UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL ERIC SAUNDERS, Plaintiff, v. CONSUMERS ENERGY COMPANY, Defendant.	)	No. 1:19-cv-782 Honorable Paul L. Maloney

OPINION

Pending before the Court are several motions: Defendant's motion for summary judgment (ECF No. 68), Plaintiff's motion for partial summary judgment (ECF No. 76), and Plaintiff's motion to strike (ECF No. 79). For the reasons to be explained, these motions will be denied in their entirety.

I. Facts

On September 19, 2017, at approximately 8:13 p.m., Plaintiff Michael Saunders was operating a 1996 Nimble sailboat downstream on the Grand River. Specifically, he sailed into a small tributary of the Grand River, known as the Lost Channel, with the intention of scouting for ducks for the upcoming hunting season. When he proceeded into the Lost Channel, Plaintiff's motor was on idle and he had the tiller of the boat in one hand and a flashlight in the other, which he was using to look for dead tree stumps in the water. Although Plaintiff was sailing at dusk, he testified that "it was visible enough," however, he did "proceed with caution" and turn on his navigation light (ECF No. 68-2 at PageID.642).

While Plaintiff was sailing, he left his mast up the entire trip because there was "no reason to take it down" (*Id.* at PageID.639). The mast was about thirty feet in height. Sailors typically consult navigational charts, published by the National Oceanic and Atmospheric Association (NOAA) before setting sail. These charts identify water depth and overhead hazards—such as overhead powerlines—among other helpful information to make sailors aware of their surroundings and potential safety hazards while boating.

Plaintiff testified that during his sailing trip, he consulted the NOAA charts (*Id.* at PageID.639-40). He had previously sailed on the Grand River and visually observed overhead powerlines, with orange warning buoys in the water, and noted that the powerlines had a clearance of ninety feet (ECF No. 69 at PageID.833). This observation was consistent with the NOAA charts, which indicate that there is a ninety-foot powerline crossing over the Grand River, and then continuing over the Lost Channel (*see NOAA Chart*, ECF No. 68 at PageID.595) (showing a dashed line over the Grand River and labeling the line "OVHD PWR CAB AUTH CL 90 FT"). However, while the chart explicitly lists the powerline's clearance over the Grand River, it only says "OVHD PWR CAB" over the Lost Channel, and it does not list the clearance (*Id.*). Plaintiff believed that the ninety-foot clearance listed on the NOAA charts applied to the entire dashed line, which crosses over both the Grand River and the Lost Channel without interruption, because there was no indication on the charts that a different height applied to the Lost Channel.

In reality, the powerline that crossed the Lost Channel only had a height clearance of 28.1 feet. Because Plaintiff believed he had plenty of clearance to sail under the powerline, he proceeded to do so. Unbeknownst to him, his mast struck the powerline, which is owned

and operated by Defendant Consumers Energy Company ("Consumers" or "Consumers Energy"). Upon the vessel's contact with the powerline, Plaintiff observed an electrical flash on his mast and immediately put the boat in neutral to investigate. He shined his flashlight up the mast but did not see any powerlines, nor did he see any orange warning buoys or warning signs in the water or on shore. Plaintiff then determined that the flash could have been related to electric wiring, so he attempted to shut down the power of the boat.

When Plaintiff turned the key toward the off position, he was electrocuted and suffered severe electrical burns. He testified that he saw a white flash, felt severe heat, and could barely see (ECF No. 69 at PageID.836). The sailboat then ignited in flames, so Plaintiff dove into the water to extinguish himself. After remaining in the water for a few minutes, Plaintiff climbed back onto the boat to extinguish the fire on the boat, but after being unsuccessful, he jumped back into the water and abandoned ship. Plaintiff then proceeded to shore and walked through a swamp until he reached a public roadway where a good Samaritan drove him to North Ottawa Community Hospital. Plaintiff suffered severe burns on his face and arms (*see* ECF No. 76-9), but he has made an excellent recovery (*see* ECF No. 77-5).

After the accident, Plaintiff brought five negligence-related counts against Consumers: (1) negligence, (2) negligence by Consumers Energy's related subcontractors, (3) gross negligence, (4) willful and/or wanton misconduct, and (5) negligence per se. In this Court's order from June 4, 2021, the Court determined that it has admiralty jurisdiction over Plaintiff's claims, which satisfies the Court's subject-matter jurisdiction (ECF No. 74). Subsequently, both Consumers and Plaintiff have moved for summary judgment, and

Plaintiff has moved to strike Mr. Donald Reinke's affidavits, which are attached to multiple documents in the record. The Court will address each motion below.

II. Law

A. Motion for Summary Judgment

Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories and admissions, together with the affidavits, show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Tucker v. Tennessee*, 539 F.3d 526, 531 (6th Cir. 2008). The burden is on the moving party to show that no genuine issue of material fact exists, but that burden may be discharged by pointing out an absence of evidence supporting the nonmoving party's case. *Bennett v. City of Eastpointe*, 410 F.3d 810, 817 (6th Cir. 2005) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). The facts, and the inferences drawn from them, must be viewed in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Once the moving party has carried its burden, the nonmoving party must set forth specific facts, supported by evidence in the record, showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The question is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251–252. The function of the district court "is not to weigh the evidence and determine the truth of the matter but to determine whether there is

a genuine issue for trial." *Resolution Trust Corp. v. Myers*, 9 F.3d 1548 (6th Cir. 1993) (unpublished table opinion) (citing *Anderson*, 477 U.S. at 249).

