STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Shapiro, PJ, Borrello and O'Connell)

RALPH SKIDMORE, JR. Individually and as Personal Representative of the Estate of CATHERINE DAWN SKIDMORE,

Plaintiff / Appellee,

v

SCT: 154030
COA: 323757
Calhoun County CC: 12-001595-NH

CONSUMERS ENERGY COMPANY,

Defendant / Appellant.

AMICUS CURIAE BRIEF BY MICHIGAN DEFENSE TRIAL COUNSEL

Respectfully submitted by:

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STATEMENT OF QUESTIONS PRESENTED

MDTC focuses on the first set of questions presented in Defendant's / Appellant's Consumers Energy Company (Consumers) Application for Leave to Appeal concerning foreseeability and duty. See Consumers' Application, p. xi. MDTC also briefly discusses whether the rescue doctrine should apply in this case.

STATEMENT OF FACTS

MDTC adopts the statement of facts contained in Consumers' application for leave to appeal.

STANDARD OF REVIEW

MDTC agrees with the standard of review stated in Consumers' application for leave to appeal.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae, Michigan Defense Trial Counsel (MDTC), is an association of attorneys whose primary focus is the representation of defendants in civil proceedings. Established in 1979 to enhance and promote the civil defense bar, MDTC accomplishes this by facilitating discourse among and advancing the knowledge and skills of defense lawyers to improve the adversary system of justice in Michigan. MDTC appears before this Court as a representative of defense lawyers and their clients throughout Michigan, a significant portion of which are potentially affected by the issues involved in this case.[1]

[1] After reasonable investigation, MDTC believes that (a) no MDTC member who voted either in favor or against preparation of this brief, and no attorney in the law firm or corporation of such a MDTC member, represents a party to this litigation; (b) no MDTC member who is a representative of any party to this litigation participated in the authorship of this brief; and (c) no one other than MDTC, or its members who authored this brief and their law firms or employers, made a direct or indirect contribution, financial or otherwise, to the preparation or submission of this brief.

INTRODUCTION

The trial court concluded that Consumers did not owe decedent, Mrs. Skidmore, a duty because it was not foreseeable she would run across the street to her neighbor's home to warn him of a fire that resulted from Consumers' downed power line, run into that hazard, and be electrocuted by it. MDTC submits the trial court was correct and its decision should be affirmed. Therefore, in accordance with the reasons set forth in this brief, as well as the application for leave to appeal filed by Consumers and the *amicus curiae* brief submitted by Michigan Manufacturers Association (MMA), this Court should grant Consumers' Application and reverse the published opinion of the Court of Appeals.

GROUNDS JUSTIFYING THIS COURT'S REVIEW UNDER MCR 7.305(B)

It is the position of amicus curiae that the tort law issues in this case are of significant public interest; are of great significance to Michigan's jurisprudence; and that the Court of Appeals' decision was clearly erroneous. See MCR 7.305(B)(2), (3) and (5).

1. *MCR 7.305(B)(2) – The Court of Appeals Established New Published Law as Applied to Public Utilities and a Decision of Such Importance Must be Reviewed by this Court*

The Court of Appeals' published opinion is, at present, the applicable law in all similar cases going forward. See MCR 7.215(B) and (C)(2). This alone warrants review. This Court is constitutionally empowered to review published opinions of the Court of Appeals which establish a new rule of law or create liabilities where none previously existed. See MCR 7.305(B)(2), (3), and (5). See also *Gulf Underwriters Ins Co v McClain Industries Inc*, 483 Mich 1010, 1011; 765 NW2d 16 (2009) (YOUNG, J., concurring). Such decisions impact this state's jurisprudence. This Court ultimately serves the different, and higher, function of being the ultimate arbiter of that jurisprudence. *People v Bulger*, 462 Mich 495, 541-542; 614 NW2d 103

(2000) (CAVANAUGH, J., dissenting), decision abrogated by *Halbert v Michigan*, 545 US 605 (2006). "[T]he function of the Court of Appeals is correcting errors" and the function of this Court under MCR 7.305(B) "is determining the merits". *Id*.

Relatedly, this Court should review this case because the question of "duty" arises comparatively rarely in negligence cases. See Witting, *Duty of Care: An Analytical Approach*, 25 Oxford Journal of Legal Studies 1, 35 (Spring 2005). "Once *ultimate* appellate courts have determined whether to recognize a duty within a particular kind of fact situation, that holding ordinarily will apply in all like cases." *Id*. (emphasis added). In the instant case, the Court of Appeals' decision expands, for the first time in Michigan jurisprudence, a duty for public utility companies to take measures to prevent harm from randomly falling power lines to a considerable swath of the general public; as far outward, it seems, as to the person who, while well-intentioned, rashly runs towards the obvious danger such a circumstance entails.

Further, it is the duty of this Court to say what the law is regarding the interrelated questions of duty and proximate cause. See, e.g., *Moning v* Alfono, 400 Mich 425, 436; 254 NW2d 759 (1977). "The law of negligence was created by common law judges and, therefore, it is unavoidably the Court's responsibility to continue to develop or limit the development of that body of law absent legislative directive." *Id*. Therefore, this Court's consideration of this ostensible extension of duty and attendant broadening of liability should be the guide for future cases, because, as mentioned, this Court is the final authority on the state's common law.

2. MCR 7.305(B)(3) – Important Public Policy Considerations are Present in this Case Making It One of Great Significance to Michigan Jurisprudence

The questions controlling this case, that of duty, foreseeability, and causation are necessarily shaped by this Court's jurisprudence addressing these interrelated issues in cases against public utilities. *Groncki v Detroit Edison Co*, 453 Mich 644, 661; 557 NW2d 289 (1996), accord

Moning, 400 Mich at 436. This Court has established the principle that no broader liabilities or extraordinary duties of care are to be imposed on companies offering broad services to the public. *Groncki*, *supra*. As already noted, this Court's jurisprudence demonstrates that such a seismic shift in the law broadening the responsibility of public utilities will not be undertaken without at least a thorough and measured analysis by this Court of the legal principles and policies supporting the ostensible extension. *Id.* at 662 (when a lower court decision expands the duty or broadens the liability of a public utility "it is proper that this Court consider the public policy ramifications of such a decision").

This case also implicates the general rule that certain events leading to personal injury are simply unforeseeable, as a matter of law. In such cases, there is no need to return the case for further factual development concerning duty, breach, and liability. *Moning*, 400 Mich at 439. As with the public policy of protecting utility companies from heightened duties and greater liabilities, Michigan has a deeply rooted tradition of protecting ostensible tortfeasors from liability for unforeseeable events brought about by the unexpected, and therefore unpredictable, actions of others.

