IN THE SUPREME COURT OF THE STATE OF DELAWARE

RODNEY L. MACDOUGALL and DIANE M. MACDOUGALL, Husband and wife,	)	Case No. 44, 2013
Plaintiffs Below, Appellants,	)	
v.	)	
MAHAFFY & ASSOCIATES, INC., a Delaware Corporation and SCHNEIDER ELECTRIC USA, INC., a Delaware Corporation.	)	
Defendants Below, Appellees	)	

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

APPELLEE MAHAFFY & ASSOCIATES, INC.'S ANSWERING BRIEF

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Date: April 29, 2013

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NATURE OF THE PROCEEDINGS[1]

In 2010, Appellants filed suit arising out of an electrical burn injury that occurred on June 14, 2008. Appellants filed suit against Mahaffy & Associates, Inc., Schneider Electric USA, Cummins Power Generation, Inc., Cummins Power Systems, LLC, State of Delaware Hospital for the Chronically Ill, State of Delaware Department of Health & Social Services, and the State of Delaware. The various State Defendants were dismissed from the case. Defendant/Third Party Plaintiff Mahaffy & Associates, Inc. ("Mahaffy" or "Engineer") filed a Third-Party Complaint against Tudor Electric, Inc. ("Tudor"). Pursuant to the Trial Scheduling Order entered on September 22,2011, Mahaffy filed a Motion for Summary Judgment on September 10, 2012. Schneider Electric USA, Inc. ("Schneider") also filed a Motion for Summary Judgment on September 7, 2012.

On January 22, 2013 the Honorable T. Henley Graves entered an order for Summary Judgment on behalf of the Defendant/Third Party Plaintiff Mahaffy and Schneider in the matter of *MacDougall v. Mahaffy & Associates, Inc.* The lower court found that Appellants cannot prevail against Mahaffy even assuming a design error created the initial need to be present at the scene of the accident to do

[1] For the convenience of the Court, and pursuant to Delaware Supreme Court Rule 14 (e), Appellee Mahaffy & Associates, Inc. cites to Appellants' Appendix whenever possible to eliminate duplicative documents in its joint Appendix with Schneider.

electrical work because the parties responsibilities and duties are clearly set forth in the contract, neither defendant had any duty to direct the specific manner of how the breaker was replaced, and nothing Defendants did in this case can establish the Defendants' voluntarily assumed the responsibility of Appellants' work place safety. The written decision is referred to hereinafter as "Opinion." Appellants filed a Notice of Appeal on February 1, 2013. On March 18, 2013, Appellants filed their opening brief. On March 28, 2013, Mahaffy filed a Motion to Affirm. On March 29, 2013, Schneider filed a Motion to Affirm. By an order on April 9, 2013, Mahaffy's and Schneider's Motions to Affirm were denied. This is Mahaffy's Answering Brief in Opposition to Appellants Opening Brief in Support of it's appeal.

SUMMARY OF ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED MAHAFFY'S MOTION FOR SUMMARY JUDGMENT SINCE APPELLANTS' NEGLIGENCE CLAIMS ARE BARRED BY THE CONTRACT

Appellants' Summary of Argument is Denied. Under Delaware law, the standard of care applicable to an architect or engineer is to perform with reasonable care the duties for which he contracts. Mahaffy's duties were clearly and unambiguously set forth in the contract. As the lower Court found, Mahaffy coordinated the replacement of a breaker at DHCI by assigning the work to Tudor. Mahaffy's contractual obligations did not include responsibility for the means and methods of construction or site safety, both of which remained solely the responsibility of Appellant's Rodney MacDougall, employer Tudor. These obligations are clearly set out in the contract. The lower Court properly determined the responsibilities and duties of the parties as provided in the contract as a matter of law, which is appropriate in summary judgment.

