An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-159

Filed: 6 November 2018

Wake County, No. 16 CVS 7353

REBECCA B. EVERETT and SIMON J. EVERETT, Co-administrators of the Estate of Simon T. Everett, Plaintiffs,

v.

DUKE ENERGY CAROLINAS, LLC; and FDB, LLC, Defendants.

Appeal by Plaintiffs from orders entered 9 October 2017 by Judge A. Graham Shirley II in Wake County Superior Court. Heard in the Court of Appeals 21 August 2018.

Twiggs Strickland & Rabenau, P.A., by Donald R. Strickland, Karen M. Rabenau; and, Wilson and Ratledge, PLLC, by Thomas J. Wilson and James E. R. Ratledge, for Rebecca B. Everett and Simon J. Everett, Co-administrators of the Estate of Simon T. Everett, plaintiff-appellants.

Parker Poe Adams & Bernstein LLP, by Jonathan E. Hall and Michael J. Crook, for Duke Energy Carolinas, LLC, defendant-appellee.

Roberts & Stevens, P.A., by Ann-Patton Hornthal and F. Lachicotte Zemp, Jr., for FDB, LLC, defendant-appellee.

HUNTER, JR., ROBERT N., Judge.

Rebecca B. Everett and Simon J. Everett, co-administrators of the Estate of Simon T. Everett, ("Plaintiffs") appeal from the trial court's 9 October 2017 orders granting summary judgment in favor of Duke Energy Carolinas, LLC and FDB, LLC ("Defendants"), and denying their motion to amend their complaint pursuant to Rule 15(a) of the North Carolina Rules of Civil Procedure. We reverse in part and affirm in part.

I. Factual and Procedural Background

On 8 June 2016, Plaintiffs filed a complaint in Wake County Superior Court against Defendants. Plaintiff's complaint alleged a claim for wrongful death describing the following events, which occurred on the morning of 12 June 2014.

In 1922, Frank D. Bell, Sr. ("Bell Sr.") founded Camp Mondamin on Lake Summit in Zirconia, North Carolina. Since its inception, Camp Mondamin has offered water activities, such as swimming, canoeing, kayaking, and sailing. Bell Sr. founded another camp for girls, Camp Green Cove, on adjacent property, which offered the same activities. Camp Mondamin and Camp Green Cove occupied fourteen and ninety acres, respectively, on a 104 acre tract of land next to the lake. FDB, LLC ("FDB"), a land holding and leasing company, owned the land at the time of the accident.

Simon T. Everett ("Decedent") attended Camp Mondamin as a child growing up many times during the summer months. At the time of his death, Decedent lived

and worked in Raleigh, North Carolina with a management company, Walk to State, LLC, and also served as an Assistant Scout Master with the Boy Scouts of America. As an adult, Decedent worked as a camp counselor at Camp Mondamin. On 3 June 2014, Decedent started working at Camp Mondamin on the sailing staff, as he had in the past, for a three-week summer camp.

During the summer months, Camp Mondamin taught campers how to use between six and seven Flying Scot sailboats on Lake Summit. The sailboats were usually derigged at the sailing docks, located along the shoreline on one side of a peninsula after use and for storage. Staff would remove boats from the water at a "boat ramp" or "boat launch" with the aid of a truck near the wooden docks at camp. The boat ramp is a "lightly graveled sloping ramp down into the lake from the road," and has been in use for over twenty years. There were at least two large trees near the boat ramp, with normal vegetation and other landscape features around the immediate area. Camp Mondamin removed one of the trees near the boat ramp since the accident happened because it "would drop limbs near the power line pretty regularly" and caused power outages. Four power lines run above the boat ramp, consisting of three separate power lines and one neutral conductor, and connect to poles on the opposite side of the boat ramp. The power lines each conduct 7,200 volts of electric current.

On the morning of 12 June 2014, Decedent and a camp counselor were loading a sailboat onto a trailer from the water's edge. As the sailboat was being pulled out of the water, the metal mast on the sailboat "came into contact with the uninsulated, energized, and dangerous high voltage power line owned, operated, and maintained by Duke Energy, which was strung over the water's edge[.]" At the time of contact, Decedent "stood beyond the water's edge with his hand on the sailboat to aid in its removal." The electric current from the power line "was conducted through the metal mast of the sailboat to the body of [Decedent]." Due to the electrocution, Decedent suffered "significant electrical burns and cardiac arrest," and Henderson County EMS were called. Decedent was pronounced dead at 12:15 p.m. at Pardee Memorial Hospital.

The complaint alleged Decedent was "reasonably unaware that an uninsulated, energized, and dangerous high voltage power line was above the mast of the sailboat at the time that the sailboat was being pulled from the water[,]" resulting in his electrocution. The complaint further alleged "insufficient vertical clearance existed for the mast of the sailboat to pass" under the power lines.

Plaintiffs' complaint alleged Defendants were negligent on the following grounds:

> 42. Duke Energy and FDB, LLC knew or should have known that campers and staff at Camp Mondamin were engaged in water-related activities on Lake Summit, including the use of sailboats and the removal of those

sailboats by a ramp and roadway that passed underneath its uninsulated, energized, and dangerous high voltage power lines.