These interrelated common law rules are squarely before the Court because the Court of Appeals' opinion imposes liability on utility companies where a party's own irrational, unreasonable, and unpredictable actions are the source of that liability's attribution. Imposing upon a provider of electricity essentially a "perpetual duty" to guard against all accidents involving downed power lines burdens it with the seemingly insurmountable task of taking measures to prevent unforeseeable, random, and by their very nature, unpredictable events. This puts the utility company in the unenviable (indeed impossible) position of risking untold liabilities for unpredictable occurrences and nonetheless having to assume enormous costs in

trying to prevent them. The very proposition of such an unchecked obligation seems sufficient to refute it. Moreover, this extraordinary burden is imposed all the while the utility must try to offer reasonably priced services to the public.

Not only then is the Court of Appeals' opinion placing a higher burden of care and a broader range of liability on public utilities, which is contrary to this Court's jurisprudence on the very subject, but it does so based on a theory of liability historically rejected by this Court. Regarding the latter point, that one is liable for the unforeseeable, random, and therefore unpredictable acts of others is unsupported under the modern "duty-breach-foreseeability" nexus analysis adopted by this Court in the law of torts. See *In re Certified Question from Fourteenth Dist Ct of Appeals of Texas*, 479 Mich 498, 501-502; 740 NW2d 206 (2007) (stating the relevant question is whether "the harm" was foreseeable to "the plaintiff" in "the case").

MDTC is particularly concerned about judicial deviation from these well-established common-law principles because defense lawyers and insurers depend on fairness, predictability, and certainty in the law when managing their practices and businesses, respectively. Indeed, the Court of Appeals followed none of these established principles in addressing the scope of Consumers' duty. It gave short shrift to the overarching public policy concerns that are supposed to guide courts when addressing tort liability of public utilities. It virtually ignored the principle of not imposing extraordinary duties and expansive liabilities upon them. By characterizing an insignificant question of fact as "material", and then shoring that up with a long-expired common-law rescue doctrine designed to avoid barring only the *slightly* negligent from recovery—one which, even if still applicable today, contains its own fundamental limitation on recovery for unreasonable actions—the Court of Appeals rationalized away this principle and practically created strict liability for utility companies. Finally, the Court of Appeals expanded

Consumers' potential liability to include plaintiffs who are well outside the scope of those generally thought to be protected. The law simply does not impose liability for injuries to the unforeseeable plaintiff, whether he or she is a rescuer or any other injured claimant. See *Moning*, 400 Mich at 439.

The net effect of the Court of Appeals' decision, duly noted by Consumers and MMA, is to provide *carte blanche* to future courts to subject public utility companies to a trial anytime a power line falls and causes personal injury, regardless of the conduct of the injured party and the circumstances that led to his or her injury. Consumers' Application, pp. 2-3. This "blanket rule of foreseeability" threatens to impose strict liability on the public utility.

The Court of Appeals' ruling creates new law, places additional burdens on public utilities, and runs contrary to the principle that a person should not be held liable for unforeseeable and therefore unpredictable events. Therefore, it is MDTC's position that this case is of jurisprudential significance to the state of Michigan and should be reviewed by this Court.

3. MCR 7.305(B)(5) – The Court of Appeals' Decision was Clearly Erroneous

The Court of Appeals erred in treating the prima facie questions of duty, foreseeability, reasonableness, and proximate cause as questions of fact, rather than of law. This Court has treated these as questions of law in the *obvious case*. See, e.g., *Harts v Farmers Ins Exch*, 461 Mich 1, 6; 597 NW2d 47 (1999). The Court of Appeals also ignored the issue of causation, finding that Consumers did not raise it in its pleadings. *In re Skidmore Estate (On Reconsideration)*, 315 Mich App 470; ___ NW2d ___ (2016), Slip. Op. at 9, n 7. However, the issue of foreseeability determines whether legal causation exists. See *Moning*, 400 Mich at 441 (stating "whether the cause is so significant and important to be regarded a proximate cause…depends in part on foreseeability whether it is foreseeable that the actor's conduct may

create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable"). The lower court concluded Mrs. Skidmore's actions were not foreseeable. This conclusion means that whatever duty Consumers had to her, and whatever negligence was committed in breach thereof, her actions and conduct—whether or not one applies the rescue doctrine—were simply not foreseeable as a matter of law. Put another way, Consumers' alleged negligence was not the proximate cause of Mrs. Skidmore's tragic death.

The Court of Appeals also erred in creating a "material" question of fact where none exists. A consideration of the scope of a utility company's duty to a claimant and the extent to which his or her injuries are a foreseeable result of any breach thereof, must be applied to the "material" facts. The Court of Appeals' injection of the "issue of fact" concerning whether Mrs. Skidmore knew that the fire she was running towards, in and of itself a significant danger evident to all the eyewitnesses, was caused by a downed power line is a red herring; it is not a "material" question of fact.

Finally, and related to the last point, the Court of Appeals' use of the "rescue doctrine" to "create" foreseeability where none exists ignored a basic element of that doctrine. Generally, in tort law, the "reasonableness" of conduct is at the heart of inquiries related to both tortfeasors and claimants. Similarly, the rescuer's conduct must have been a *reasonable* or *rational* reaction or response for his or her injury to be considered actionable. This limitation on the doctrine has existed since its inception and was incorporated into the common-law rescue doctrine of Michigan. See, e.g., *Wagner v Int'l Railway Co.*, 232 NY 176; 133 NE 437 (1921) (CARDOZO, J.), accord *Brown v Ross*, 345 Mich 54, 63-64; 75 NW2d 68 (1956).

In concluding this section, to the extent the Court of Appeals' decision broadened the duty and expanded the liabilities of a public utility, it ran contrary to this Court's established

jurisprudence that such entities are not held to a higher standard of care, nor are they to be burdened with strict liability as insurers of public safety. Any Court of Appeals decision that fundamentally alters the jurisprudence of this Court is only tentatively applicable unless and until this Court affirms, reverses, or issues an otherwise clarifying decision. See MCR 7.305(B)(5); *Groncki*, 453 Mich at 662 (where a lower court decision would expand a public utility's duty or broaden its liabilities "it is proper that this Court consider the public policy ramifications of such a decision.") (emphasis added). See also *Gulf Underwriters Ins Co*, 483 Mich at 1011.

MDTC respectfully suggests that sufficient grounds for review of the Court of Appeals opinion are present.