However, the party opposing the summary judgment motion "must do more than simply show that there is some metaphysical doubt as to the material facts." *Amini v. Oberlin College*, 440 F.3d 350, 357 (6th Cir. 2006) (quoting *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 800 (6th Cir. 1994)) (quotation marks omitted). A mere "scintilla of evidence" in support of the non-moving party's position is insufficient. *Daniels v. Woodside*, 396 F.3d 730, 734–35 (6th Cir. 2005) (quoting *Anderson*, 477 U.S. at 252). Accordingly, the non-moving party "may not rest upon [his] mere allegations," but must instead present "specific facts showing that there is a genuine issue for trial." *Pack v. Damon Corp.*, 434 F.3d 810, 814 (6th Cir. 2006) (quoting Fed. R. Civ. P. 56(e)) (quotation marks omitted). In sum, summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

B. Motion to Strike

Fed. R. Civ. P. 12(f) authorizes courts to strike certain material from pleadings: "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 7 identifies that only a complaint, an answer to a complaint, an answer to a counterclaim designated as a counterclaim, an answer to a crossclaim, a third-party complaint, an answer to a third-party complaint, and a reply to an answer constitute "pleadings," which are subject to Rule 12(f).

If a party has an objection to an opposing party's motion or other document in the record, typically, "a motion to strike is the wrong vehicle for overcoming [the opposing party's] motions" or other record evidence. *See Davis v. Cox*, No. 2:18-cv-11255, 2019 WL 1783066, at *10 (E.D. Mich. Mar. 29, 2019); *see also Fox v. Mich. State Police Dep't*, 173 F. App'x 372, 375 (6th Cir. 2006) (upholding the denial of the district court's denial of a motion to strike exhibits accompanying a motion for summary judgment on the grounds that the exhibits were not pleadings within the meaning of Fed. R. Civ. P. 12(f)). Thus, "[a] motion to strike is technically not available for motions for summary judgment and the attachments thereto." *Wright v. Cellular Sales Mgmt., Grp., LLC*, No. 3:17-CV-324-JRG-DCP, 2019 WL 903846, at *2 (E.D. Tenn. Feb. 22, 2019).

Instead, under Fed. R. Civ. P 56(c)(2), "A party may object that the material cited [in the motion for summary judgment] to support or dispute a fact cannot be presented in a form that would be admissible evidence." If a party challenges such objectionable material, "the Court will consider whether the challenged statements . . . should be disregarded, as opposed to the statements being stricken." *Wright*, 2019 WL 903846, at *2.

III. Plaintiff's Motion to Strike

Plaintiff has made a very vague request that this Court "strike Donald Reinke" (ECF No. 79). It appears that, based on the two documents labeled as affidavits by Mr. Reinke that Plaintiff attached to his motion, Plaintiff seeks to strike these two affidavits (hereinafter the "Reinke affidavits") from the record (*see* ECF Nos. 79-1, 79-2). Consequently, any time the Reinke affidavits are mentioned in the parties' briefings, Plaintiff must also seek to strike such statements discussing the Reinke affidavits.

Plaintiff's motion suffers from procedural defects. When a party seeks to challenge statements or exhibits to a motion for summary judgment based on an evidentiary rule, that party should do so through an objection, not a motion to strike. *See Wright*, 2019 WL 903846, at *2. If the court sustains the objection, then the court will disregard the relevant material rather than striking it from the record. *See id.*

Plaintiff makes several arguments why the Reinke affidavits are inadmissible under Fed. R. Civ. P. 56(c)(4), 37(c)(1), and 26(a)(1)(A)(i). The Court finds that Plaintiff's argument under Rules 26(a)(1)(A)(i) and 37(c)(1)—that Mr. Reinke is testifying as an undisclosed expert witness in his affidavits—is meritorious.

Rule 26(a)(1)(A)(i) requires parties to include in their initial disclosures "the name and, if known, the address and telephone number of each individual likely to have discoverable information—*along with the subjects of that information*—that the disclosing party may use to support its claims or defenses. . . ." (emphasis added). Plaintiff argues that Consumers is using Mr. Reinke beyond the scope of its initial disclosures in violation of Rule 37(c)(1). Instead of using Mr. Reinke solely as a fact witness because he provided the parties with a copy of the 1940 permit authorizing Consumers to construct the powerline over the Grand River (*see Defendant's 26(a)(1) Disclosures*, ECF no. 70-1 at PageID.1067), it appears that Consumers is using Mr. Reinke as an expert witness to assert that the 1940 permit was not applicable to the Lost Channel. Mr. Reinke, who is employed in the Regulatory Office of the Army Corps. of Engineers (Corps), makes assertions regarding the Corps' jurisdiction over the Lost Channel in 1940 (*see* ECF No. 79-1 at PageID.1434, ¶ 4-15).

Although Consumers argues that Mr. Reinke is not an expert witness and that he is merely testifying about his personal knowledge regarding the Corps' permitting process, he is not permitted to interpret the law or make assertions regarding jurisdiction. Fact witnesses may only testify about perceived facts that they have personal knowledge about, *see* Fed. R. Evid. 602, and they may only give their opinion in limited circumstances. *See* Fed. R. Evid. 701 (stating that a lay witness may only testify in the form of an opinion if the opinion is (1) rationally based on the witness's perception, (2) helpful to clearly understanding the witness's testimony or to determining a fact in issue, and (3) not based on scientific, technical, or other specialized knowledge). Mr. Reinke's opinions in his affidavits go beyond the scope of what a lay witness is permitted to testify about. He states his opinion regarding the Corps' jurisdiction of the Lost Channel in 1940 based on specialized knowledge, and he interprets the Code of Federal Regulations in determining this opinion. It is not a witness's job—lay or expert—to interpret the law.