II. THE TRIAL COURT PROPERLY GRANTED MAHAFFY'S MOTION FOR SUMMARY JUDGMENT SINCE APPELLANTS' OWN NEGLIGENCE WAS THE SOLE PROXIMATE CAUSE OF HIS INJURIES

Appellants' Summary of Argument is Denied. The lower Court ruled that, as a matter of law, Appellant Rodney MacDougall's conduct in replacing the breaker

was the sole proximate cause of his injuries. Delaware applies the traditional "but for" definition of proximate cause. The sole proximate cause of Appellant's accident was the action or inaction resulting in the area becoming re-energized during the course of Appellant's work. Appellant's own negligence is overwhelming, such that reasonable minds could not differ that his negligence was the sole proximate cause of his injuries, and not a superseding intervening cause. The sole proximate cause of Appellant's incident was his failure to perform his work in accordance with OSHA and NFPA Standards and the lower Court properly determined this issue as a matter of law.

STATEMENT OF FACTS

A. The Project/Incident

This is a construction worker injury case. Appellant Rodney MacDougall ("Appellant" or "MacDougall") was a licensed master electrician and managerial employee of Tudor[2]. Diane MacDougall is Rodney MacDougall's wife, who is also a party to this case, but she was not present when the incident occurred, nor played a role in the background facts of the case. Tudor entered into a standard AIA Document A 101–1997 Contractor's Agreement with the State of Delaware for the purpose of providing electrical work on the Phase I Electrical Upgrades ("the Project") at the Delaware Hospital for the Chronically Ill ("DHCI").[3]

In 2008, the 3P-500A circuit breaker feeding the generator and pad mounted transformer repeatedly tipped (referred to as "nuisance tripping") whenever the generator would run, causing repeated outages within the DHCI facility.[4] After Schneider (supplier of the equipment) completed its investigation into the nuisance tripping, it was determined that the LE 500 Ampere circuit breaker, installed by Tudor, could not be properly coordinated with the electrical protection system given the electrical characteristics of the step-down transformer that was

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[2] B-4.
[3] B-269-B-271.
[4] B-285-B-295;B-311; B-102; A-184-A-201; and A-336-A-348.

supplied by the circuit breaker.[5] It was determined that the circuit breaker should be replaced.[6] Tudor was assigned and accepted responsibility for replacing the circuit.[7]

The circuit breaker change out was scheduled for Saturday June 14, 2008 to be performed by Appellant in coordination with DHCI maintenance personnel, consisting of master electrician Wesley Wolfe (Wolfe) and physical plant maintenance worker Ronald Moore.[8]

Wolfe performed the Lock–Out/Tag–Out procedures on the generator and pad mounted transformer.[9] However, neither Appellant nor Wolfe performed a Lock–Out/Tag–Out on the Cummins Power Automatic Transfer Switch.[10] After the transformer had been disconnected from utility power, the automatic transfer switch closed the circuit and re-energized the transformer after the standard fifteen minute time delay.[11] Appellant relied on Wolfe to de-energize the line.[12] As Appellant began to go about his work, the tool he was using came in contact with

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[5] *Id.*
[6] *Id.*
[7] B-109.
[8] B-10-B-12; B-19; B-22-B-24; B-26; B-29; B-33-B-35; B-37-B-38; B-42-B-45; B-48; and B-56.
[9] *Id. See also,* B-282-B-295; B-136-B-137; B-144; B-151; and A-336-A-348.
[10] *Id.*
[11] *Id.*
[12] B-10-B-12; B-19; B-22-B-24; B-26; B-29; B-33-B-35; B-37-B-38; B-42-B-45; B-48; and B-56.

the bare bus bars, which were energized by the generator.[13] Appellant sustained electrical burn injuries as a result.[14] If the transfer switch had been locked out and tagged out, Appellant's accident would not have happened.[15] No one from Mahaffy was at the site.[16] Appellant testified that he did not see any reason for Mahaffy to be present that day.[17]

Prior to the accident, Appellant attended a training session on the equipment.[18] Richard Glazeski is a project manager for Synerfac.[19] He is contracted to work for the Division of Facilities Management under the Office of Management and Budget. [20] He was the Project Manager for this Project.[21] He testified that he informed the managers of Tudor that its employees needed to attend training on the system.[22] The purpose was to introduce the appropriate employees to the equipment and train them on the operation and maintenance.[23] State employees Ronald Ballentine, Isaac Henry, Jerry Higgins, Rodney Holderbaum, and Robert McClements all testified that they attended the January