APPLICABLE LEGAL PRINCIPLES

As noted, this Court has established a set of overarching principles that guide the liability inquiry for tort claims against public utilities. These principles also establish the framework for applying the general tort law analysis to this case.

1. Public Policy

Michigan has a robust common-law tradition of protecting public and quasi-public service providers from the burdens of litigation. *Mich Central R Co v Coleman*, 28 Mich 440, 449-451 (1874). In *Coleman*, Justice Campbell, writing for a unanimous court, which included Justices Graves, Cooley and Christiancy, recognized the importance of efficient operation of the common carrier for the benefit of the public at large and the burdens that would be imposed upon these quasi-public entities if a heightened standard of duty were applied. *Id*.

The Court would later extend this same rationale to public utilities providing electricity. *Swaczyk v Detroit Edison Co*, 207 Mich 494, 505-506; 174 NW 197 (1919). See also the discussion in *Groncki v Detroit Edison Co*, 453 Mich 644, 661; 557 NW2d 289 (1996). Therefore, public policy considerations apply to <u>*any*</u> legal analysis of a utility company's duty. *Groncki*, *supra*. "Sound public policy is a factor in deciding duty." *Id*., citing *Sizemore v Smock*, 430 Mich. 283, 293; 422 NW2d 666 (1988); *Antcliff v State Employees Credit Union*, 414 Mich 624, 630-631; 327 NW2d 814 (1982); and Prosser Keeton, Torts (5th ed), § 53, p 358. The provision of public and quasi-public services, such as the carriage of electricity, are fraught with danger due to its hazardous qualities and the sheer volumes needed for its provision. *Coleman*, *supra* at 450-451. "Social policy must intervene at some point to limit the extent of [the public utility's] liability." *Groncki*, *supra*, quoting *Sizemore*, *supra* at 293.

Anytime a case seeks to expand the duty of a public utility, it is appropriate for this Court to address the question of duty as a question of law. *Groncki*, *supra* at 662 (explaining that where a lower court decision would expand a public utility's duty or broaden its liabilities "it is proper that this Court consider the public policy ramifications of such a decision"). In these cases, "[t]he social policy at issue is the public's need for electric power at a reasonable cost" and imposing new duties, regardless of the desire to do so, must be undertaken with care in considering the costs that would be passed on to consumers if all similar cases are allowed to proceed to litigation. *Id.* Therefore, because this case involves a tort claim against a public utility, as a first principle, the analysis must be oriented from the perspective of this public policy.

2. The Duty of Public Utilities is to Exercise Reasonable Care as Far as Practicable in the Provision of Services, Not Extraordinary Care, and Not Care in Avoidance of Strict Liability for Any Potential Harm – Public Utilities Are Not Insurers of Public Safety

Leading directly from this first principle, this Court long ago noted Michigan follows the rule of imposing a duty on the providers of public services that is neither more nor less than that of "reasonableness." *Coleman*, 28 Mich at 449-450 (applying the rule to common carriers). See also *Frederick v City of Detroit*, 379 Mich 425, 430-43; 121 NW2d 918 (1963) (same); *Swaczyk v Detroit Edison Co*, 207 Mich 494, 505-506; 174 NW 197 (1919) (explaining the various standards of care, rejecting a "heightened duty" or "broadened liability due to the nature of the hazardous activity engaged in by the utility" and concluding that "reasonable care" is the proper standard; "[r]easonable care is to be determined by, and must be commensurate with, the risk involved, within the limits of reasonable practicability under the circumstances") and *Laney v Consumers Power Co*, 418 Mich 180, 184-87; 341 NW2d 106 (1983) (both extending this rule to public utilities that maintain power lines, the former a wrongful death case in which a 13-year old boy was electrocuted when he came into contact with a live wire which had been laying on

the ground in a vacant lot, and the latter a wrongful death action involving a child electrocuted when he climbed a tree in his yard that came into contact with the defendant's power lines). *Laney* overruled *Lamb v Consumers Power Co*, 286 Mich 228; 281 NW 632 (1938), which had purported to adopt the "high degree of care" duty for public utilities involved in their maintenance and placement of electrical power lines. See 418 Mich at 186. In *Laney*, *supra*, the Court clarified the duty of a company providing electrical power as being "one of reasonable care measured by what a reasonably careful person or company engaged in maintaining electric power lines would do under the same circumstances."

The Court of Appeals' decision places upon Consumers and all other public utility companies an extraordinary duty of care because it imposes strict liability for unforeseeable injuries caused by their alleged negligence. This is the precise type of burden, i.e., a "heightened" duty of care leading to enhanced, or "strict" liability, cautioned against by this Court on numerous occasions in defining the duties owed and the liabilities to be assumed by public utilities. Michigan jurisprudence will not impose an insurer's liability on public service providers. See, e.g., *Frederick v City of Detroit Dep't of St Railways*, 370 Mich 425, 428; 121 NW2d 918 (1963).

3. No Duty is Owed to the Unforeseeable Plaintiff

The two principles noted above necessarily frame the initial question of duty, foreseeability, and proximate cause, and therefore define the extent of a public utility's liability for certain injuries caused by its actions and conduct. With respect to all tort actions, however, this Court has long recognized and applied Justice Cardozo's analysis in *Palsgraf v Long I R Co*, 248 NY 339; 162 NE 99 (1928). While *Palsgraf* forever detached "but for" causation from "duty", and replaced the former with the more malleable "proximate cause", which shaped the scope of duty

in a variety of circumstances (including public policy, which already noted, bears heavily on the analysis to be applied in this case), the case also fixed the outer boundaries of duty: "No duty is owed to [the] unforeseeable plaintiff." *Moning*, 400 Mich at 439, citing *Palsgraf*, *supra*.

ARGUMENT AND ANALYSIS

1. Summary of Argument

Assuming there is always negligence in the failure to repair or maintain a high voltage electric power line, is it foreseeable that a homeowner or his or her family members could be injured if a live power line breaks as a result of this negligence and falls in their yard, or on their home or property? Is it foreseeable that personal injury or property damage might befall someone in the immediate vicinity at the time the power line falls? Is it foreseeable that a pedestrian or passer-by could be injured if the power line falls on or near to them? In each of these circumstances, both the relationship between the utility company and the injured party, and the "harm" or "injury" to the individual may be a foreseeable *consequence* of the utility company's alleged negligence. Put another way, in such cases, the injury potentially could have been ***caused by*** the alleged negligence. However, these hypothetical situations are not currently before this Court.