Therefore, the Reinke affidavits are inadmissible because Mr. Reinke improperly testified as an expert witness when Consumers failed to disclose him as such. The Court will disregard the Reinke affidavits and all mentions of these affidavits throughout the record.

IV. Defendant's Motion for Summary Judgment

A. Federal Maritime Law

Because this Court is exercising admiralty jurisdiction, it must apply federal maritime law. *See Watz v. Zapata Off-Shore Co.*, 431 F.2d 100, 112 (5th Cir. 1970) ("Traditionally, courts apply general principles of maritime law in cases subject to admiralty jurisdiction."). But not every question of law in admiralty suits can be answered by federal maritime law.

See Alcoa S.S. Co. v. Charles Ferran & Co., 383 F.2d 46, 50 (5th Cir. 1967) ("[E]ven though admiralty suits are governed by federal substantive and procedural law, courts applying maritime law may adopt state law by express or implied reference or by virtue of the interstitial nature of federal law."). Thus, if there is no settled admiralty rule on a particular issue, state law will govern. *See Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 313-14 (1955) (finding that Texas state law applied in a situation where there was no federal admiralty rule governing the interpretation of the warranties at issue); *Russo v. APL Marine Servs. Ltd.*, No. 2:14-cv-03184-ODW, 2014 WL 3506009, at *4 (C.D. Cal. July 14, 2014) ("[I]n cases in which the issues are not sufficiently addressed by maritime law, and where state law fills those gaps in a way that is not destructive to the uniformity that admiralty law endeavors to maintain, the relevant state law applies.").

Admiralty law has adopted the traditional elements of negligence for a maritime negligence claim:

> (1) the existence of a duty that requires a standard of care or conduct to protect against foreseeable risks, (2) a breach of that duty by conduct that falls below a reasonable norm, and (3) a reasonably close causal connection between the breach of duty and the resulting loss.

Alprin v. City of Tacoma, 159 P.3d 448, 451 (Wash. Ct. App. 2007). The plaintiff bears the burden of proof of each element by a preponderance of the evidence, while the defendant bears the burden of proof by a preponderance of the evidence regarding any affirmative defenses. *See Valentine v. United States*, 630 F. Supp. 1126, 1132 (S.D. Fla. 1986).

B. Duty

Consumers Energy's first argument in support of summary judgment is that it did not owe Plaintiff a duty to warn or protect him from the open and obvious powerline. If Consumers did not have a duty to warn, then all of Plaintiff's negligence claims would be defeated.

Admiralty law recognizes the defense of "open and obvious," in that there is no duty to warn of open and obvious dangers. *See Gemp v. United States*, 684 F.2d 404, 407-08 (6th Cir. 1982) ("[D]efendant had no duty under general principles of the law of negligence to warn [Plaintiffs] of the open and obviously dangerous condition below Meldahl Dam."). However, this defense has only been applied to open and obvious dangerous conditions surrounding dams, large ships, and pleasure boats—not powerlines crossing navigable waters. *See id.* (applying the open and obvious doctrine to currents under a dam); *Lancaster v. Carnival Corp.*, 85 F. Supp. 3d 1341, 1344-45 (S.D. Fla. 2015) (applying the open and obvious doctrine to luggage on the floor of a cruise ship that the plaintiff tripped over); *Schade v. Clausius*, 48 N.E.3d 707, 709 (Ill. App. Ct. 2016) (applying the open and obvious doctrine to a slippery swim platform on a boat). Because there is no federal maritime law regarding the open and obvious doctrine as applied to overhead powerlines, the Court will consult Michigan state law.

Michigan courts have held that "there is no duty to warn of known overhead powerlines." *Groncki v. Detroit Edison Co.*, 557 N.W.2d 289, 295 (Mich. 1996). In *Groncki*, a man was electrocuted while moving a twenty-nine-foot-high scaffold on a forklift, and the scaffold made contact with overhead powerlines. *Id.* at 292. The Michigan Supreme Court found that the defendant electrical company owed no duty to the man because he

knew about the overhead powerlines. *See id.* at 295. While Consumers uses *Groncki* in support of its position that it had no duty to warn Plaintiff of the overhead powerline, the present matter is distinguishable from *Groncki*. First, while Consumers argues that Plaintiff knew about the powerline, Plaintiff did not know the height of the line. Whether the powerline was "known" is subject to a dispute of fact. Second, *Groncki* concerned a skilled construction worker who was fully aware of the powerline. Plaintiff, on the other hand, was not a skilled workman who had to maneuver around the powerline frequently for his job. And finally, *Groncki* contains no analysis regarding powerlines over navigable waterways. The Court finds that *Groncki* provides little insight to the question at bar.

Because neither federal admiralty law nor Michigan law answer the question as to whether powerlines over navigable waterways are open and obvious dangers, the Court can consult the Restatement (Second) of Torts § 343A (Am. L. Inst. 1965), which both federal admiralty law and Michigan have adopted. *See Gemp*, 684 F.2d at 407-08 (finding that § 343A provided useful guidance to the action brought under the Suits in Admiralty Act); *Hoffner v. Lanctoe*, 821 N.W.2d 88, 479-80 (Mich. 2012) (consulting § 343A to determine whether ice on a sidewalk was an open an obvious condition).