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[13] *Id.*
[14] *Id.*
[15] B-56; and B-275-B-276.
[16] B-276-B-279.
[17] B-69.
[18] B-296-B-300.
[19] B-305.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*

2007 training session.[24] Earl Smith of Cummins provided the training.[25] No one from Mahaffy was present at the training.[26]

Bobby Tudor testified that Appellant was a Master Electrician.[27] He indicated Appellant would have learned lock out/tag out procedures as an apprentice, before becoming a Master Electrician.[28] Tudor testified that an electrician is obligated to ensure that the equipment he will work on is de-energized and cannot become re-energized.[29] It is against company policy to work on equipment not locked out.[30] Tudor's investigation into this incident revealed the transfer switch was not locked out or tagged out, and thus became re-energized.[31]

Appellants filed suit as a result of the incident.[32] The Complaint alleges Mahaffy failed "to employ adequate protocol and safety measures", "to provide proper and adequate training, instruction, supervision and oversight", "to implement adequate policies and protections to prevent accidents", "to adequately

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[24] B-309-B-326.
[25] A-41; and A-43-45.
[26] B-296-B-300.
[27] B-88.
[28] B-91.
[29] B-92.
[30] B-95; B-100; B-102; and B-109.
[31] B-100; B-102; B-109; B-116; B-123-B-124; B-135-B-137; B-144; and B-151.
[32] B-327.

and/or properly warn" and "to employ adequate protocol and safety measures." [33]

B. The Contract

According to the Project Manual for this Project dated November 14, 2005, the Owner of the Project was the Office of Management and Budget, Division of Facilities Management. The Contractor was Tudor and the Engineer was Mahaffy.[34] The Contract between Mahaffy and the State is an AIA B151-1997 form agreement promulgated by the American Institute of Architects.[35] The Contract has a clause that substitutes the word "Engineer" for the word "Architect" throughout the document.[36] Therefore, every time the word "Architect" appears, it is referring to the Engineer. The Contract addresses the relationship between the Engineer and the Contractor in the following clauses:

Section 2.6.5:

> The Architect shall neither have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents.[37]

Section 2.6.6:

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[33] B-338-B-340.
[34] A-89-A-92 and A-105.
[35] *Id.*
[36] *Id.*
[37] *Id.*

> . . . the Architect shall not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect shall be responsible for the Architect's negligent acts or omissions, but shall not have control over or charge of and shall not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or of any other persons or entities performing portions of the Work.[38]

The Project Manual (which Tudor was obligated to follow as part of its Contract) included the AIA Standard General Conditions of the Construction Contract ("Standard General Conditions") which set forth the parties respectful roles, duties and obligations on this Project.[39] Pursuant to the Standard General Conditions, Mahaffy was not responsible for safety on the Project and did not control the means and methods of construction.[40]

Paragraph 3.3.1:

> The Contractor shall supervise and direct the Work . . .The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedure and for coordinating all portions of the Work under the contract. . .[41]

Paragraph 3.3.2:

> The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees. . .[42]

Paragraph 4.1.2:

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[38] *Id.*
[39] B-353-B-361.
[40] *Id.*
[41] *Id.*
[42] *Id.*

> Duties, responsibilities and limitations of authority of the [Engineer] as set forth in the Contract Documents shall not be restricted, modified or extended without written consent of the Owner, Contractor and [Engineer].[43]

Paragraph 4.2.3:

> The [Engineer] will not have control over or charge of and will not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work.[44]

Paragraph 10.2.1:

> The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to . . . employees on the Work and other persons who may be affected thereby.[45]

Paragraph 10.2.3:

> The Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection. . .[46]

The AIA General Conditions are standard in the construction industry and they have been used by the State of Delaware for decades. The Trial Court noted in its decision "it is not disputed that the contract language is the standard language in the industry."[47]

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[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] Opinion at 7.