The Court of Appeals' analysis assumed Mrs. Skidmore's tragic injury was equally "foreseeable", despite the vast differences in the circumstances of her case and those hypothetical situations mentioned above. The panel did this in two ways. First, it concluded that a question of fact existed concerning whether Mrs. Skidmore was aware that a downed power line had caused the fire in Mr. Cooper's yard. According to the panel, this was a question that could only be answered by a jury. *In re Skidmore Estate (On Reconsideration)*, 315 Mich App 470; ___ NW2d ___ (2016), Slip Opinion at 7-8. The implication appears to be that if a jury

concludes that Mrs. Skidmore thought there was only a fire in her neighbor's front yard, as opposed to a live, downed high-voltage power line, it was somehow more reasonable, and therefore foreseeable, that she would run across the street and try to warn him.

Second, hedging further, the Court of Appeals *sua sponte* found a second reason to return this case to the jury, to wit, it was foreseeable that Mrs. Skidmore would undertake to rescue Mr. Cooper from danger. As explained, *infra*, the rescue doctrine, to the extent it is still a viable common law construct due to comparative fault principles statutorily codified in Michigan (duly noted by Consumers), is simply inapplicable where the rescuer acts unreasonably or irrationally. In such a case, the would-be rescuer's actions and conduct are more than "negligently undertaken." They are reckless, irrational and unpredictable. Thus, there is no need for a comparison of "fault" because such unforeseeable events interpose into the analysis a break in the normal causal chain that would ordinarily allow an imposition of liability on the tortfeasor, and any associated mitigation thereof by the injured party's comparative fault. Put simply, as a matter of law, such actions are not those for which the tortfeasor will be held liable.

In short, events brought about by the unforeseeable actions and conduct of individuals are themselves deemed unforeseeable. In such cases, the causal connection between the defendant's negligence and the injury to the plaintiff is broken. Unreasonable and irrational conduct on the part of a plaintiff, or of a third-party, are sufficient reasons to "break" the chain of causation between the defendant's negligence, and the injury complained of. *Moning*, 400 Mich at 439.

In a variety of contexts, Michigan law will not impose liability on a defendant for unforeseeable events caused by the actions of others. See, e.g., *Williams v Cunningham Drug Stores Inc*, 429 Mich 495, 498-499; 418 NW2d 381 (1988) (noting the general rule that liability for unforeseeable events that the defendant cannot prevent because there is no special

relationship between himself and the injured party are not compensable); *MacDonald v PKT Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001) (citing *Mason v Royal Dequindre Inc*, 455 Mich 391; 566 NW2d 199 (1997) and noting even where special relationships might exist, as between common carrier and passenger, innkeeper and guest, tavern owner and patron, there is no duty to protect from "unreasonable risks that are unforeseeable").

The Court of Appeals used the rescue doctrine to rationalize Mrs. Skidmore's conduct and actions so that they could be deemed "foreseeable." In this way, her injury could be said to have been caused by Consumers' alleged negligence. In fact, however, as the trial court noted, her actions were not foreseeable. Therefore, regardless of the existence of a duty, and even of Consumers' alleged negligence, the scope of liability does not extend this far.

2. This Court's Analysis Applicable to Personal Injury Cases Requires Reversal

As noted by amicus curiae MMA, this Court has adopted a "duty-breach-foreseeability" nexus approach, which is a modern derivative of *Palsgraf*. MMA Amicus Curiae Brief, pp. 5-6. See also Cardi, *The Hidden Legacy of Palsgraf: Modern Duty Law in Microcosm*, 91 B U L Rev 1873, 1875 (2011). Cardi explains the "duty-breach nexus" theory, as follows: "even where a defendant breached a duty of care owed to someone, only a breach of *the duty owed to the plaintiff* may result in liability." *Id*. at 1876. (emphasis added). See also Zipursky, *Foreseeability in Negligence Law*, 44 Wake Forest L J 1247, 1273 (2009) (explaining that under this application, which most courts seem to have acknowledged as the modern extension of *Palsgraf*, "[t]he defendant must have failed to take care not to visit *this sort of injury* upon the plaintiff…." (emphasis in original). Thus, "[a] plaintiff claiming injury must show that the failure to take precautions *against the invasion she suffered* was negligent." *Id*. (emphasis in original). Similarly, as noted by now Chief Justice Markman writing for the majority in the case of *In re*

Certified Question from Fourteenth Dist Ct of Appeals of Texas, 479 Mich 498, 501-502; 740 NW2d 206 (2007), the relevant question is whether "the harm" was foreseeable to "the plaintiff" in "the case".

While the certified question related to duty, specifically, "[w]hether, under Michigan law, Ford, as owner of the property on which asbestos-containing products were located, owed [plaintiff], who was never on the property, a legal duty", the Court went on to explain "duty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection. 479 Mich at 502, 504-505, citing *Buczkowski v McCay*, 441 Mich 96, 100-101; 490 NW2d 330 (1992). In the latter case, the Court stressed that the question of "duty", and when to impose one, is largely a choice in competing policy interests. *Id*. at 102-103.

In explaining the circumstances in which, even if a duty exists between the defendant and the claimant in a given case, another element that must be considered is the foreseeability of the harm. *Certified Question*, 479 Mich at 507-508. "When the harm is not foreseeable, no duty can be imposed on the defendant." *Id*. at 508. Ultimately, the Court explained, "in determining whether a defendant owes a duty to a plaintiff, competing policy factors must be considered." *Id*. But, in every case, "[b]efore a duty can be imposed, there must be a relationship between the parties, and the harm must have been foreseeable" and, even then, "the burden that would be imposed on the defendant and the nature of the risk presented must be assessed to determine whether a duty should be imposed." *Id*. at 509.

All this to say that the Court ultimately concluded, like most modern courts, that "the ultimate inquiry in determining whether a legal duty should be imposed is whether the social benefits of imposing that duty outweigh the social costs of imposing a duty." *Id*. at 515; *Hidden*

Legacy of Palsgraf, 91 B U L Rev at 1876; *Foreseeability in Negligence Law*, 44 Wake Forest L J at 1273.