Section 343 of the Restatement (Second) of Torts establishes the general elements of the open and obvious defense:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Id. For Consumers to prevail under this defense, (1) it must be a possessor of the land in question, (2) Plaintiff must have been an invitee on the land, (3) the danger must have been known or obvious, and (4) Consumers could not have anticipated harm by the alleged open and obvious danger. Taking each element in turn, there are questions of fact remaining regarding each element.

With respect to whether Consumers is a possessor of the "land" in question, there remains a question of fact as to exactly what the "land" is. While Consumers argues that it is a possessor of the Lost Channel "by virtue of rights of way granted in 1939 and 1940," (ECF No. 68 at PageID.605, n.4), the deeds that Consumers references gave Consumers the right to construct and maintain powerlines across the "described parcel of land" (ECF No. 68-15 at PageID.714, 716). However, it is unclear whether the referenced "parcel of land" merely includes the land surrounding the Lost Channel where the powerline poles would be placed, or whether it also includes the navigable waterway that the powerlines would cross over. Further, while *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 564 (1870) determined that the Grand River is a navigable waterway owned by the United States, Consumers owned the powerline crossing the navigable waterway. There does not appear to be any authority determining whether powerlines crossing a navigable waterway constitute "land" for purposes of the open and obvious defense. Because it is unclear exactly what "land" is relevant to this case and whether Consumers was a possessor of that "land," there remains a question of fact as to this first element of the open and obvious defense.

Next, it is equally unclear whether Plaintiff was an "invitee" onto the "land" in question. Section 332 of the Restatement (Second) of Torts states that invitees include people

who are invited to enter public land and use the land for a public purpose, or business visitors who are invited on the land to conduct business dealings. Again, because it is unclear whether the "land" for the purpose of this defense includes the powerline, the navigable waterway, or the land where the powerline poles are placed, there also remains a question of fact as to whether Plaintiff was an invitee on the relevant "land."

The next element of the open and obvious defense—whether the overhead powerline was "known or obvious"—is discussed above. There remains a question of fact as to whether Plaintiff knew about the powerline, and there remains a question of law as to whether it was obvious. Neither Michigan law nor admiralty law have concluded that powerlines crossing navigable waterways are or are not "known and obvious" dangers.

The final element of the open and obvious defense under the Restatement requires Consumers to show that the harm that Plaintiff suffered was not foreseeable. When analyzing this element in regard to powerlines, "The test to be applied is: Was there a likelihood or reasonable probability of human contact with the wires by persons who had a right to be in a place from which such contact was possible? If so, the danger should have been foreseen or anticipated by the defendant." *Clumfoot v. St. Clair Tunnel Co.*, 190 N.W. 759, 760 (Mich. 1922). The parties have presented competing facts and opinions on foreseeability of the harm. Plaintiff presented evidence from its electrical safety expert, Johannes Laun, that, considering the high volume of sailboat traffic on the Grand River, Consumers should have foreseen the possibility of a sailboat mast contacting the powerline over the Lost Channel (*see* ECF No. 69-11 at PageID.968, 970, 972, 976). Conversely, Consumers argues that because the powerline existed for approximately seventy-seven years without coming into

contact with a sailboat, it was not foreseeable that Plaintiff would do so. Therefore, there exists a question of fact as to whether Plaintiff's harm was foreseeable.

Because questions of fact remain on all elements of the open and obvious defense, Consumers is not entitled to summary judgment establishing that the powerline was open and obvious. Thus, a question of whether Consumers owed a duty to warn Plaintiff of the powerline also remains.

C. Breach

Consumers next argues that even if it did owe Plaintiff a duty to warn, it did not breach any duty because Plaintiff was adequately warned of the powerline by the NOAA charts. There is no dispute that Plaintiff consulted the NOAA charts before he sailed down the Lost Channel. There is also no dispute that the charts list the clearance over the Grand River powerline as ninety feet, and that where the powerline crosses the Lost Channel, the charts state "OVHD PWR CAB" (*see NOAA Chart*, ECF No. 68 at PageID.595). However, there is a dispute as to whether the chart's height clearance indication of ninety feet over the Grand River also applies to the clearance over the Lost Channel. There are two ways to interpret the relevant NOAA charts: (1) the charts list a clearance of ninety feet over the entire powerline, including the portion that crosses the Lost Channel, or (2) the charts fail to list a clearance over the Lost Channel. Plaintiff argues that he read the charts according to the first interpretation, while Consumers argues that it read the charts according to the second interpretation. Thus, there is a genuine dispute of material fact as to how the charts are properly interpreted, and whether they did adequately warn Plaintiff of the powerline.