43. Duke Energy and FDB, LLC knew or should have known that campers and staff at Camp Mondamin were likely to be exposed to electrical hazards associated with the uninsulated, energized, and dangerous high voltage power line located over the water's edge of Lake Summit when removing sailboats from Lake Summit and that such exposure would likely cause serious injury or death by electrocution.

44. Duke Energy and FDB, LLC knew or should have known that campers and staff at Camp Mondamin removing sailboats from Lake Summit would not likely see a power line above the area where a sailboat was being pulled from the water.

45. Duke Energy and FDB, LLC knew or should have known that campers and staff at Camp Mondamin removing sailboats from Lake Summit, if they did see the power line above, would be unlikely to judge its height, or to realize that such line was uninsulated, energized, and dangerous and with insufficient vertical clearance for the mast of a sailboat to pass beneath[.]

46. Under North Carolina law, Duke Energy, as a provider of electric current and as a public utility, had a duty to [Decedent] and others, to protect them from injury by exercising the highest skill, the most consummate care and caution, and the utmost diligence and foresight constructing, locating, maintaining, operating, and inspecting its power distribution system, including its power lines and poles, consistent with the system's safe and practical operation.

47. At all relevant times herein, Duke Energy had the ability, power, and control to relocate the uninsulated, energized, and dangerous high voltage power line away

from Lake Summit or to otherwise eliminate the hazard and risk associated with accidental human contact with the uninsulated, energized, and dangerous high voltage power line, as required by North Carolina law and the National Electric Safety Code.

48. Duke Energy, by and through its agents, employees, officers, directors, managers, and representatives, was negligent in the construction, ownership, operation, maintenance, and control of this uninsulated, energized, and dangerous high voltage power line in connection with its sale of electricity in that it did not:

a. Install and maintain[ ]a power line with an adequate vertical clearance;

b. Comply with industry safety customs and practice by installing and maintain a power line with an adequate vertical clearance;

c. Design and construct its high voltage power line and support poles with regard for the conditions under which they were to be operated, in a reasonably practical manner that reduced hazard to life and limb;

d. Comply with the sound engineering practice by designing and constructing its high voltage power line and support poles with due regard for the conditions under which they were to be operated, in a reasonably practical manner that reduced hazard to life and limb;

e. Construct, install and maintain its high voltage power line in a manner that safeguarded [Decedent] and other members of the public from hazards arising from them;

f. Properly and adequately design, plan, insulate, guard, protect, maintain, remove, or otherwise isolate its power line on this aforesaid property;

g. Inspect its electrical energized power line to ascertain that they were in reasonably safe condition under all the facts and circumstances then and there present;

h. Move and relocate its electrically energized power line to a location and position away from the aforesaid location at Lake Summit to reduce or eliminate the hazards of electrical shock;

i. Exercise reasonable care to analyze, appreciate, and warn residents of the property, including [Decedent] and others of the dangerous and unsafe conditions then and there existing;

j. Exercise the high degree of care required of a supplier of electricity; and

k. Adopt and employ proper adequate safety precautions, procedures, measures, programs, and plans.

49. At all relevant times herein, FDB, LLC owed a duty to all lawful visitors of the property on which Camp Mondamin was located, including [Decedent]:

a. To keep the premises in reasonably safe condition;

b. To inspect for and correct unsafe conditions and hidden dangers; and

c. To warn of unsafe conditions and hidden dangers.

50. FDB, LLC, by and through its agents, employees, officers, directors, managers, and representatives, was negligent in that it:

a. Failed to keep and maintain, or failed to cause the proper upkeep and maintenance of, the property on which Camp Mondamin was located in a reasonably safe condition for reasonably anticipated visitors, including [Decedent];

b. Failed to correct, or have Duke Energy correct, the unsafe condition and hidden danger posed by the uninsulated, energized, and dangerous high voltage power line beyond the water's edge of Lake Summit, along the path from the sole ramp where sailboats operated by campers and staff at Camp Mondamin were routinely pulled from the water; and

c. Failed to warn of the unsafe condition and hidden danger posed by the uninsulated, energized, and dangerous high voltage power line beyond the water's edge of Lake Summit, along the path from the sole ramp where sailboats operated by campers and staff at Camp Mondamin were routinely pulled from the water.

> 51. As a direct and proximate result of the negligence of Duke Energy and FDB, LLC, as alleged herein, [Decedent] was electrocuted. Consequently, [Plaintiffs], in their representative capacity as Co-Administrators of the Estate of [Decedent], are entitled to recover damages under the North Carolina Wrongful Death Statute, N.C.G.S. § 28a-18-2.

On 11 July and 5 August 2016, FDB and Duke Energy each filed answers generally denying the claim for wrongful death, and contested whether Decedent knew or should have known the power lines existed above the boat ramp at the time of the event. Defendants contended Plaintiffs were barred from recovery because Decedent was contributorily negligent on the morning of 2 June 2014, and moved to dismiss Plaintiffs' complaint.