Michigan has adhered to the majority view from *Palsgraf*, which is the prevailing view to this day. The utility does *not* "have the duty to foresee or anticipate 'every possible fortuitous circumstance that might cause injurious contacts with…power lines.'" *Wilhelm v Detroit Edison Co*, 56 Mich App 116, 129; 224 NW2d 289 (1974), citing *Dees v L F Largess Co*, 1 Mich App 421, 427; 136 NW2d 715 (1965). Put another way, the incident itself must have been "reasonably foreseeable" from the resulting activity of provision of electricity, and not simply the fortuitous but unfortunate consequence of a series of events leading from breakage of the electrical lines to the electrocution of one who while perceiving danger nonetheless ventures into harm's way and suffers grave injury. Justice Cardozo "eliminated both 'unforeseeable' plaintiffs and 'unforeseeable' risks from the scope of an action in negligence." White, *Tort Law in America: An Intellectual History* (Expanded Edition, Oxford University Press 2003), p. 99.

Ultimately, the factors of any tort analysis must include foreseeability, proximate cause and public policy. See *Hidden Legacy of Palsgraf*, 91 B U L Rev at 1878-1879 and n 22 (citing *Valcaniant v Detroit Edison*, 470 Mich 82; 679 NW2d 689 (2004), a case cited by Consumers, for the proposition that Michigan applies a comprehensive approach, considering 6 out of 7 factors in the "duty-breach-foreseeability" nexus analysis, including foreseeability, proximate cause, and public policy).

According to the modern "duty-breach-foreseeability" nexus or "scope of liability" analysis, which as demonstrated is applied by this Court to personal injury actions involving public utilities, Mrs. Skidmore's death was not foreseeable. It was a consequence of her own rash

judgment to rush across the street into Mr. Cooper's yard when by all accounts, even her own statements, there was a fire threatening to engulf his home and his van

As explained, whether Mrs. Skidmore knew or did not know a downed power line was the cause of the fire and potential explosion of Mr. Cooper's van is not *material* to the issues, because in either case Mrs. Skidmore did not act rationally in running towards the danger to warn Mr. Cooper. Thus, the "foreseeability" analysis becomes one of "proximate cause" because even assuming the negligence of Consumers, can that negligence in this case be deemed to have been the proximate cause of the particular injury? Was the harm foreseeable to this plaintiff in this case? *In re Certified Question*, 479 Mich at 501-502. See also *Hidden Legacy of Palsgraf*, 91 B U L Rev at 1876, accord *Tort Law in America*, *supra* at 97-98.

Despite what decedent has advanced in this case, the trial court did not confound the issue of duty with principles of comparative fault. The trial court specifically connected Mrs. Skidmore's conduct, describing it as *unreasonable*, with the conclusion that the resulting harm was not foreseeable. See, App Br, p. 12, citing the trial court's August 11, 2014 Opinion at 48-49. Unreasonable or irrational conduct, even more when it is undertaken in an emergent moment of panic, is, by definition, unexpected, irrational, and therefore *not* foreseeable. Put another way it cannot be deemed to have been proximately caused by the alleged negligence. The trial court employed the proper analysis and arrived at the correct outcome.

It is irrelevant, therefore, how Mrs. Skidmore's conduct is characterized. Whether her actions were merely unreasonable or outrageous, or simply an act of panic oblivious to the consequences, they were, by all accounts, unforeseeable. And this has no bearing on Consumers' admitted duty to keep and maintain its power lines in a reasonably safe manner. This is the

classic example of harm caused not by "breach" of duty, but by an unforeseeable intervening event that could not have been anticipated.

It is of no moment that the cases cited by Consumers were stationary power line cases in which the injured party came into contact with the power line. Each demonstrates a different aspect of the power company's duty, to wit, if it is aware of a proximity between an electrical hazard caused by one of its wires and an area where people might be playing or working, then it is placed on notice of a potentially dangerous situation, which, if it occurs, *may* give rise to a breach of duty depending on a host of other circumstances. The question of causation in such cases really plays second fiddle, because the harm that befalls the injured party is already within the scope of the utility's duty. There was already forewarning, so to speak, that some individual (whether it be a child climbing a tree, a homeowner fixing an antenna, or a painter on top of a commercial roof) might accidentally or unintentionally contact the power line and be electrocuted. The precise event is already foreseeable. The Court in *Schultz v Consumers Power Co*, 443 Mich 445, 452; 506 NW2d 175 (1993) realized as much when it said: "a reasonable person could certainly anticipate that a painter could be electrocuted if his aluminum ladder came close to, or touched, a pitted, corroded and frayed electric wire. Furthermore, a reasonable person could confidently conclude that this event would cause serious injury or death to the painter." The Court continued:

> Those engaged in transmitting electricity are bound to anticipate *ordinary use* of the area surrounding the lines and to appropriately safeguard the attendant risks. The test to determine whether a duty was owed is not whether the company should have anticipated the particular act from which the injury resulted, but whether it should have foreseen the probability that injury might result *from any reasonable activity* done *on the premises* for business, work, or pleasure.
>
> [*Id*. (emphasis added).]

These circumstances presuppose the *reasonable* plaintiff performing *reasonable* and *ordinary* activities in a place where he or she had a right to be. Therefore, it would be a much closer case if the power line in the instant case had caused injury to Mr. Cooper, a member of his family, or to an unsuspecting pedestrian passing underneath or near to the power line when it fell. But, people ordinarily do not run *towards* a fire, much less one that is caused by a downed power line. Judge Cardozo did not draw such a wide circle for the scope of the public utility's liability. And, indeed, this Court has recognized this by stating so. There is no such thing as the unforeseeable plaintiff. *Moning*, 400 Mich at 439, citing *Palsgraf*, *supra*.

3. Foreseeability Analysis Requires Proximate Cause Analysis – Since a Central Inquiry in this Case Depends on the Foreseeability of the Injury It is a Case Fundamentally Addressing the Issue of Proximate Cause

The question at the very heart of this dispute is not duty, breach, and injury, but, "causation", and particularly, proximate causation. While the Court of Appeals stated Consumers did not raise the issue of causation, the trial court's conclusion that decedent's conduct was not reasonable, and therefore unforeseeable, necessarily means that Consumers' alleged negligence was not and could not have been the proximate cause of the injury. Slip. Op. at 9, n 7.

In its motion for summary disposition, Consumers argued it had no duty to protect against Mrs. Skidmore's actions because of her intervening conduct in "ignoring warnings, defying common sense and her knowledge that a downed power line could kill her." See Consumers' Application for Leave to Appeal at 12. This is the equivalent of saying that the duty, if there was one, was not the legal, i.e, proximate, cause of the injuries complained of in Mr. Skidmore's complaint. Causation is directly at issue in this appeal.