Courts have found that accurate NOAA charts satisfy a party's duty to warn. *See Alprin*, 159 P.3d at 452 (holding that the NOAA charts sufficiently warned the plaintiff of overhead powerlines "by noting the location of the power lines *and* clearance on the pertinent NOAA chart") (emphasis added); *Liner v. Dravo Basic Materials, Co.*, 162 F. Supp. 2d 499, 506 (E.D. La. 2001) (finding that the duty to warn was satisfied by the NOAA charts, which *accurately* noted the hazard in the water, in addition to the warning buoys at the site and the notice given to mariners). Both *Alprin* and *Liner* are distinguishable from the present matter. In *Alprin*, the court found that the NOAA charts adequately warned the plaintiff by noting *both* the location of the powerlines and the clearance. In Plaintiff's case, there exists a question of fact as to whether the charts' ninety-foot clearance indication also applied to the Lost Channel. And in *Liner*, not only did the charts accurately note the hazard in the water, but there were also warning buoys around the hazard as well as notice given to sailors. In Plaintiff's case, there exists a question of fact as to whether the charts accurately represented the overhead powerlines. Moreover, it is undisputed that no warning buoys, signs, or other notices were utilized to warn boaters of the powerline over the Lost Channel, making Plaintiff's case even further distinguishable from *Liner*.

Because Plaintiff's case is distinguishable from *Alprin* and *Liner*, the Court cannot, on summary judgment, determine that the NOAA charts adequately warned Plaintiff of the powerline. Questions of fact remain as to whether Consumers breached its duty to warn, if Consumers did indeed have such a duty.

D. Causation

Consumers makes two arguments in support of summary judgment on causation: (1) that Plaintiff's own negligence was an intervening and superseding cause, and (2) that Consumers Energy's conduct was not a substantial factor in contributing to Plaintiff's injuries.

Federal maritime law has adopted the doctrine of intervening and superseding causes. *See Exxon Co. U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 832 (1996) (affirming that the requirement of proximate causation and the related "superseding cause" doctrine apply in admiralty cases). However, pure comparative fault also applies in admiralty cases. *See United States v. Reliable Transfer Co.*, 421 U.S. 397, 411 (1975) ("We hold that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault."). Therefore, so long as Plaintiff was not 100% negligent, which would classify him as a superseding cause, Plaintiff's recovery is not barred by his own negligence. Rather, his damages will be reduced in proportion to his percentage of negligence.

When a plaintiff's conduct constitutes an intervening and superseding cause, the court views the plaintiff as the sole cause of his injuries. *See Exxon*, 517 at 840. In other words, the plaintiff is 100% negligent when his conduct constitutes an intervening and superseding cause, and it thus breaks the chain of proximate causation imposed on the original actor. *See id.* at 835. An intervening and superseding cause requires "extraordinary" negligence, which

is defined as "neither normal nor reasonably foreseeable." *Id.* In *Exxon*, a tanker broke away from a mooring system for two hours and forty-one minutes. *Id.* at 832-33. After the captain successfully maneuvered the ship to a safe position subsequent to the breakout, he then decided to operate the ship without consulting any navigational charts despite not knowing his position, and eventually ran the ship aground resulting in its constructive total loss. *Id.* at 834. During the breakout, the captain's actions were "grossly and extraordinarily negligent" enough to constitute an intervening and superseding cause, relieving the mooring system's manufacturer of liability. *Id.*

Consumers argues that Plaintiff was an intervening and superseding cause because his "failure to correctly read the NOAA chart, and his failure to observe his surroundings and to note the presence of the poles and line, are 'neither normal nor reasonably foreseeable'" (ECF No. 68 at PageID.613). While Plaintiff may have failed to observe the powerlines, whether he failed to correctly read the NOAA chart is disputable. And even if Plaintiff was partially negligent, based on the pure comparative fault system, his claim is not necessarily barred by his own negligence. The Court finds that whether Plaintiff was negligent enough to constitute an intervening and superseding cause is subject to questions of fact.

Also regarding causation, Consumers further argues that it was not a substantial factor in contributing to Plaintiff's injuries. In support of this argument, Consumers relies on multiple Michigan law cases, which are inapplicable. *Reliable Transfer* has established the pure comparative fault standard for admiralty cases, meaning that whether Consumers was or was not a substantial factor in Plaintiff's injuries is irrelevant. 421 U.S. at 411. Due to the pure comparative fault standard, any evidence that Consumers presents showing that Plaintiff

was negligent simply reduces its own fault; this evidence will not relieve Consumers from liability unless Plaintiff was 100% negligent. Thus, this argument is without merit.

E. Negligence Per Se

Finally, Consumers argues that it is entitled to summary judgment on Plaintiff's negligence per se claim because Consumers did not violate any statute. Consumers asserts that it could not have been negligent per se because it complied with the National Electric Safety Code (NESC) regulations and because Consumers was not required to receive a permit to construct the powerlines over the Lost Channel from the Army Corps. of Engineers.

In *Pettis v. Bosarge Diving, Inc.*, 51 F. Supp. 2d 1222, 1238-39 (S.D. Ala. 2010) the court discussed the requirements for a negligence per se action in admiralty cases pursuant to the Jones Act. The five elements of negligence per se in admiralty cases are: (1) violation of a statute or regulation, (2) the plaintiff is a member of the class intended to benefit from the statute, (3) the plaintiff suffered an injury the statute was designed to protect against, (4) the violation was unexcused, and (5) causation. *See id.* Consumers Energy's arguments in support of summary judgment on the negligence per se claim only concern the first element: whether Consumers violated a statute or regulation.