On 15 February 2017, the trial court filed a Case Management Order, which set forth the schedule of discovery, evidence collection, and pre-trial motions. The trial court ordered all parties to identify experts by 1 April 2017, and complete depositions by 15 April 2017. The trial court set a final date of 1 September 2017 for all discovery to be completed, and scheduled a mediation for all parties on the same date. The trial court designated the case shall be ready for trial on 2 October 2017.

On 23 February 2017, Plaintiffs deposed Andrew Bell ("Bell"), who had been a staff member at Camp Mondamin since 1996, and eventually became the Camp Director in 2013 after his father, Bell Sr., retired. When asked about the power lines that electrocuted Decedent, Bell testified to the following:

Q. Were you aware of the power line in question that was hit by the mast of the sailboat on June 12th, 2014?

A. Yes, I was.

Q. And had you had any specific conversations with [Decedent] to tell him where the power line was and to not take a sailboat under there because the mast could hit it, or any conversations along those lines?

A. Not having to do with sailboats, no.

Q. Okay. Tell me the conversations you had – any conversations you recall you had with [Decedent] specifically with respect to the power line in question.

A. There was a tree that would drop limbs near the power line pretty regularly and cause Duke Power to have to come out and turn the power back on, which has since been taken down. There is another tree that is still there, in close proximity to the power line, and I remember specifically discussing with [Decedent] the difficulty of taking that tree down when the time comes.

Q. And what was the difficulty?

A. Being close to a power line.

. . .

Q. Okay. So from 2005 until that tree was taken out about a year-and-a-half ago, so approximately a ten-year period, how often do you think Duke Power was out to repair the power line?

A. Eight to ten times.

. . .

Q. Okay. So you talked to [Decedent] about the power line in connection with the tree that had to come down, but you never had any specific conversation with [Decedent] about the danger of the power line with respect to pulling a sailboat under the power line. Is that right?

A. Correct.

Q. And as you sit here today, of your own personal knowledge did you know if [Decedent] knew or did not know that a trailered Flying Scot with the mast up would hit the power line or not hit the power line?

A. I do not know.

. . .

Q. Had you had any conversations with any camper or any counselor, prior to [Decedent]'s death, warning them of the danger of the power line, with respect to a sailboat being pulled out of the lake on the ramp?

A. No.

Q. And I think we have already established that there were no warning signs regarding a warning to anybody that there was a power line there.

A. Correct.

. . .

Q. [D]id you ever give it a second thought that the power line may not be insulated?

A. No.

Q. And why was that?

> A. Just that power lines are generally hazardous, and most people I expect – or I understood that everybody coming into camp would know that a power line is a power line. They are pretty prevalent in today's world, and I think they are easily recognized.
>
> Q. And would that be the reason that you didn't have any conversation specifically with the camp counselors, including Max [Appley] or [Decedent], about the dangers of the power line?
>
> A. Partly. Well, yes.

Bell further testified about responding to the scene of the accident after medical personnel arrived, and general knowledge about the de-rigging process of the sailboats at Camp Mondamin. Bell confirmed he had no personal knowledge of the incident happening, conversations between Decedent, and other counselors, or the reasoning behind the mast remaining upright when the sailboat was being pulled from the dock area.

On 3 March 2017, Plaintiffs deposed William Felder ("Felder"), an experienced camp counselor and sailing director at Camp Mondamin. Felder was very familiar with Lake Summit and Camp Mondamin, having attended the camp himself in the 1960s as a child. Felder is an experienced, competitive sailor, and has sailed recreationally since 1980. Felder stated there was a handbook for staff training at Camp Mondamin, but not any written materials specific to sailing activities.[1] Felder

[1] Frank Bell Jr., whose father founded the camp, testified Camp Mondamin had "documentation which says that the mast should be taken down prior to pulling the boat out. It does not, as far as I can recall, specifically mention the power line."

testified to the following regarding sailing activities and power lines at Camp Mondamin:

> Q. Okay. Was sailing staff, before the incident involving [Decedent], told anything about the power lines that ran through Camp Mondamin?
>
> A. No.
>
> . . .
>
> Q. Were they told anything about the height of the masts of the various sailboats?
>
> A. No, sir.
>
> Q. Were they told anything about whether the – the masts of the sailboats, if up, could or could not clear the power lines at the boat ramp at Camp Mondamin?
>
> . . .
>
> A. No.
>
> Q. Did you, yourself, have any knowledge or information about whether the mast of the Flying Scot could clear the power lines at the boat ramp of Camp Mondamin?
>
> A. No, sir.
>
> Q. Is that something that you had ever thought about before the incident involving [Decedent]?
>
> A. I'm not sure I understand the question.
>
> Q. Had you ever consciously thought about the question of whether the mast of the Flying Scot could or could not clear the power lines at the boat ramp of Camp Mondamin before the incident?

> . . .
>
> A. We don't pull boats up that ramp with the masts up.
> . . .
>
> Q. All I'm trying to find is if you had ever thought, one way or another, whether the mast of the Flying Scot could or could not clear the power lines.
>
> A. No. You just don't do it.
>
> . . .
>
> Q. And just to follow up and make a clear record, was [Decedent] ever informed by you that an important reason for taking the mast down first at Camp Mondamin was that there were power lines at the boat ramp that could be contacted by the mast?
>
> A. No, sir.