Moreover, the Court of Appeals' focus on the foreseeability of Mrs. Skidmore's actions necessarily requires a consideration of proximate cause. If her actions and conduct were

foreseeable to Consumers, then Consumers might be held liable if it is found to have been negligent because the connection between its negligence and Mrs. Skidmore's death may be established. "'Proximate cause' normally involves examining the *foreseeability* of consequences, and whether a defendant should be held *legally responsible* for such consequences." *Craig ex rel Craig v Oakwood Hosp*, 471 Mich 67, 87; 684 NW2d 296 (2004) (emphasis added), citing *Skinner v Square D Co*, 445 Mich 143, 163; 516 NW2d 475 (1994).

Where the question is fairly addressed by the lower court, either directly or by implication, and it is a question of law that can be resolved by the appellate court, the issue is appropriately before the court. See *Peterman v Department of Natural Resources,* 446 Mich 177, 183; 521 NW2d 499 (1994). Moreover, this Court may decide to consider it where it is interrelated and part of the major issues presented. *Id*. Finally, this Court has noted that "the preservation requirement is not an inflexible rule; it yields to the necessity of considering additional issues when 'necessary to a proper determination of a case'" *Klooster v City of Charlevoix,* 488 Mich 289, 310; 795 NW2d 578 (2011), quoting *Prudential Ins Co of America v Cusick,* 369 Mich 269, 290; 120 NW2d 1 (1963).

The trial court concluded Mrs. Skidmore's injury was not "foreseeable". Foreseeability is part and parcel of the duty-breach-foreseeability-proximate cause analysis applied in all tort actions. *In re Certified Question*, 479 Mich at 501-502; *Valcaniant v Detroit Edison*, 470 Mich 82; 679 NW2d 689 (2004). Finally, the Court of Appeals concluded Mrs. Skidmore's injury *was* foreseeable because it applied the rescue doctrine, which presupposes that a plaintiff may foreseeably undertake a reasonable rescue effort. Slip Op. at 7-8. Therefore, the issue of proximate cause was interrelated with the trial court's dispositive conclusion. *Peterman*, *supra*.

4. In this Case Proximate Cause is a Question of Law for the Court

The issue of causation can, in certain circumstances, be considered as one of law, and therefore subject to resolution by this Court if public policy and the efficient administration of justice so warrants. In Michigan, "the question whether the defendant owes an actionable legal duty to the plaintiff is one of law which the court decides after assessing the competing policy considerations for and against recognizing the asserted duty." *Friedman v Dozorc*, 412 Mich 1, 22; 312 NW2d 85 (1981).

"Normally, the existence of cause in fact is a question for the jury to decide, but if there is no issue of *material* fact, *the question may be decided by the court*." *Genna v Jackson*, 286 Mich App 413, 418; 781 NW2d 124, 128 (2009) (emphasis added), citing *Holton v A+ Ins Assoc Inc,* 255 Mich App 318, 326; 661 NW2d 248 (2003). See also *Helmus v Mich Dep't of Transp*, 238 Mich App 250, 256; 604 NW2d 793 (1999) ("proximate cause is usually a factual question", but noting "the trial court may dismiss a claim for lack of proximate cause when there is not issue of *material* fact") (emphasis added). To close the point, this Court stated in *Moning v Alfono*, 400 Mich 425, 438; 254 NW2d 759 (1977) that "the court decides questions of duty, general standard of care and proximate cause…."

Proximate causation involves examining the foreseeability of consequences and whether a defendant should be held legally responsible for such consequences given his negligent acts or omissions. *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). This Court has defined proximate cause as "a *foreseeable*, *natural*, and *probable* cause" of the defendant's negligence. *Shinholster v Annapolis Hosp*, 471 Mich 540, 546; 685 NW2d 275 (2004) (emphasis added); accord *Nielsen v Stevens,* 368 Mich 216, 220; 118 NW2d 397 (1962). Such causation is distinct from factual or "but for" causation. *Moning*, 400 Mich at 439. Issues of proximate

causation thus call for an independent, searching inquiry, the focus of which is whether the result of conduct that created a risk of harm and *any intervening causes* were foreseeable. *Jones v Detroit Med Ctr*, 490 Mich 960, 960; 806 NW2d 304 (2011).

A mere possibility of such causation is not sufficient; and when the matter remains one of pure speculation and conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant. *Skinner*, 445 Mich at 165.

Under this analysis, it must be shown that reasonable minds cannot differ that injury was a foreseeable, natural, and probable consequence of the defendant's negligence. *Jones*, 490 Mich at 961. In the instant case, reasonable minds cannot but conclude that Mrs. Skidmore's actions in approaching the deadly hazard of fire on or near to a vehicle (whatever she perceived the root cause to be) was simply not within the scope of liability assumed by Consumers as a public utility. If it were otherwise, any injury caused no matter how remote to the original incident or how far removed from the bounds of sensible projection could be the subject of a trial on the merits against and potential liability of the public utility.

5. Whether Mrs. Skidmore Knew the Fire at Mr. Cooper's House was Caused by a Downed Electrical Line is Not a Dispute of "Material" Fact

Attempts to create a "material" question of fact over whether Mrs. Skidmore knew the apparent fire towards which she was running was caused by the downed power line do not aid in the required analysis. Even if she was unaware of the exact cause of the fire, Mrs. Skidmore feared that Mr. Cooper's van would explode, and nonetheless ran directly towards the house, which placed her path directly across the narrow strip of grass where the power line had fallen between the street and Mr. Cooper's house. See Skidmore Answer to Application (Skidmore Answer) at 2-4 (including the first photograph represented as showing the line of sight from Skidmore's home to Cooper's home). Regardless of what was causing the fire, decedent

expressed her awareness that the van could explode, and yet, she put herself dangerously near to it when she ran directly across the street from her home.

Realizing the inadequacy of the Court of Appeals' first opinion the estate interjects the question of fact concerning Mrs. Skidmore's unawareness of the precise danger. While this *may* require a finding that injury she suffered was a result of not knowing what danger she was running towards on that fateful evening, it does not require a different conclusion than that of the trial court as to liability. By all accounts, Mrs. Skidmore was warned by her husband and by the cries of her neighbors, who were aware of what was transpiring, and the danger it posed. The proofs are equivocal whether she knew or not that the fire was caused by a downed power line. Did she think Mr. Cooper's van was just on fire? Did she approach the window in the front of the house through the yard where the power line had fallen because she saw Mr. Cooper in the window and wanted to make sure he knew what was going on? Was her direct reaction a result of her knowledge that in fact the fire was caused by a power line that had fallen and therefore the situation was all the more dire? These questions are fact questions, indeed. They may never be answered. But even if they are answered in the manner implied, i.e., that Mrs. Skidmore was unaware that there was a downed, live power line laying in the yard when she crossed into it to warn Mr. Cooper, this does nothing to mitigate the unforeseeable nature of her conduct.