Plaintiff's complaint first alleges that Consumers violated the rules and regulations of the NESC, which set the guidelines for practical safeguarding of the public during the installation, operation, and maintenance of electric equipment (ECF No. 21 at PageID.70). In its motion for summary judgment, Consumers asserts that it complied with the NESC standards. Consumers argues that when it installed the powerline over the Lost Channel in

1940, it complied with the Fifth Edition of the NESC standards, which contained no rule specifying clearances over water (*see* ECF No. 68-16 at PageID.722). Then in the 1977 version of the NESC standards, Rule 202(B)(2) contained a "grandfather" clause, which stated that all existing installations need not comply with the new NESC standards, so long as they complied with prior editions (*see* ECF No. 68-18 at PageID.780). Consumers asserts that because it complied with the relevant standards at the time of installation, it was compliant.

In response, Plaintiff argues that even if the grandfather clause applied, Consumers replaced one of the powerline's poles in 1988, which would have triggered the need for Consumers to increase the height of the powerline to comply with the then-current NESC standards (*see* ECF No. 69 at PageID.857). The grandfather clause contains a provision that in the event of a replacement of a supporting structure, that replacement must comply with the current NESC standards (ECF No. 68-18 at PageID.781). Whether the replacement pole required Consumers to increase the height of the powerline is a genuine dispute of material fact (*see Report by Plaintiff's Expert, Johannes Laun*, ECF No. 69-12 at PageID.1002) (concluding that the replacement pole triggered the need for Consumers to increase the height of the powerline); (*but see Deposition of Peter Mulhearn*, ECF No. 68-14 at PageID.712) (concluding that the mere replacement of a broken part does not trigger the need for compliance with the current NESC standards).

Even if Consumers complied with the proper NESC standards, in maritime law, industry standards are not binding on the issue of negligence. *See Schaeffer v. Michigan-Ohio Navigation Co.*, 416 F.2d 217, 222 (6th Cir. 1969) ("As to the industry safety standards,

the District Judge properly instructed that the jury had a right to consider them in arriving in a verdict, but that they were not binding on the issue of negligence."). This rule is due to the pure comparative fault system in admiralty cases. *See id.* For example, in *Schultz v. Consumers Power Co.*, 506 N.W.2d 175 (Mich. 1993), a Michigan Supreme Court case discussing Consumers Energy's compliance with NESC standards, the court found that even though Consumers complied with the relevant NESC standards five-fold, custom and industry practices are merely relevant to the issue of due care, and they are not dispositive with respect to duty. *Id.* at 456. Thus, Consumers is not entitled to summary judgment on negligence per se based on its argument that it complied with the relevant NESC standards.

Plaintiff also alleges that Consumers "is in violation of [the] permit issued by the United States Army Corps. of Engineers," which authorized Consumers to build the powerline in question (ECF No. 21 at PageID.70). Consumers moves for summary judgment on this argument because it asserts that (1) the permit only applies to the powerline crossing the Grand River, and (2) that it did not need a permit to construct a powerline over the Lost Channel because the Corps did not have jurisdiction over the Lost Channel.

With respect to Consumers Energy's argument regarding the scope of the 1940 permit, the Court finds that there are questions of fact as to whether the permit applies to only the Grand River, or whether it also applies to the Lost Channel. The permit authorizes Consumers to "construct an aerial electric transmission line, across [the] Grand River" near Spring Lake, Michigan with a clearance height of eighty feet (ECF No. 68-10 at PageID.694). Because the Lost Channel is merely a tributary of the Grand River, it is unclear whether the permit was intended to govern the Lost Channel. Thus, questions of fact exist as to the scope

of the permit and whether Consumers is in violation of the height clearance requirements of the permit.

Consumers further argues that the Corps did not have jurisdiction over the Lost Channel, and consequently, it was impossible for the 1940 permit that the Corps issued to apply to the Lost Channel. The Rivers and Harbors Act of 1899 requires a party to receive authorization via a permit[1] from the Corps to construct any structure over a navigable waterway. *See* 33 U.S.C. § 403. In its motion for summary judgment, Consumers argues that the Code of Federal Regulations carved out an exception to this requirement: "Activities that were commenced or completed shoreward of established Federal harbor lines before May 27, 1970 do not require section 10 permits. . . ." 33 C.F.R. § 322.4 (internal citation omitted). Consumers then points to NOAA chart 14933, which shows the Grand River and Lost Channel (ECF No. 68-4 at PageID.661). It states that the black dashed lines surrounding the white area down the middle of the Grand River are "harbor lines," and that the Lost Channel is clearly outside those lines. Consumers therefore argues that the powerline in question meets the exception in 33 C.F.R. § 322.4 because the powerline was constructed before May 27, 1970, and because the portion crossing the Lost Channel is shoreward of the established harbor lines. Thus, Consumers asserts that the Corps did not have jurisdiction to issue a permit covering the Lost Channel, which was outside the established harbor lines.

In support of this argument, Consumers also cites to *United States v. Stoeco Homes, Inc.*, 498 F.2d 597 (3d Cir. 1974), which confirms that the Corps's permitting policy under

[1] These permits are commonly called "Section 10" permits because the Act was originally enacted as the "Rivers and Harbors Appropriation Act of March 3, 1899, ch. 425, § 10, 30 Stat. 1151."

33 U.S.C. § 403 changed in 1970 subsequent to the enactment of the relevant CFR sections. It noted that prior to 1970, the Corps did not require permits for construction shoreward of established harbor lines. *Id.* at 602-03. The court then discussed 33 C.F.R. § 209.150—issued in 1970—which states that "[f]or work already completed or commenced in conformance with existing harbor line authority before that date, no permit is required." Thus, the Third Circuit held that construction shoreward of harbor lines completed before May 27, 1970, was not required to conform with the permit requirement of 33 U.S.C. § 403.