Felder described the de-rigging process at different points of the sailing season and the processes the sailing staff used to protect the sailboats during the winter months, which included de-masting the sailboats in different methods, both for overnight sailing trips and dry storage. When asked about the power lines at the boat ramp where Decedent was electrocuted, Felder testified to the following:

> Q. Do you know if [Decedent] had any knowledge about the mast height of the sailboat?
>
> A. No, sir.
>
> Q. Do you know if he knew that there were power lines at the boat ramp?

> A. No, sir.
>
> Q. Did you know anything about the voltage of the power lines at the boat ramp before the incident?
>
> A. No, sir.

On the date of the accident, Felder testified about what he said to Decedent and Max Appley ("Appley"), another sailing staff member, to remove the sailboat from Lake Summit.

> Q. What did you ask [Decedent] – well, what did you ask [Decedent] and [Appley] to do?
>
> A. Three things. To take a boat from a mooring, bring it to the dock, unrig it. Take the mast [ ] down. Get some tools that they were going to need to actually extract the tiller from the rudder head. Get everything bundled up, make sure the mast is tied down in some fashion and then pull it out of the water. And then make a fuel run and fill up the truck, the – we use fuel to run motors and vehicles and whatnot. And to also get another trailer from our trailer yard and bring it down to the boat ramp in anticipation of having to pull a second boat later, because it takes two boats. We use two boats on our trips. Those are generally the instructions.
>
> . . .
>
> Q. Okay. And so what did [Decedent] and [Appley] do once they got your instructions? If you know.
>
> A. They took the boat off the mooring. I didn't physically see them remove the boat from the mooring, but I did see them go around the corner of the peninsula. And I spoke to [Decedent] and he responded back to me that – I said, "What are you doing?" And he responded back to me, "I have got this," and that's the last I saw of them.

> Q. What was your understanding of what [Decedent] meant by "I have got this"?
>
> A. He was confirming to me he knew what he was doing.
>
> Q. What did you mean by saying something to the effect of, "What are you doing"?
>
> A. I was questioning why he was going around the corner with the mast up.
>
> Q. Why were you questioning that?
>
> A. Because those weren't the instructions I had asked them to do.

On 30 March 2017, Plaintiffs deposed Max Appley, another camp counselor and driver of the truck at the scene of the accident. Appley had been a camp counselor since 2010, and a camper before that as well. As a camper, Appley had some experience de-rigging sailboats at the boat dock on Lake Summit.[2] Appley testified to the following about the "boat ramp" area:

> Q. Were you ever taught, at Camp Mondamin, anything about masts and power lines?
>
> A. No.
>
> Q. At Camp Mondamin did anybody ever tell you about the power lines that were contacted by the mast in this case?
>
> A. No.
>
> Q. Did you, yourself, know those power lines were there

[2] There are several different wooden docks at Camp Mondamin, including a swimming dock, "I-dock" for multiple uses, "F-dock" for paddling, and "T-dock" for sailing.

> before the incident?
>
> A. In a general sense.
>
> Q. Describe what you mean.
>
> A. I – the first summer I was a camper, I lived in that cabin closest to the boat launch. The second summer I was a camper I lived in the cabin closest to the boat launch. The first summer I was a counselor, I spent the entire summer in the cabin next to the boat launch. I was familiar with the area, and the power lines are part of the landscape. So in a general sense I knew they existed.
>
> . . .
>
> Q. Tell me about the launch area that you mentioned. First of all, describe it for me.
>
> A. It's a grassy, mixed with some gravel area that there is no seawall. There is a seawall around almost the entire camp, and that's an area where there is no seawall. The ground meets the water. There is a kind of a – I mean, it's a worn path, and in the area there are trailers and boats, and that's where we keep a lot of trailers and unused boats. It's, you know, the boat launch, boat ramp.

Appley testified about what Decedent and he did the morning of 12 June 2014 and the events leading up to the accident later that day:

> Q. Do you have any knowledge whether [Decedent], immediately before the incident, knew there were power lines there?
>
> . . .
>
> A. I don't think it would have happened if he knew they were there.

Q. Did he ever say anything to you, before the incident, about power lines being present?

A. No.

Q. Did he ever indicate to you that he was aware that there were power lines present?

A. No.

. . .

Q. Was there ever an exchange between Bill Felder and you or [Decedent] during this process of moving the sailboat over to the launch area?

A. Yes.

Q. Tell me about that.

A. [Felder] called out to us when we were towing it. He saw us going around the peninsula, which in retrospect was unusual for taking a boat out to still have the mast up, and he said, "Hey," he waived at us, and [Decedent] responded, "I got this, Cap," or "I got this," something like that.

Q. You say "in retrospect it was unusual." At the time, to you, was it unusual.

A. At the time it didn't occur to me that it was unusual. That's not necessarily correct. I mean, I knew it was – we were doing something different.

. . .