Ed Fayda testified that as the Engineer of Record, Mahaffy was responsible for the design, engineering, assembling the drawings and specifications, preparing the package for bid, assisting the State with advertising, and assisting with construction administration through project completion.[48] The preconstruction meeting minutes dated February 13, 2006 indicate "Contractor was advised that safety is the individual responsibility of each contractor.[49] The Owner and Engineer do not share responsibility for safety on the work site."[50]

C. Expert Opinions

Bybee's Opinion

Appellants produced the expert report of Roger Bybee.[51] Bybee's report places the bulk of the responsibility for the Appellant Rodney MacDougall's incident on Schenider, but opined the following concerning Mahaffy's role: (1) Mahaffy "was an active participant . . . in the flawed/defective Coordination Study," and (2) Mahaffy "knew or . . . should have known that the defective outdoor unit substation . . . was unsuitable . . . and represented a violation of the applicable safety standards and was unsafe for the patients at DHCI as well as the workers, including Tudor and [Appellant]."[52]

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[48] B-272-B-284.
[49] B-362-B-363.
[50] *Id.*
[51] A-184-A-201.
[52] *Id.*

Rubin's Opinion

Sid Rubin provided an expert report on behalf of Mahaffy.[53] According to Rubin, Appellant violated NFPA 70E Items 340-7(B)(2)&(4) at the time of the incident.[54] Appellant and Tudor violated safety standards and procedures required by OSHA and NFPA and attempted to perform electrical work in an improper and hazardous manner.[55] Mahaffy had no control or responsibility in the safety aspect of the work performed by Tudor.[56]

Lickiss' Opinion

Schneider produced the expert report of Lyle Lickiss.[57] Lickiss concludes that it was the Appellants' sole responsibility to establish that the system was properly Locked-Out/Tagged-Out.[58] Specifically, he states that Appellant "assumed and was assigned the task to change out the circuit breaker and as such it was his responsibility to personally witness how the power was turned off and locked out and to personally verify that the power would not turn back on while he was working on and inside the equipment."[59] Appellant "was responsible for his own safety, a responsibility that can not be delegated to someone else, including

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[53] B-285-B295.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] A-336-A-348.
[58] *Id.*
[59] *Id.*

those who were allegedly assisting him."[60] Thus, the means and methods of the work performed were solely in the control and responsibility of Tudor and the Appellant.[61]

Lickiss further states "if [Appellant] or Wolfe did not know how to properly shut OFF the power or how to rackout the Type NW circuit breakers in the Automatic Transfer Switch, they should have called Cummins for help, called Schneider for help, and/or read the Transfer Switch manual to determine the proper procedures.[62] To do nothing and gamble that the power would not come back (despite the high level of training of both men) was unacceptable."[63]

Lickiss further opines the means and methods of the work performed were under the Appellant's control.[64] For example, "verifying that all parts and tools are available to complete the proposed work is something that should have been done before the actual work is started" and "[Appellant] was responsible for his own safety, he did not verify that power had been turned OFF and Locked-Out properly and thus, he is responsible for the accident and his own injuries."[65]

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[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED MAHAFFY'S MOTION FOR SUMMARY JUDGMENT SINCE APPELLANTS' NEGLIGENCE CLAIMS ARE BARRED BY THE CONTRACT

A. Question Presented

Is an Engineer free of a duty, when a worker is injured while on the job at a Project site due to the "means and methods" the worker utilized; and the contract documents for the Project specifically state that the Engineer was not responsible for safety on the site, in addition to not being responsible for or controlling the "means and methods" of the construction?

B. Standard and Scope of Review

This court reviews summary judgment decisions from the trial court *de novo*.[66]

C. Merits of the Argument

Appellants allege that Mahaffy owed a duty, was negligent in that duty, and was the cause of Appellant Rodney MacDougall's injuries. To state a claim for negligence, Appellants must establish that there is a duty, breach of that duty, and a causal connection between the injury and the breach.[67] Appellants have no

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[66] *Jones v. Crawford*, 1 A.3d 299 (Del. 2010).
[67] *Piper v. Parsell*, 930 A.2d 890 (Del. Super. Ct. 2007).

evidence to offer to show that Mahaffy owed a duty, was negligent, or was the proximate cause of the injury; and the Trial Court properly granted Summary Judgment for Mahaffy.

