess this job and determine a safe manner of completing it.

[12] Expert opinions about whether MacDougall was or was not "qualified" within the meaning of NFPA standards miss the point. Such opinions are reached solely with the benefit of the hindsight borne of the accident. Mr. MacDougall testified that he knew to: lock out, tag out, verify, ground and use personal protective equipment. Had he followed those fundamental safe work practices, he would not have been hurt, and he, by his own admission, would have been able to do the work to which his employer assigned him. It is his failure to follow safe work practice, as evidenced by the happening of this accident, which causes people to question whether he is a qualified person. There is no suggestion in this record that anyone had such a question concerning the base of knowledge of this long-experienced Delaware

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Mr. Tudor testified that he believed MacDougall to be qualified, and he assigned him to the task due to his familiarity with site conditions and site personnel. (B-000091, 101-102, 132, 195). There is no suggestion that anyone at Schneider had a base of knowledge of this particular electrical system that is similar to, much less superior to, MacDougall's. Indeed, MacDougall was the foreman on site who installed it. (B-000091; A-131-132). The argument that Schneider might have followed rules of general applicability that MacDougall admittedly knew about and opted not to follow is spurious—nothing more than a suggestion that someone competent would not have gotten hurt. Appellants ignore, of course, and do not even acknowledge before this Court, the record demonstrating that MacDougall knew the rules he needed to follow, and knew how to follow them. That he opted not to do so does not forge a claim against Schneider, which was not asked to have any role in his work practices, deficient or otherwise.

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licensed Master Electrician in advance of the accident. Indeed, Bybee rather flippantly admits this case does not logically turn on the word "qualified":

"Q. Can someone who is qualified ever get hurt?

A. Oh sure. Sure. We kill those people all the time."

(A-238).

Mr. MacDougall admitted the ability to do all that was required to do his work safely,[13] and further admitted that he opted to delegate his safety to Wesley Wolfe rather than use his knowledge, training and experience to protect himself, as OSHA, NFPA 70E and his own years of experience and training require. Specifically, Mr. MacDougall expressly admitted, among other things:

1. Working as an electrician for some 35 years pre-incident (B-000004);
2. Working as a foreman on many jobs (including this one) (B-000006, 8);
3. He had done 20-30 prior breaker swaps, on similar breakers of the same size (B-000012);
4. "Changing the breaker wasn't the problem" because "Square D I-Line is- from the changing the breaker's viewpoint- is one of the safest designs." (B-000013);
5. MacDougall relied on Wolfe to lock out the transfer switch and never verified that Wolfe had done it (B-000016,35);
6. In the ordinary course of things, MacDougall would know how to lock out a transfer switch, and he had done it before. (B-000031). He made no efforts to learn how to lock out the subject transfer switch because he was relying on Wolfe. (B-000016). As he testified "I assumed that when he said it was off, it was going to stay off." (B-000051);

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[13] Mr. MacDougall was asked what he would teach a young apprentice about such a task, and gave the following answer:

"[M]y opinion, if I'm teaching any person about doing that, is always do it that it's off. There is a – we had an old bucket truck that said . . . if it isn't grounded, it isn't dead."

(B-000026). MacDougall further admitted to learning the rule of "presume it is energized" "very early on in the trade." (B-000033).

7. It would have taken him less than 45 seconds to verify[14] (or here fail to verify) that lock out was accomplished (B-000051);
8. At deposition, Mr. MacDougall was able to explain how to rack out the breaker merely by looking at a picture (B-000048-49);
9. He chose to work on I-Line live, which he knew was violative of OSHA and NFPA requirements (B-000033);[15]
10. Had MacDougall grounded the bus bars, his injury would have been much less or non-existent (B-000043); and
11. Had the breakers been racked out, Mr. MacDougall's work "wouldn't have been a problem." (B-000019, 38).

The Court properly recognized the above, and properly ruled, consistent with Delaware law, that while Schneider owed no duty, MacDougall had a duty toward his own safety: "Plaintiff had a personal duty to ensure that this electrical system he was about to work on was physically locked out. He did not. Plaintiff failed in his duty

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[14] Appellants argue "[t]he parties will never know what Wolfe did when he attempted to shutdown the system." (Appellants' Brief at 8). As Mr. Bybee admitted, the reason we will never know what Mr. Wolfe did is because Mr. MacDougall did not verify. "In the electrical business it is not de-energized unless you see it open or locked out and tagged and grounded." (A-236). In no manner can failings of Wolfe and MacDougall as to the means and methods of their work be attributed to Schneider which was not asked to have any role in this regard.

[15] MacDougall admits that they could have run the generator with the transfer switch totally locked out for the entire time of the breaker swap. (B-000046). Instead he opted to work live. (B-000046).

to protect himself when he relied on Wolfe instead of his 'eyes on' making sure the equipment was locked out." (Opinion at 4).