Q. Did you interpret Bill Felder's statement about "What are you doing"? have any reference to do with power lines?

A. No.

Q. Did [Decedent] say anything, one way or the other, about power lines at that point?

A. No.

Q. Do you have any indication or evidence that [Decedent] interpreted that exchange to mean anything about power lines?

. . .

A. No.

Q. Did you think there would be any problems with derigging and demasting at the boat launch ramp?

. . .

A. Yes, it occurred to me that we would need to get the boat to flat ground, that that would be – that was my concern. It was nothing about power lines popped into my head. It was like, this isn't going to be easier if we are not on flat ground was my thought.

Q. And did you express that thought to [Decedent] at all?

A. I believe I did.

Q. And did [Decedent] say anything in return?

A. "Don't worry about it," something of that nature.

. . .

Q. Take me through this part. Take me through how you get down to the boat ramp area.

A. We entered through the barn entrance which is – yeah, the barn entrance, which would be the road, straight road

directly to the boat ramp area, boat launch. And from there [Decedent], I believe at that time got out of the car – truck. He might have stayed in the truck, but he coached me on the exact maneuver that I had practiced in the Greene's parking lot on getting the trailer down the boat launch and into the water. That was the specific maneuver that we were practicing in the Greene's parking lot.

Q. And so you were driving?

A. I was driving.

Q. And [Decedent] was outside of the truck?

A. I don't recall.

Q. When he was coaching you, was he inside the truck?

A. I don't recall.

Q. And so you get the trailer into the water?

A. Yes.

Q. And then what happens?

A. We, I guess, tied the bowline to the crank on the trailer, which is the first step. I guess there is something, the rudder, we had to get a tool to get the rudder up, because you can't – at some point we got a tool for the rudder.

. . .

Q. And did you guys do that derigging process with the rudder while the sailboat was already on the trailer?

A. I don't recall.

Q. Okay. Was the sailboat still in the water?

A. Yes. It would have to have been.

Q. So then what happens?

A. [Decedent] coached me on – [Decedent] stayed outside of the boat and was coaching me on pulling the boat out of the water. It was "Keep going. You have got plenty of room. Keep going. Keep going," that sort of thing. I'm stopping and starting, trying to get it all straight, you know, because I have to make a turn onto the camp road at some point.

Q. And during this process are you seeing the power lines? Are you consciously aware of the power lines?

A. No. I'm beneath them.

Q. And again, did [Decedent] say or do anything that indicated that he was aware of the power lines?

A. No.

. . .

Q. All right. So then take me to the part where the tragedy happens.

A. I'm continuing to move forward. I'm watching [Decedent] in the rear-view mirror and doing, you know, "Go, go, straighten out," all that stuff. And out of the blue I see [Decedent] drop out of sight and then a very loud pop, bang noise. I, at the time – I mean, I wasn't sure what it was, didn't know what it was. It did not immediately occur to me that it was a power line, but it very soon occurred to me that it was a power line when I looked up and saw the mast on the power line and it was still sparking.

Q. Okay. And what happened next?

A. I turned the car off. I think I forgot to put it in park,

> even. Like I just turned it off and got out and rushed to [Decedent]. I have first responder training, wilderness first responder first aid, lifeguard, so I tried to be conscious of my safety, which is the first step in all that.
>
> To this day I don't know how I wasn't electrocuted, as well. I don't know how that works, that, you know, evening opening the car door or coming in contact with anything. I reached [Decedent] and I determined that I needed to get him away from where he was. I was in the – I guess you call it the bilge. You know, there is water coming out of the back of the boat. You know, there is usually rain water in boats, it was pouring out of the back from the plug that we had taken out at some point. And I dragged him, as far as I could away from that, by myself.
>
> Q. And just to clear something up, was [Decedent] holding on to any part of the boat?
>
> A. I don't know.
>
> Q. Do you know if he was holding up any part of the rudder during the process?
>
> A. I don't know.

The parties deposed several additional people, including expert witnesses in the area of electrical engineering, to gather more information about the nature of the power lines, dangers associated with electrical current, and specific safety codes pertaining to high voltage power lines.[3] Plaintiffs learned the power lines running

[3] One expert witness, David J. Marne, testified in a deposition the power lines that electrocuted Decedent were in violation of the National Electrical Safety Code because they were too low to maintain a proper clearance above the boat ramp. However, the question of Defendants' possible negligence is not before this Court.

over the boat ramp were originally installed between 1941 and 1953, and had not been changed since installation.

After the depositions were completed on 12 July 2017, Plaintiffs moved to amend their complaint on 17 July 2017, based on new evidence gathered from discovery and witness testimony. The amended complaint sought to add willful and wanton conduct amounting to gross negligence, non-compliance with safety standards, spoliation of evidence, and issues relating to FDB's role as a landowner. On 25 and 27 July 2017, Defendants each moved for summary judgment based on Decedent's contributory negligence as a matter of law. On 18 August 2017, the trial court held a hearing on Plaintiff's motion to amend and Defendants' motions for summary judgment. During the hearing, the trial court heard arguments from both parties concerning whether there was an genuine issue of material fact whether Decedent was contributorily negligent leading to his electrocution. The trial court took the matters under advisement, and entered an order on 29 September 2017, denying Plaintiff's motion to amend due to futility and untimeliness, and granting Defendants' motions for summary judgment based on Decedent's contributory negligence. Plaintiffs timely filed written notice of appeal on 18 October 2017.