In response, Plaintiff argues that the Corps did have jurisdiction over the Lost Channel because Consumers misinterpreted the relevant NOAA chart. He argues that there are no harbor lines on chart 14933, and the lines that Consumers believes are harbor lines are actually the limits of dredged channels. If Plaintiff is correct that there are no harbor lines on the NOAA chart, then Consumers Energy's argument that the powerline over the Lost Channel is outside the Corps's jurisdiction, due to the structure being outside of harbor lines, is without merit. And if the Corps did have jurisdiction over the Lost Channel, Consumers was required to receive a permit from the Corps before constructing the powerline.

There is a genuine issue of material fact as to whether chart 14933 contains harbor lines. While Consumers Energy's expert, Mr. Robert Taylor, who is a naval architect and mechanical engineer, asserts that the black dashed lines down the middle of the Grand River on chart 14933 are harbor lines (*see* ECF No. 68-21 at PageID.811, ¶¶ 15, 18), Plaintiff's expert, Ms. Marjorie Cooke, a marine safety expert, states that there are no harbor lines on chart 14933 (*see* ECF No. 69-16 at PageID.1021, ¶¶ 6-8). Rather, Ms. Cooke states that the

black dashed lines represent the limits of the dredged channels, as shown in the NOAA charts key (ECF No. 69-15).

Whether the black dashed lines on chart 14933 are harbor lines is relevant to Plaintiff's negligence per se claim because if they are harbor lines, it appears that Consumers was not required to receive a permit, pursuant to 33 U.S.C. § 403, from the Corps to construct the Lost Channel powerline. However, if the lines are not harbor lines, it appears that Consumers was required to receive a permit. Because there remains a genuine dispute of material fact regarding the classification of the relevant lines on the chart, Consumers Energy's motion for summary judgment will be denied on the grounds of negligence per se.

Because questions of fact exist as to the elements of duty, breach, causation, and negligence per se, Consumers Energy's motion for summary judgment will be denied in its entirety.

V. Plaintiff's Motion for Summary Judgment

A. Duty

Plaintiff first seeks summary judgment regarding the element of duty and that Consumers owed Plaintiff a duty to warn of the powerline crossing the Lost Channel. As stated above in Section IV.B., which discusses duty in the context of Defendant's motion for summary judgment, admiralty law cases do not provide a clear answer whether a utility company has a duty to warn of powerlines over navigable waterways. However, Michigan law discusses the general duty to warn of known powerlines. While "there is no duty to warn of known overhead powerlines" *Groncki*, 557 N.W.2d at 295, Michigan law has not discussed

the duty regarding *unknown* powerlines. *Groncki* is not applicable to the present case because Plaintiff did not know that the powerline in question had such a low clearance.

Further, Plaintiff cites *Wilhelm v. Detroit Edison Co.*, 224 N.W.2d 289, 296 (Mich. Ct. App. 1974) for the proposition that utility companies have a "duty to warn persons . . . of the danger involved." However, the holding of this case is not as broad as Plaintiff suggests. Without Plaintiff's strategically placed ellipses, the holding of this case is that "Edison had a duty at least to warn persons legally on the premises, doing any kind of work that could reasonably be expected to be performed near the lines, of the danger involved." *Id.* In *Wilhelm*, a painter was knowingly doing work near power lines and was electrocuted while painting. *Id.* at 292. Thus, the holding of this case applies to skilled workers legally performing reasonably foreseeable work near powerlines. In that scenario, utility companies have a duty to warn the worker of the powerlines. *Id.* at 296.

Because there is no controlling admiralty or Michigan case law that answers whether Consumers had a duty to warn Plaintiff of the powerline crossing the Lost Channel, there remains a question of law as applied to the facts of this case. As such, the question of duty is not proper to resolve on summary judgment.

B. Breach

Plaintiff next argues that there is no question of fact that Consumers breached its duty to warn Plaintiff of the powerline over the Lost Channel. Plaintiff supports this argument by first citing Consumers Energy's internal governing policies, which he argues required "the placement of warnings on power lines that cross over navigable waterways" (ECF No. 76 at PageID.1093; *Aerial Markering and Lighting Policy*, ECF No. 76-12). The policy further

establishes what the warning markers' shape, size, and color should be. Plaintiff argues that Consumers is in direct breach of this policy because it is undisputed that there were no warning markers around or near the Lost Channel powerline. Plaintiff has observed orange warning buoys on the same powerline where it crosses the Grand River, so he argues that Consumers, at the very least, could have put the same type of buoys by the powerline where it crosses the Lost Channel.

In response, Consumers asserts that it did not violate its internal policies because the policy that Plaintiff cited only requires the marking of lines over navigable waterways "requiring a waterway crossing permit" (ECF No. 76-12). Consumers maintains its argument that it did not need a permit to construct the powerline over the Lost Channel, and thus, the failure to place warning markers around the Lost Channel powerline did not violate Consumers Energy's internal policies. As stated above, the necessity of a permit authorizing the construction of the powerline in question is subject to a dispute of fact depending on whether the black dashed lines on the relevant NOAA charts are harbor lines. Thus, a question of fact remains.

Consumers further argues—as it did in its motion for summary judgment—that although it did not place warning buoys or signs by the Lost Channel powerline, the NOAA charts adequately warned Plaintiff of the powerline. This Court explained in Section IV.C. that a question of fact exists as to whether the NOAA charts adequately warned Plaintiff of the height clearance of the Lost Channel powerline, considering the charts did not list the height specifically over the Lost Channel. Because questions of fact exist as to whether

Consumers breached a duty, Plaintiff's motion will be denied regarding the element of breach.