The implication in questioning whether Mrs. Skidmore knew the danger was caused by the downed power line is that it was somehow "more reasonable" and therefore "foreseeable" for Mrs. Skidmore to run across the street *towards* a fire to warn her neighbor because she feared the van would explode due to the fire, than had she known the fire and potential explosion was due to the downed power line. But, the "material" fact is that she ran towards the danger at all, which

shows her actions were no more reasonable regardless of her knowledge of its source. See cases discussed *infra*, holding the rescue doctrine requires the rescuer to act reasonably.

Every other eyewitness, including Mr. Skidmore (who was in the house with Mrs. Skidmore and warned her not to go outside), did know that a power line had fallen, knew that it was causing the fire on the van and in Mr. Cooper's yard, saw the nature and extent of the conflagration, knew to avoid it, and shouted warnings at Mrs. Skidmore, to no avail. She quickly approached Mr. Cooper's house in a direct path that intersected with the span of power lines from which the downed line had fallen. See generally, Consumers' Application at 6-12 (explaining the testimony and observations of Mssrs. Skidmore, Cooper, Beam and Stutzman). All of their actions further indicate their awareness of the danger.

Beam testified he saw "sparks on top of the van" and that it "looked like it was going to catch on fire, maybe explode." Slip Op. at 2. He and Stutzman tried to warn Cooper "there was a fire."

Stutzman saw sparks in two places "*at the transformer at the top of the utility pole* at Shirley and Winnifred" the corner closest to Cooper's front door, and at the opposite end of Cooper's house "by Cooper's van in the driveway", closest to the Skidmore residence. Slip Op. at 3.[2] Stutzman further stated because of the two places he observed fire and sparking, and because he could see the line coming down from the utility pole "[a]lthough he could not see the rest of the line, he concluded that it was somewhere along the side of Cooper's house." *Id*.

Mr. Cooper also described the intensity of the fire. He testified he saw the entire power line engulfed in flames as it twisted and turned through his yard. Consumers' Application, p. 8 (citing

[2] While the Court of Appeals later states: "[t]he eyewitnesses all agreed that the only place the line could be seen was at Cooper's van, a significant distance from the dining room window that [Mrs. Skidmore] was approaching." Slip Op. at 8, this is moderated by Mr. Stutzman's testimony that he saw sparks *at the transformer at the top of the utility pole* at the corner of at Shirley and Winnifred and at the opposite end of Cooper's house at or near to the van.

Cooper Testimony). He also described that an eight foot high bush in his yard was entirely consumed by flames.

Not only does this unequivocal testimony from the four eyewitnesses diminish the theory that Mrs. Skidmore somehow did not know that a power line had fallen because she never personally acknowledged it (something which can never be known), it also demonstrates how irrational her actions were, and the extent to which they were undertaken without any forethought or acknowledgment of the consequences. Therefore, it is of no moment whether Mrs. Skidmore knew a power line had fallen and was causing the fire, she knew there was a fire that could potentially cause Mr. Cooper's van to explode, and she nonetheless ran towards this danger.

6. The Rescue Doctrine is Not Applicable Where the Would-Be Rescuer's Actions are Unreasonable

The rescue doctrine, like Michigan tort law generally, contains the same basic limitation of imposing liability for the "unforeseeable" plaintiff. The rescue doctrine was traditionally applicable in Michigan to prevent "contributory negligence" from barring recovery by one injured in the act of rescuing another from harm caused by a third party's negligence. *Hughes v Polk*, 40 Mich App 634, 643; 199 NW2d 224 (1972). See also *Brugh v Bigelow*, 310 Mich 74, 77, 80; 16 NW2d 668 (1944), citing *Wagner v Int'l Railway Co.*, 232 NY 176; 133 NE 437 (1921) (CARDOZO, J.) As stated by the Court of Appeals in *Hughes*, *supra*:

> The rule is well settled that one who sees a person in imminent and serious peril caused by the negligence of another cannot be charged with contributory negligence, as a matter of law, in risking his own life or serious injury in attempting to effect a rescue, *provided the attempt is not recklessly or rashly made*.
>
> [*Hughes*, 40 Mich App at 643 (emphasis added).]

Thus, while it may follow that "danger invites rescue", see *Wagner*, 232 NY at 180, a person's conduct in undertaking the rescue is always considered in terms of the "reasonableness" of their decision and the "rationality" of their ensuing conduct in light thereof. That consideration also guides the question of a particular defendant's liability to the rescuer, as a matter of law. See also Seavey, *Mr. Justice Cardozo and the Law of Torts*, 48 Yale L J 3, 399 (1939) (explaining the boundaries of Justice Cardozo's view of tort liability, in which he directly addressed the rescue doctrine).[3] Justice Cardozo's exploration of the rescue doctrine in *Wagner*, *supra*, occurred earlier than the *Palsgraf* decision, but it contains equally important rationale that came to be associated with the exception to the general rule that the defendant would not be liable to third parties – in other words, where there was no apparent, immediate relationship between the defendant and the plaintiff in a tort action, the law did not allow recovery for a third party injured as a result of his or her intervention in seeking to rescue the plaintiff.[4] Cardozo understood that if the rescue doctrine was invoked to allow the imposition upon a defendant of liability to a third party, the act of attempting the rescue must itself have been rationally executed. *Id*. Accord *Brown v Ross*, 345 Mich 54, 63-64; 75 NW2d 68 (1956), citing *Wagner*, *supra*, *inter alia*. This Court in *Brown* quoted *Cote v Palmer*, 127 Conn 321; 16 A2d 595, 598 (1940), which

[3] This acclaimed work was also published in the law reviews of Columbia and Harvard by Professor Seavey of Harvard Law School.