II. Jurisdiction

Plaintiffs appeal the trial court's 29 September 2017 order denying their motion to amend and granting Defendants' motions for summary judgment. Because

this order is the final judgment of the superior court in a civil action, jurisdiction is proper in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2017).

III. Summary Judgment

Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)).

Analysis

On appeal, Plaintiffs contend the trial court erred because it granted Defendants' motion for summary judgment when there existed a genuine issue of material fact as to whether Decedent was aware or should have been aware of power lines at the time of his electrocution. We agree.

Plaintiffs filed a complaint alleging wrongful death. In the complaint, Plaintiffs alleged Defendants (1) had a duty to Decedent as a staff member working at the camp; (2) breached said duty owed to Decedent by maintaining an unsafe electrical wire; (3) Defendants' negligence was the proximate and direct cause of Decedent's untimely death; and (4) Plaintiffs incurred damages as a result of Decedent's electrocution.

The right to recovery under a wrongful death theory originated under "Lord Campbell's Act of 1846,"[4] which has now been incorporated widely in statutes in the United States. Actionable claims for wrongful deaths have long been held valid in North Carolina, having first been codified in its current form in 1969.[5] *See* 1969 N.C. Sess. Laws 194. The current wrongful death statute expanded recovery to eclipse "such damages as are a fair a just compensation for the pecuniary injury resulting from such death." *DiDonato v. Wortman*, 320 N.C. 423, 428-29, 358 S.E.2d 489, 492 (1987) (quoting N.C. Gen. Stat. § 28-174 (*superseded by* N.C. Gen. Stat. § 28A-18-2(b))).

N.C. Gen. Stat. § 28A-18-2 provides, in pertinent part:

> (a) When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled the injured person to an action for damages therefor, the person or corporation that would have been so liable, and the personal representatives or collectors of the person or corporation that would have been so liable, shall be liable to an action for damages, to be brought by the personal representative or collector of the decedent . . . .
>
> (b) Damages recoverable for death by wrongful act include:
> (1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;
> (2) Compensation for pain and suffering of the decedent;
> (3) The reasonable funeral expenses of the decedent;

[4] *McInnis v. Provident Life & Acc. Ins. Co.*, 21 F.3d 586 (4th Cir. 1994).

[5] S.L. 1969-194 replaced former Section 28-174. *See* Ralph Peeples and Catherine T. Harris, *What Is a Life Worth in North Carolina? A Look at Wrongful-Death Awards*, 37 Campbell L. Rev. 497, 501 (2015).

> (4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected;
>
> . . .
>
> (5) Such punitive damages as the decedent could have recovered pursuant to Chapter 1D of the General Statutes had the decedent survived, and punitive damages for wrongfully causing the death of the decedent through malice or willful or wanton conduct, as defined in G.S. 1D-5;
> (6) Nominal damages when the jury so finds.

N.C. Gen. Stat. § 28A-18-2(a)-(b) (2017).

Plaintiffs' complaint alleged the necessary elements under Section 28A-18-2, and sufficiently alleged the purported duty, breach, proximate and direct causation, and damages resulting from Decedent's death. However, Plaintiffs' contend on appeal the trial court erred in granting summary judgment in finding Decedent was contributorily negligent as a matter of law; thus, barring recovery from Defendants.

"[S]ummary judgment will be granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Collingwood v. General Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citing N.C. Gen. Stat. § 1A-1, Rule 56(c) (201[7])). "The party moving for summary judgment has the burden of establishing the lack of any triable issue." *Id.* at 66, 376 S.E.2d at 427. "An issue is

material if the facts alleged are such as to constitute a legal defense or are of such nature as to effect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail." *Dickens v. Puryear*, 302 N.C. 437, 453, 276 S.E.2d 325, 335 (1981) (citation and quotation marks omitted). Once the movant has "met its initial burden, the nonmoving party must produce a forecast of evidence demonstrating that the nonmoving party will be able to make out at least a prima facie case at trial in order to survive summary judgment." *Webb v. Wake Forest University Baptist Med. Ctr.*, 232 N.C. App. 502, 505, 756 S.E.2d 741, 743 (2014) (citation, brackets, and internal quotation marks omitted).

"[S]ummary judgment is a drastic measure, and it should be used with caution. This is especially true in a negligence case in which a jury ordinarily applies the reasonable person standard to the facts of each case." *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 402, 250 S.E.2d 255, 257 (1979) (citations omitted). "The burden of showing contributory negligence . . . is on the defendant, and the motion for nonsuit may never be allowed on such an issue where the controlling and pertinent facts are in dispute . . ." *Battle v. Cleave & Rogers*, 179 N.C. 112, 114, 101 S.E. 555, 556 (1919) (citations omitted). "The motion for summary judgment and the motion for a directed verdict, formerly nonsuit, are functionally very similar." *Williams*, 296 N.C. at 404, 250 S.E.2d at 258 (citation omitted).