Bybee has never met MacDougall (A-246), but nonetheless dismisses some of his testimony about his willful disregarding of safe work practice rules. (*Id.*). He takes the same approach to the testimony of Mr. Ronald Moore, a journeyman electrician at the scene who admitted that racking out the subject breaker was a simple task if one opted to do it. (A-226). "If an expert bases an opinion on an erroneous factual foundation, the inaccurate premises invalidate the conclusion even if the expert's methods are generally valid." *Perry v. Berkley*, 996 A.2d 1262, 1268 (Del. 2010)(quoting David H. Kaye, David E. Bernstein and Jennifer L. Mnookin, *The New Wigmore: Expert Evidence* § 3.1 (2004)); *Spencer v. Wal-Mart Stores, East, LP.*, 930 A.2d 881 (Del. 2007). For this reason, the lower Court's conclusion that Bybee's opinions are of the "because I say so" variety is clearly correct, there are no record facts or standards otherwise supporting anything Bybee has to say. Even so, Bybee agrees that the entrustment by MacDougall of his safety to Wolfe, without verification, was a breach of all applicable standards. (A-247).

The notion that Schneider owed some nebulous and ill-described duty to do things that it was never asked to do flies in the face of logic and common sense. Judge Graves properly, and quite logically, refused to go along with appellants'

"bridge too far" strategy of trying "to find liability on the part of as many defendants as possible." (Opinion at 4). His decision is consistent with the record when read in the light most favorable to the non-movant, and must be affirmed.

II. Appellants' Causation Theory is Barred by Delaware Law

A. Question Presented

Does a proximate cause theory which involves the mere furnishing of a condition for the happening of an accident pass muster under Delaware Law?

B. Standard and Scope of Review

Summary judgment decisions are reviewed *de novo*. *Jones v. Crawford*, 1 A.D.3d 299 (Del. 2010).

C. Merits of Argument

Appellants attempt to argue that this case does not allow for a determination of intervening or superseding causation as a matter of law[16]. Such an argument misses the point. There must be legal "causation" on the part of the defendant before the question of appellant's superseding negligence is even reached. Here, Schneider

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[16] Appellant's own negligence does not appear to be the subject of dispute, and does not appear to be meaningfully challenged on appeal. Mr. Bybee references numerous activities, including following basic requirements in the Tudor Manual, that Mr. MacDougall could have and should have done to avoid injury, including working with personal protective equipment, following the NFPA 70E standard and following and verifying lockout/tagout. (A-241).

owed no duty, which means there was no need to even reach causation. In any event, a Court may find as a matter of law, as Judge Graves did here, that a plaintiff's causation theory amounts to nothing more than the furnishing of a condition. *Spicer v. Osunkoya*, 32 A.3d 347 (Del. 2011). Judge Graves correctly concluded that here there is no causation; at most, what we have is the furnishing of a condition.

Delaware applies the traditional "but for" definition of proximate cause. *Jones v. Crawford*, 1 A.3d 299, 302 (Del. 2010) (citing *Wilmington Country Club v. Cowee*, 747 A.2d 1087, 1097 (Del. 2000)). Proximate cause is that which "brings about or produces, or helps to bring about or produce the injury and damage, and but for which the injury would not have occurred." *Nutt v. GAF Corp.*, 526 A.2d 564, 567 (Del. Super. 1987) (citing *Biddle v. Haldas Bros.*, 190 A. 588, 596 (Del. Super. 1937)). In other words, proximate cause exists if "a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred." *Duphily v. Del. Elec. Co-op, Inc.*, 662 A.2d 821, 828-29 (Del. 1995) (citing *Culver v. Bennett*, 588 A.2d 1094, 1096-97 (Del. 1991)).

The mere furnishing of a condition for an accident to happen does not equate to "but for" proximate cause. *Spicer*, 32 A.3d 347. Schneider is not being sued because Mr. MacDougall was assigned by his employer to swap breakers (i.e. because he showed up at DHCI on the day of the accident). Rather Schneider is

being sued for an injury which resulted from an accident. The injury and accident resulted from the selection of incredibly deficient means and methods for work that were not anticipated or subject to reasonable anticipation by Schneider. These means and methods, which Schneider had no role in selecting, and was not involved with at all, violated every safe work practice for electricians, as Mr. Bybee has testified.

Conditions which put a plaintiff at the scene of an accident, but are not meaningful in assessing why the accident happened, are not "but for" causes. The Court below made the following fine analogy:

> An example with similar facts may be appropriate. A design flaw in an automobile requires a part to be replaced. There is a recall by the auto manufacturer so that the unsafe part can be replaced. A mechanic is injured while working on the auto because he did not put the emergency brake on and the car rolled over his foot Under Plaintiff's theory, "but for" the design flaw by the automobile engineer, the car would not have rolled over the mechanic's foot. Plaintiff's theory fails as the theoretical cause is remote and not proximate. **The proximate cause of this accident was not that the work had to be done but how it was done.**

(Opinion at 5 (emphasis added)).