As for establishing a duty, Mr. Bybee is Appellants' only liability expert. Mahaffy filed a Motion In Limine to preclude Bybee's opinions concerning Mahaffy in this case, as Bybee seeks to expand Mahaffy's duty beyond the obligations contained in the contract documents. This Motion was pending at the time the trial Court ruled on the Summary Judgement motions (Docket No. 193).

In deciding the Summary Judgment motions, the trial Court stated that Bybee's "opinion appears to be nothing more than a 'because I say so' statement. The conclusion is not based on any trade industry standards or codes. Moreover the opinion is directly contrary to what the contract dictates, i.e., the contractor (Tudor) is responsible."[68]

Appellants utilized Bybee to attempt to create a question of fact in the case, despite a clear and unambiguous Contract. The lower Court properly determined that, "Plaintiff's expert cannot create a question of fact by opining that the contract should be ignored or that it should be interpreted contrary to its plain meaning. A 'because I say so' statement by an expert does not change the relationship between

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[68] Opinion at 10.

the parties."[69] Appellants have not appealed that part of the determination from the decision below.

Without an expert, Appellants cannot show that Mahaffy owed a duty to them, and have presented no evidence to support their claims. The Contract is without doubt. It is clear based upon the contract documents that Tudor, as the Contractor, was solely responsible for the means and methods of construction and for site safety.[70] Mahaffy, the Project Engineer, had no duty or responsibility for the means and methods of construction or site safety.[71]

The Contract between Mahaffy and the State is an AIA B151-1997 form agreement.[72] As indicated above, the Contract states in relevant part:

Section 2.6.5:

> The **[Engineer] shall neither have control over** or charge of, **nor be responsible for, the construction means, methods,** techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are **solely the Contractor's rights and responsibilities** under the Contract Documents.[73] (Emphasis added)

Section 2.6.6:

> The [Engineer] shall be responsible for the [Engineer's} negligent acts

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[69] Opinion at 10.
[70] B-269-B-271; B-353-B-361; A-89-A-92; and A-105.
[71] *Id.*
[72] A-89-A-92 and A-105.
[73] *Id.*

> or omissions, **but shall not have control over** or charge of and **shall not be responsible for acts or omissions of the Contractor,** Subcontractors, or their agents or employees, or of any other persons or entities performing portions of the Work.[74] (Emphasis added)

The Project Manual included the AIA Standard General Conditions of the Construction Contract ("Standard General Conditions") which set forth the parties respectful roles, duties and obligations on this Project.[75] As stated above, Pursuant to Sections 3.3.1, 3.3.2, 4.1.2, 4.2.3, 10.2.1, and 10.2.3 of the Standard General Conditions, Mahaffy did not control the means and methods of the Project and was not responsible for safety on the Project.[76] As stated above, the AIA General Conditions are standard in the construction industry and they have been used by the State of Delaware for decades. "AIA documents are the standard of the construction industry."[77]

The Trial Court was proper in granting Summary Judgment since it has been granted in similar cases where a party has tried to "re-write" a professional's contract or expand a professional's duties beyond the obligations stated in the contract documents. In *Continental Casualty Company v. Geppert Brothers, et al.,* the Court granted summary judgment in favor of the engineer despite efforts

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[74] *Id.*
[75] B-353-B-361.
[76] *Id.*
[77] Werner Sabo, Legal Guide to AIA Documents, 4th Ed., 1998.

made by the opposing parties to expand the engineer's contractual obligations by way of expert testimony.[78] In *Continental*, a historic renovation project was under way involving Harrison Court, a six-story building in Philadelphia when the building burned down during renovation on May 3, 1984. Several property insurance carriers which had paid first-party direct claims then sued the demolition contractor, Geppert Bros., Inc., the construction manager for the project, and the owners, seeking to recoup over $4 million.

The complaint charged that these three defendants failed to abide by numerous pertinent standards of the Life Safety Code put out by the National Fire Protection Association (NFPA). Geppert, the demolition subcontractor, and the construction manager (CM), then brought third-party complaints against the design team - - - the architect, the mechanical engineer, and the structural engineer. They claimed that these three design professionals failed to adequately specify or design temporary fire suppression systems for the demolition phase of the project. The mechanical engineer sought summary judgment dismissal from the *Continental* case on the grounds that the scope of his work had nothing to do with the demolition phase of the project. The contract between the architect and the mechanical engineer utilized AIA Document C141, the Standard Form of

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[78] *Continental Casualty Company v. Geppert Brothers, et al.*, C.A. No. 85-6242, 1986 WL 187 (E.D. Pa. Mar. 21, 1986).