[4] The relationship between the defendant and the plaintiff in Wagner was arguably much closer than the relationship between Consumers and Mrs. Skidmore in this case. International Railway Company, as its name implies, operated an electric railway between Buffalo and Niagara Falls. *Wagner*, 232 NY at 178. The injured party, Arthur Wagner, was a railway passenger (to whom the railway already owed a heightened duty under the common law "special relationship" between common carriers and passengers) who had boarded one of the cars with his cousin at a station below one of the trestles of a bridge that the railway used to cross over another set of railway tracks. *Id*. at 179. Wagner was injured when he fell from the trestle after disembarking from the railway car and trying to reach his cousin, who had fallen out of the railway car as it was crossing the bridge. *Id*.

summarized from other cases including *Wagner*, *supra* and 2 Restatement Torts § 472 noted: "[I]t is not contributory negligence [and therefore, a bar, at that time to recovery] for a plaintiff to expose himself to danger *in a reasonable effort* to save a third person…from harm." (emphasis added). Of this statement, and the emphasized language, this Court in *Brown* stated:

> The statement quoted contains *in itself a limitation*, for it only applies where the effort to save is "*reasonable*" and it suggests a question as to the elements involved in determining what effort is to be deemed reasonable. The answer to that, so far as it admits of an answer, is that the same standard generally used in testing whether or not an act is negligent is to be applied; that is, the conduct of an ordinarily prudent person in the same circumstances as the plaintiff. The question in such a case is not what a careful person would do, under ordinary circumstances, but what would he be likely to do…in the presence of such existing peril. It better accords with the analogies of the law to apply the usual standard of conduct, that is, the conduct of *an ordinarily prudent person under the same circumstances*….
>
> [*Id*. at 63-64 (emphasis added) (internal case citations and quotation marks omitted).]

Returning to *Hughes*, 40 Mich App at 643, which provides the clearest statement of this limitation, the Court of Appeals there simply stated that the law will not recognize the right of recovery if the attempt was "reckless" or "rashly made".

As noted, regardless whether Mrs. Skidmore knew that a power line was the cause of the fire, she saw the fire near to or on Mr. Cooper's van, and stated she thought the van might explode. Instead of heeding her husband's counsel to stay in the house and waiting for emergency responders to arrive, she told her husband to call 911 and she bolted out of the house and ran across the street straight towards the fire without stopping or heeding the frantic cries of Mssrs. Stuzman and Beam. Whether her effort is characterized as an attempt to rescue Mr. Cooper or simply a misguided attempt to warn him of what she thought was only a fire (although according to her and the other eyewitnesses one which appeared to threaten involvement with the gasoline powered van), it must still be considered in terms of its reasonableness. Was the rescue

"reckless" or "rashly made"? See *Hughes*, *supra*, citing *Wagner*, *supra*. Or, were here actions and conduct simply unforeseeable because they were reckless, irrational and unreasonable? *Moning*, 400 Mich at 439, citing *Palsgraf*, *supra*. MDTC submits the answer in either case is affirmative, and thus, recovery is barred.

7. The Analysis of this Case Must Consider the Public Policy Regarding Utility Companies

> [O]ver the past four centuries, from the time of Lord Chancellor Francis Bacon's first maxim of law, *in jure non remota causa, sed proxima, spectator* [in law, not the remote cause, but the proximate cause, is looked to], courts and commentators have been struggling mightily to properly understand, and to correctly apply the concept of proximate cause to present-day negligence actions.
>
> In practice, however, most courts have long implicitly understood, and most tort practitioners have long suspected, that the concept of proximate cause is very different from the concept of cause-in-fact and has very little to do with causation principles per se. Rather, according to prevailing contemporary American tort law theory and practice, proximate cause can best be understood as a limitation to tort liability primarily based on public policy grounds, rather than based upon underlying causation principles.
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> [Swisher, *Causation Requirements in Tort and Insurance Law Practice: Demystifying Some Legal Causation "Riddles"*, 43 Tort Trial & Ins Practice L J 1, 8 (Fall 2007).]

Notably, *Palsgraf* itself was a case against a public utility, and Justice Cardozo did not miss the occasion to apply the public policy protecting such entities from being overburdened with liability for unforeseeable events. In his influential work *Tort Law in America*, Professor White noted that Justice Cardozo in *Palsgraf* used an "interest balancing" convention to define the parameters of acceptable tort liability on large public corporations. *Tort Law in America*, p. 99. As Professor White puts it, essentially, the *Palsgraf* case "balanced the 'justice' of Ms. Palsgraf's position as an innocent bystander injured by the carelessness of a solvent enterprise against the threat of future financial security of that enterprise posed by too extensive an ambit of tort liability." *Id*. at 99.

It is especially important to consider the "duty-breach-foreseeability" paradigm in the context of the public utility cases where, by sheer volume of the services provided, some accident (whether resulting from negligence or not) could happen at any moment. A public utility has a relationship with the public at large, but this does not translate into a "special relationship" with each of its members whereby each is equally protected from harm that might be caused by the utility's negligence. The duty is that of a reasonable utility. And, in any event, the scope of liability does not extend beyond the foreseeable, which is the limitation recognized as applicable to all tortfeasors.

When considered in this way, the public policy of protecting utility companies from such extraordinary occurrences, coupled with the fact they are held to a "reasonable as far as practicable" standard, and the recognition in all of negligence law that the "unforeseeable plaintiff" is not owed a duty, the trial court came to the right conclusion.

CONCLUSION

MDTC seeks consistency in the law of negligence and the principles that guide litigants in the day-to-day conduct of their affairs. This Court is constitutionally empowered to review published opinions of the Court of Appeals that establish a new rule of law or create liabilities where none existed before, because such decisions impact this state's jurisprudence. See MCR 7.305(B)(3); *Gulf Underwriters Ins Co v McClain Industries Inc*, 483 Mich 1010, 1011; 765 NW2d 16 (2009) (YOUNG, J., concurring). This Court ultimately serves the different, and higher, function of being the ultimate arbiter of that jurisprudence. *People v Bulger*, 462 Mich 495, 541-542; 614 NW2d 103 (2000) (CAVANAUGH, J., dissenting), decision abrogated by *Halbert v Michigan*, 545 US 605 (2006). "[T]he function of the Court of Appeals is correcting errors" and the function of this Court under MCR 7.305(B) "is determining the merits". *Id*.

Public policy supporting the provision of affordable energy to Michigan citizens requires close examination of any decision purporting to impose a new duty upon or to expand the liability of a public utility. In the former case, only this Court should be able to decide whether such a duty can be recognized by Michigan jurisprudence. In the latter case, expansion of liability imposes a higher duty of care on such companies, which is contrary to this Court's common-law principle that they are to be held only to a "reasonable" standard of care. Finally, this Court has long adhered to the view, applicable in all tort cases, that liability should not be imposed when injury is to an unforeseeable plaintiff. The Court of Appeals' decision in the instant case ignored or failed to apply these three basic limitations on the potential liability of Consumers in the instant case.

RELIEF REQUESTED

Amicus curiae respectfully request this Court to grant leave to appeal or issue such other corrective orders it deems just in this case.

Respectfully submitted,

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