"The existence of contributory negligence is ordinarily a question for the jury; such an issue is rarely appropriate for summary judgment, and only where the evidence establishes a plaintiff's negligence so clearly that no other reasonable conclusion may be reached." *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 479, 562 S.E.2d 887, 896 (2002). "All inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Marcus Bros. Textiles, Inc., v. Price Waterhouse, LLP*, 350 N.C. 214, 220, 513 S.E.2d 320, 325 (1999) (citation and brackets omitted). Put differently, a decision to grant or deny summary judgment is contextual, and fact dependent. *See id.* at 220, 513 S.E.2d at 325; *Martishius*, 355 N.C. at 479, 562 S.E.2d at 896.

"It is well settled that when a person is *aware* of an electrical wire and knows that it is or may be highly dangerous, he has a legal duty to avoid coming in contact with it. *Williams*, 296 N.C. at 404, 250 S.E.2d at 258 (citations omitted) (emphasis added). "That does not mean, however, that a person is guilty of contributory negligence as a matter of law if he contacts a known electrical wire regardless of the circumstances and regardless of any precautions he may have taken to avoid the mishap." *Id.* at 404, 250 S.E.2d at 258 (citations omitted).

Defendants contend our Supreme Court's holding in *Floyd v. Nash*, 268 N.C. 547, 151 S.E.2d 1 (1966) is analogous to the instant case. Therefore, Defendants argue the case *sub judice* is "squarely within the *Floyd* line of cases, entitling

[Defendants] to summary judgment in [their] favor." *See Brown v. Duke Power Co.*, 45 N.C. App. 384, 263 S.E.2d 366 (1980) (decedent was electrocuted carrying an aluminum ratio antenna); *Lambert v. Duke Power Co.*, 32 N.C. App. 169, 231 S.E.2d 31 (1977) (a man grabbed onto an uninsulated power line resulting in a fall and serious injuries); *Bogle v. Duke Power Co.*, 27 N.C. App. 318, 219 S.E.2d 308 (1975) (decedent contacted a power line with a metal ladder despite an explicit warning). In *Floyd*, our Supreme Court held

> [e]ven if negligence by either of these defendants could reasonably be inferred upon the evidence in this record, the evidence leads *inescapably* to the conclusion that the deceased . . . was guilty of contributory negligence. Knowing of the presence of the power line, and having filled this tank on many previous occasions, the deceased, for some unknown reason, permitted the metal blower pipe to rise far higher than necessary and to come in contact with the power line. This tragic lapse of attention to a known danger in the immediate vicinity must be deemed negligence by the deceased.

Floyd, 268 N.C. at 551, 151 S.E.2d at 4 (citation omitted) (emphasis added).

In *Floyd*, the Supreme Court determined the evidence presented *inescapably* showed the decedent was contributorily negligent, and a motion for nonsuit was granted at the end of the plaintiff's case-in-chief. 268 N.C. 547, 151 S.E.2d 1. While *Floyd*, *Brown*, *Lambert*, and *Bogle* may be instructive to our analysis, we view each in the light of their respective facts. Accordingly, we must examine the particular facts of the instant case, and whether there exists a genuine issue as to Decedent's

knowledge of power lines above the dock amounts to contributory negligence. *See Tyburski v. Stewart*, 204 N.C. App. 540, 544, 694 S.E.2d 422, 425 (2010) ("[T]he question before us is whether, considering all of the circumstances and any precautions taken by [Decedent], a reasonable person would have acted as plaintiff did.").

In their motion for summary judgment, Defendants attached several exhibits that tended to show Decedent was aware or should have been aware of the power lines above the dock. Defendants attached depositions of sixteen different individuals, and an affidavit from Gregory Booth, an electrical engineer, as evidence showing no genuine issue of material fact existed between the parties. However, the depositions attached to Defendants' motion for summary judgment show varying accounts of Decedent's awareness of the power lines in question.

At the motion hearing, Defendants argued the Bell, Felder, and Appley depositions established a fact pattern on the morning of 12 June 2014 showing Decedent knew the power lines existed over the boat ramp, he temporarily diverted his attention from their known danger, and his conduct amounted contributory negligence. Plaintiffs argued the depositions were insufficient to ascertain what Decedent knew or should have known at the time of the accident; thus, summary judgment was inappropriate because the determination of Decedent's knowledge is a question best left to the jury.

From Bell, Felder, and Appley's testimony, it is apparent from the record there were procedures established and followed at Camp Mondamin regarding the derigging, transportation, and storage of sailboats and associated equipment by employees. However, Bell and Felder could not testify with personal knowledge to the events surrounding the removal of the sailboat at the ramp. Appley's recount of the particular facts surrounding Decedent's electrocution leave many aspects of the case unanswerable at this stage in the proceedings. Much of the deposition testimony develops in detail the procedures, training, traditions, and history of sailing at Camp Mondamin. However, the issue before this Court is whether the evidence *inescapably* shows Decedent was contributorily negligent as a matter of law, not whether Defendants were negligent. *See Floyd*, 268 N.C. at 551, 151 S.E.2d at 4; *Williams*, 296 N.C. at 404, 250 S.E.2d at 258.