Agreement Between Architect and Engineer.

In opposition to the motion for summary judgment, both Geppert and the CM produced expert witnesses who testified that, in their opinion, the contract between the architect and mechanical engineer did encompass demolition phase responsibility and the mechanical engineer did have an obligation to design temporary fire suppression systems for the demolition phase. However, the Court in *Continental* found that the opposing experts were irrelevant to the legal issue. The legal issue was an interpretation of the scope of services under the architect/mechanical engineer contract. The Court pointed out that the initial project description carefully restricted the mechanical engineer's duties to construction design only. Accordingly, the Court granted summary judgment dismissal to the mechanical engineer. The Court rejected the testimony of opposing experts as theirs was merely legal opinion with respect to the interpretation of the contractual responsibilities of the engineer.[79]

As held in *Seiler v. Levitz Furniture Co., Inc.,* the standard of care applicable to an architect or engineer is "to perform with reasonable care the duties for which he contracts."[80] As held in *Chesapeake and Potomac Telephone Co. of Maryland v. Chesapeake Utilities Corp.*, the engineer's duty to halt a

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[79] *Id.* at Fn. 11

[80] *Seiler v. Levitz Furniture Co., Inc.*, 367 A.2d 999, 1007 (Del. Super. Ct. 1976).

contractor's work due to unsafe practice must arise by contract, conduct or law.[81] In *Kreiger*, the claim against the engineer was dismissed as the engineer did not have a contractual or legal duty to take such action.[82]

In Delaware case, *Rabar v. E.I. duPont de Nemours & Co., Inc.*, it sets forth the test that determines whether an entity is responsible for the safety of workers on a construction site.[83] According to *Rabar*, a defendant is responsible for safety on the jobsite (1) if defendants were Plaintiff's employer, (2) if defendants controlled the work area, or (3) if defendants voluntarily or by agreement undertook the responsibility of implementing the safety measures.[84]

Troise v. Herman Miller, Inc., applies the *Rabar* test to the relationship between architects and owners using an AIA form contract.[85] In *Troise*, the Plaintiff was injured while installing a panel on a construction site. Plaintiff alleged that the Architect was negligent for failing to supervise the work, supply the necessary tools, and for failing to provide someone on the site who was trained in this type of work. The AIA contract between the Owner and Architect stated,

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[81] *Chesapeake and Potomac Telephone Co. of Maryland v. Chesapeake Utilities Corp.*, 436 A.2d 314 (Del. 1981) (*citing Krieger v. J.E. Greiner Co., Inc.*, 382 A.2d 1069 (Md. Ct. App. 1978)).
[82] *Krieger v. J.E. Greiner Co., Inc.*, 382 A.2d 1069 (Md. Ct. App. 1978).
[83] *Rabar v. E.I. duPont de Nemours & Co., Inc.*, 415 A.2d 499 (Del. Super. Ct. 1980)(rev. on other grounds).
[84] *Id. See also, Hawthorne v. Summit Steel, Inc.*, 2003 WL 23009254 (Del. Super. July 14, 2003)(stating that the *Rabar* test is still valid).
[85] *Troise v. Herman Miller, Inc.*, 1989 WL 64119 (Del. Super. May 15, 1989).

"The Architect shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the work..." The court held that this clause alone would exonerate the Architect from liability.