Appellants' counsel counters with a hypothetical of his own:

> More on point is an example in which a mechanic is repairing a defectively designed transmission in a rare sports car. The mechanic has no experience with the complex transmission. During the repair, the tool he was using came in contact with the fuel injector, which was situated in a location unique to the type of car, causing the engine to catch fire. Given his unfamiliarity and lack of training on this car, he was unable to appreciate the risk of

> harm. As with MacDougall, it is entirely foreseeable that the mechanic's conduct could result from the initial design defect.

(Appellants' Brief at 33).

Judge Graves' analogy actually describes this case. Appellants' analogy ignores the general applicability of the rules violated by Mr. MacDougall (rules he admitted knowing). These rules apply regardless of whether, to borrow opposing counsel's analogy, one is fixing a fancy sports car, a monster truck, a go cart or a 1981 Yugo. In short, any vehicle will do. If one is going to work on any sort of electrical equipment, lock out/tag out is required. Personal verification of that lock out is also required. Grounding is required. Personal protective equipment is required. The rules that appellant attaches to the record in this case, NFPA 70E, apply across the board, not just to "sports car" type applications.

Indeed, appellants offer no basis to conclude, factually (as opposed to the bare inadmissible[17] conclusions of Mr. Bybee), that the work itself was something subjectively unknown to Mr. MacDougall given his prior base of knowledge and status as a Master Electrician. Mr. MacDougall has, in fact, conceded that he knew to follow all of the rules he opted to violate which caused his injuries. (B-000033, 43,

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[17] Again, the Court below found Bybee's opinions to be of the ipse dixit variety, hence inadmissible, a decision not appealed by the appellants.

48-49). In short, there is no proof in this record that Mr. MacDougall was "fixing a sports car" or was in any manner confused about what was to be done when he got hurt. At deposition he admitted that if the product had simply been de-energized, his work was safe and easy to do. (B-000038). As Mr. MacDougall has testified:

> Changing the breaker wasn't the problem. . . Square D I-Line is—from the changing the breaker viewpoint—is one of the safest designs.

(B-000013). Neither the changing of a breaker nor the failure to employ lock out/tag out, a rule applicable to all electrical work from the simple to the complex, may be analogized to a "rare sports car." All electricians, from apprentice to journeyman to master, are supposed to follow safe work practice, regardless of the application, as the rules themselves provide, and as appellant's employer separately required through workplace rules. (A-225). Tudor, and MacDougall, knew what they were supposed to do, and knew how they were supposed to do it. "Neither Tudor nor [MacDougall] was a stranger to the system… There is nothing in the record to suggest or infer that Tudor did not know what it was doing as the contractor." (Opinion at 10-11).

III. Appellants Offer No Basis to Conclude that this Accident was Foreseeable to Schneider

A. Question Presented

Can appellants even argue foreseeability of this occurrence given the concession of objective unforeseeability made by their "expert?"

B. Standard and Scope of Review

Summary judgment decisions are reviewed *de novo*. *Jones v. Crawford*, 1 A.D.3d 299 (Del. 2010).

C. Merits of Argument

Appellants' own "expert" concedes the objective unforeseeability of this occurrence:

> [I]t is ***unbelievable to me*** that anyone would go around the back and take off that back panel and, when it hadn't been locked out and tagged.

(A-225 (emphasis added)).

Schneider neither selected Mr. MacDougall nor had reason to know about his work practices. The resident engineer, Mahaffy, testified that Schneider did everything that was asked of it, and no one ever asked Schneider to do the work, train or supervise Mr. MacDougall. (A-83; A-232). None of the factual arguments set forth by appellants on pages 32 and 33, even if true (and, yet again, no citations to the record are provided in order to probe whether they have support in the record) even mention Schneider, except for mention of the "expert's" precluded (a conclusion not appealed) opinion that

Schneider owed some nebulous duty to the plaintiff. Certainly there is no suggestion of why violation of fundamental work practices, of general applicability, should have been foreseeable in advance to Schneider while "unbelievable" to Mr. Bybee even with the benefit of hindsight. For the foregoing reasons, the lower Court found properly when it held that defendants could not have, and had no duty to, "anticipate that Plaintiff would negligently and possibly recklessly" put himself into the position that led to the accident. (Opinion at 8).

CONCLUSION

Judge Graves correctly found that 1) Schneider owed no duty and 2) that appellants' theory of causation amounts to no more than the furnishing of a condition which does not pass muster under Delaware Law. Appellants have not appealed from the preclusion of Mr. Bybee as an "expert" testifying with no basis other than his own "say so," a decision which is also amply supported in this record. Appellants similarly offer no proof that this incident was objectively foreseeable to Schneider. Therefore summary judgment must be affirmed.

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