Whether Decedent was contributorily negligent is highly dependent on the facts surrounding the accident on 12 June 2014. Appley, the only witness to the accident, testified he did not know how Decedent was touching the sailboat as it was advancing up the boat ramp, though the complaint alleges Decedent's hand was on the sailboat. Appley did not see Decedent get electrocuted; however, he did hear a loud noise from behind the truck when he was driving.

From his recollection, Appley could not testify with certainty whether Decedent was aware or knew of the power lines at that particular area of shoreline.

Varying descriptions of how high the power lines were at different points on the shoreline, and their visibility against the trees and leaves, cast doubt on whether the power lines themselves were readily visible. Based upon Felder and Bell Jr.'s depositions, it is unclear whether Decedent was told explicitly to avoid a known danger at the boat ramp or he should have known independently of Felder's instructions the morning of the accident. The senior staff further testified Camp Mondamin had regular practices for sailing, and Decedent purportedly deviated from some of the traditional practices of derigging, but evidence does not establish *inescapably* Decedent was contributorily negligent as to a known and obvious danger.

A reasonable inference can be made the power lines were not a *known* danger, and Decedent had a lapse of attention momentarily. *See Floyd*, 268 N.C. at 551, 151 S.E.2d at 4. In light most favorable to Plaintiffs, reasonable inferences can be made the power lines were not readily visible or obvious due to the surrounding landscape, including vegetation, height of the power lines, and at least two large trees and branches overlapping the power lines at various points above the boat ramp.

Because, here, Plaintiff has raised a material question of fact, we cannot determine conclusively based on the evidence whether Decedent was aware of a known danger at the time of the accident. *See Martishius*, 355 N.C. at 479-81, 562 S.E.2d at 896; *Williams*, 296 N.C. at 404, 250 S.E.2d at 258. Assuming, *arguendo*, Decedent knew of the danger, "[t]he law imposes upon a person *sui juris* the duty to

use ordinary care to protect himself from injury, and the degree of such care should be commensurate with the danger to be avoided." *Gibbs v. Carolina Power & Light Co.*, 268 N.C. 186, 191, 150 S.E.2d 207, 211 (1966) (citation and quotation marks omitted); *Alford v. Washington*, 244 N.C. 132, 140-41, 92 S.E.2d 788, 794 (1956) (citations omitted) ("Thus where a person seeing an electric wire knows that it is, or may be highly dangerous, it is his duty to avoid coming in contact therewith."). However, we cannot say Decedent was aware or knew of the uninsulated, energized power lines above him at the time of his electrocution. Based on the facts developed before trial, taken as a whole, whether Decedent was contributorily negligent as a matter of law is uncertain. *See Floyd*, 268 N.C. at 551, 151 S.E.2d at 4.

Accordingly, after a careful *de novo* review of the evidence on appeal, we reverse the portion of the trial court's order granting summary judgment in favor of Defendants.

IV. Motion to Amend

Standard of Review

"The granting or denial of a motion to amend is within the sound discretion of the trial judge, whose decision is reviewed under an abuse of discretion standard." *Rutherford Elec. Mbrshp. Corp. v. 130 of Chatham, LLC*, 236 N.C. App. 86, 89, 763 S.E.2d 296, 299 (2014) (citation omitted).

Analysis

Plaintiffs argue the trial court abused its discretion in denying their motion to amend their complaint due to timeliness and futility. Plaintiffs contend their motion to amend the complaint was not futile because it was an attempt to conform to the evidence discovered before trial and it was not untimely because discovery had not closed. We disagree.

Rule 15 of the North Carolina Rules of Civil Procedure provides:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

N.C. Gen. Stat. § 1A-1, Rule 15(a) (2017). Generally, Rule 15 is construed liberally to allow amendments where the opposing party will not be materially prejudiced, unless the amendment is futile, made in bad faith, or constitutes repeated failure to cure defects. *Watson v. Watson*, 49 N.C. App. 58, 60-61, 270 S.E.2d 542, 544 (1980); *see Delta Envtl. Consultants of N.C., Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 166, 510 S.E.2d 690, 694 (1999). "[A]mendments should be freely allowed unless some material prejudice to the other party is demonstrated. The burden is upon the opposing party to establish that that party would be prejudiced by the amendment." *Mauney v. Morris*, 316 N.C. 67, 72, 340 S.E.2d 397, 400 (1986) (citations omitted).

Here, Plaintiffs made a motion to amend their original complaint on 17 July 2017, seeking to expand their complaint to include punitive damages, willful and wanton misconduct on behalf of Defendants, gross negligence, and spoliation of evidence. However, Plaintiffs have not clearly shown the manner in which the trial court abused its discretion in denying their motion to amend several months after the beginning of discovery, while only expert discovery remained open. Accordingly, we affirm the trial court's denial of Plaintiff's motion to amend under Rule 15(a).

REVERSED IN PART; AFFIRMED IN PART.

Judges BRYANT and ARROWOOD concur.

Report per Rule 30(e).