Furthermore, the court held in *Seeney v. Dover Country Club Apartments, Inc.,* that it requires an architect to have a duty to supervise the method and manner of doing the details of the work, before the architect could be liable to an independent contractor.[86] In *Seeney*, the Court held that providing locations and depths of an excavation as well as specifications were not controlled in determining an Architect's liability because the contractor had active control of the manner and methods of the work, including the decisions concerning whether shoring of the excavation was necessary for safety and choosing how to physically install the pipe.[87] For these reasons, the court held that the Architect was not liable. Appellants allege in this case that Mahaffy had a duty to coordinate and direct the breaker replacement work; a duty to train Appellant Rodney MacDougall as to how to perform his work in changing out the breaker; and that Mahaffy, by coordinating the work necessary to stop the "nuisance tripping," thereby directed the means and methods of construction. Appellants argue that

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[86] *Seeney v. Dover Country Club Apartments, Inc.*, 318 A.2d 619 (Del. Super. 1974).
[87] *Id.*

these are issues of fact.

As in *Troise,* the contract governs Mahaffy's duties and what their obligations are as a matter of law. Mahaffy was not obligated to direct and oversee the "means and methods" Tudor utilized to replace the breaker. By determining that the breaker needed to be replaced in order to stop the nuisance tripping, Mahaffy did not undertake an additional obligation to control "how" Tudor's employee performed the breaker replacement.

Furthermore, by determining the breaker needed to be replaced, Appellants cannot claim this creates a new duty that requires Mahaffy to be involved and onsite for the replacement, when the agreed upon Contract does not require this. As the lower Court found, "the defendants did not have a duty to anticipate 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."[88]

In *Healy v. Silverhill Constr. Inc.*, the Owner and the Architect used an AIA form contract with the same language as the contract in *Troise.*[89] And, even though the Architect was also the Construction Manger, the court still held that, "In the end, the Contractor cannot blame the Architect or the Construction

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[88] Opinion at 8.

[89] *Healy v. Silverhill Constr. Inc.*, 2009 WL 295391 (Ct. Com. Pl. Feb. 5, 2009).

Manager for its failure to [properly perform the work]."[90]

The lower Court's decision should be upheld. The lower Court properly granted Mahaffy's Motion for Summary Judgment because Mahaffy had no duty to Appellants under the contract to either provide for the Appellant Rodney MacDougall's safety as an employee of the Contractor on the Project site, or to control the means and methods of the Contractor in performing the work at hand. As in *Continental,* Mahaffy's duties were clearly and unambiguously set forth in the contract. Mahaffy's contractual obligations did not include responsibility for the means and methods of construction or site safety, both of which remained solely the responsibility of Tudor.[91]

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[90] *See also, Continental Casualty Co. v. Geppert Bros. Inc.*, 1986 WL 187 (E.D. PA Mar. 21, 1986).

[91] B-269-B-271; B-353-B-361; A-89-A-92; and A-105.

II. THE TRIAL COURT PROPERLY GRANTED MAHAFFY'S MOTION FOR SUMMARY JUDGMENT SINCE APPELLANTS' OWN NEGLIGENCE WAS THE SOLE PROXIMATE CAUSE OF HIS INJURIES

A. Question Presented

When an Engineer merely directs that certain work be completed on a job site; does the worker on the job site have a duty to comply with normal and standard safety procedures to complete that work, as those safety procedure are in place to prevent any injury?

B. Standard and Scope of Review

This court reviews summary judgment decisions from the trial court *de novo*.[92]

C. Merits of the Argument

Appellants argue causation despite being unable to show a duty was owed by Mahaffy. Regardless, the lower Court found as a matter of law, that Mahaffy did not owe a duty, and was not the proximate cause of Appellant Rodney MacDougall's injuries. Appellants theory of causation as summarized by the lower Court was, "but for the design error and selection of the wrong sized capacity breaker, it would not have needed replacing, and if it did not need replacing, no

[92] *Jones v. Crawford*, 1 A.3d 299 (Del. 2010).

injury could have occurred."[93] Delaware applies the traditional "but for" definition of proximate cause. 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."[94] A "prior and remote cause cannot form the basis of liability" if such remote cause "did nothing more than furnish the condition by which the injury was made possible."[95] In analyzing Appellants' argument the lower Court stated:

> One can argue a whole series of events fall into the 'but for' category; but when the nexus from the alleged cause to the injury becomes so remote and tenuous, it becomes totally unforeseeable and cannot trigger liability. An example with similar facts may be appropriate. A design flaw in an automobile requires a part of 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.[96]

In the present case, Appellant Rodney MacDougall was on site at the Project at the time of his incident to change out a circuit breaker for his employer, Tudor.[97] Appellants' theory of causation against Mahaffy is that Mahaffy had

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[93] Opinion at 4.
[94] *Wilmington Country Club v. Cowee*, 747 A.2d 1087, 1097 (Del. 2000).
[95] *McKeon v. Goldstein*, 164 A.2d 260, 262 (Del. 1960).
[96] Opinion at 5.
[97] B-11.

some role in causing the need for the circuit breaker to be replaced.[98] "Why" the task was necessary is a "prior and remote cause." The proximate cause, or the "how," of Appellant's incident was the action or inaction resulting in the area becoming re-energized during the course of Appellant's work. The lower Court found, "everyone agrees that, had this equipment been physically "locked out and tagged," it could not have recycled and re-energized and, thus, the accident would not have occurred."[99] In regards to the events on the day in question, the lower Court established:

> Plaintiff's recollection is that he relied on Wolfe to make sure power was off. Both the Occupational Safety and Health Administration and the National Fire Protection Association regulations, as well as Tudor's own work safety policy, require the power to be turned off and also that the electrical equipment or device be 'locked out and tagged.' 'Locking out' means physically locking the unit so it can not be re-energized until the lock is removed. 'Tagged' means affixing a tag that informs others of what is being done. Neither Wolfe nor Plaintiff locked and tagged the power source equipment (transfer switch) and, had that been done, the breaker would not have re-energized back on and Plaintiff would not have been electrocuted.[100]

Mahaffy was not sued because Appellant went to DHCI that day. Mahaffy was sued because of "how" Appellant went about his work that day. Appellant's negligence is overwhelming. The proximate cause of Appellant's incident was his

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[98] A-184-A201.
[99] Opinion at 4.
[100] Opinion at 4.

failure to perform his work in accordance with OSHA regulations and NFPA Standard 70E, in that he: failed to have a written work plan, worked on an energized line, delegated the task of de-energizing the line, failed to lock out/tag out, and failed to wear the appropriate personal injury protection or "PPE."[101]

Appellant had an obligation to perform the work in a safe manner,[102] and as the lower Court found, "Plaintiff had a personal duty to ensure that this electrical system he was about to work on was physically locked out. He did not."[103] Appellants argue that Rodney MacDougall was not qualified and that he did not understand and appreciate the hazards he confronted, and therefore could not have disregarded the risk of harm he faced. The lower Court described Appellants' experience and knowledge of the situation:

> Tudor was tasked with replacing the breaker. Plaintiff was and had been Tudor's foreman on this project and was familiar with the project. Plaintiff is a master electrician with 30-plus years experience. 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) . . .[104]

At the end of the day, Rodney MacDougall, a Master electrician with 30-

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[101] B-1; B-4; B-10-B-12; B-19; B-20-B-24; B-26; B-29; B-33-B-35; B-37-B-38; B-42-B-45; B-48; B-55-B-56; B-285-B-295; and A-336-A-348.
[102] *Id.*
[103] Opinion at 4.
[104] Opinion at 3.

plus years experience, did not comply with standard safety procedures followed on all jobs. The argument that he did not appreciate the hazards fails on its face. Moreover, if he did not understand what he was doing, he had an obligation to cease work if unsure how to proceed in a safe manner. As the lower Court stated, " Tudor was the contractor that built and overhauled the electrical system. Neither Tudor nor its employee was a stranger to the system."[105]

As the lower Court found, Appellants' positions "are simply a bridge too far. Plaintiff fails to establish any duty owed to Plaintiff by either defendant that was breached and proximately caused Plaintiff's injuries." While Mahaffy may have furnished the condition by which the injury was made possible, it simply is a bridge too far as this prior and remote cause cannot form the basis of liability; since but for Rodney MacDougall's failure to comply with safety procedures he would have not been injured. It is for these reasons that this Court should affirm the lower Court's decision.

[105] Opinion at 10.

CONCLUSION

For the reasons set forth above, Appellee Mahaffy & Associates, Inc. respectfully requests that the Trial Court's decision granting Summary Judgment be upheld.

Respectfully submitted,

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