C. Causation

Plaintiff also moves for summary judgment because "there is no genuine issue of material fact that Defendant's failure to warn caused Plaintiff's damages" (ECF No. 76 at PageID.782). Both parties have presented ample evidence that the other party was at least partially negligent in causing Plaintiff's damages. As stated above in Section IV.D., *Reliable Transfer* established the pure comparative fault system for admiralty cases. 421 U.S. at 411. Thus, while Consumers Energy's failure to install a powerline with a higher clearance, and Plaintiff's choice to sail at dusk in unknown waters could both constitute proximate causes to Plaintiff's injuries, the percentage of each party's alleged fault is yet to be determined. In other words, it is possible that both parties were a proximate cause of Plaintiff's injuries. Thus, Plaintiff's motion for summary judgment that Consumers was the sole cause of Plaintiff's injuries is denied.

D. Negligence Per Se

When this Court analyzed negligence per se in Defendant's motion for summary judgment in Section IV.E., it concluded that summary judgment is not appropriate on this issue because there are remaining questions of fact that determine whether Consumers was in breach of 33 U.S.C. § 403, which requires authorization from the Corps before building a structure over a navigable waterway. The parties assert the same arguments in Plaintiff's motion for summary judgment and response that they did in Defendant's motion for summary judgment and response. While Plaintiff argues that 33 U.S.C. § 403 required

Consumers to receive a permit to construct the Lost Channel powerlines, which it did not do, Consumers argues that it was exempted from this requirement under the Code of Federal Regulations. *See* 33 C.F.R. §§ 322.4, 330.3 ("Activities that were commenced or completed shoreward of established Federal harbor lines before May 27, 1970, do not require section 10 permits."). For the reasons stated above, there is a genuine dispute of material fact regarding whether the black dashed lines on chart 14933 are harbor lines, which determines whether Consumers was required to seek a permit for the Lost Channel powerline (*see Affidavit of Robert Taylor*, ECF No. 68-21 at PageID.811, ¶¶ 15, 18) (stating that the dashed black lines "are known as Harbor Lines"); (*but see Affidavit of Marjorie Cooke*, ECF No. 69-16 at PageID.1021, ¶¶ 6-8) (stating that "there are no harbor lines present on . . . NOAA No. 14933 charts). Plaintiff's motion for summary judgment regarding negligence per se will be denied on this argument.

Plaintiff further argues that even if Consumers did not need a permit to construct the powerline in 1940, when Consumers replaced one of the powerline's poles in 1988, that event triggered the need for Consumers to comply with 33 U.S.C. § 403 and obtain a permit (*see Report by Plaintiff's Expert, Marjorie Cooke*, ECF No. 76-15 at PageID.1260-61) (concluding that the replacement pole triggered the need for Consumers to comply with § 403). On the other hand, Consumers asserts that simple replacements of broken parts do not trigger the need to comply with § 403, unless the structure is modified. *See* 33 C.F.R. § 330.3. Because a question of fact remains as to whether the 1988 pole replacement constituted a "modification" or a "replacement" for the purpose of compliance with § 403, Plaintiff's motion for summary judgment will be denied on the grounds of negligence per se.

E. *The Pennsylvania* Rule

Plaintiff next argues that because there is no genuine issue of material fact that Consumers breached 33 U.S.C. § 403, the burden shifting rule under *The Pennsylvania* should apply to the present matter. 86 U.S. (19 Wall.) 135 (1873). While this rule originally applied to only ship collisions, it has been extended to encompass many types of marine accidents where a defendant is in violation of a statute or regulation. *See Pennzoil Producing Co. v. Offshore Express, Inc.*, 943 F.2d 1465, 1472 (5th Cir. 1991) ("[T]he [*Pennsylvania*] rule has been reformulated to apply to any 'statutory violator' who is a 'part to a maritime accident.'"). Thus, once the plaintiff shows that the defendant was in violation of a statute or regulation, the burden then shifts to the defendant to show that the violation of the statute could not have been a cause of the accident. *See The Pennsylvania*, 86 U.S. at 136.

Because there is a question of fact—whether the lines on chart 14933 are harbor lines—that will likely determine whether Consumers violated § 403, Plaintiff has not met its burden under *The Pennsylvania* of showing that Consumers violated a statute. Thus, summary judgment determining that the rule of *The Pennsylvania* applies is not appropriate at this time and is denied without prejudice pending the resolution of whether Consumers violated a statute or regulation.

F. Harbor Lines

Plaintiff concludes its motion by arguing that there are no harbor lines present in the Lost Channel. First, because the Court held that the Reinke affidavits must be disregarded, all discussion in this section of Plaintiff's motion regarding Mr. Reinke's assertions is disregarded. Second, Plaintiff does not appear to move for summary judgment on the fact

that the Lost Channel did not contain harbor lines. Rather, Plaintiff rebuts an "anticipated" defense that it assumes Consumers will make (ECF No. 76 at PageID.1108). Because Plaintiff has not moved for summary judgment on this fact, and because the Court has already discussed why there is a question of fact regarding the presence of harbor lines on chart 14933, the Court need not further discuss whether the lines on the relevant NOAA charts are or are not harbor lines.

Accordingly,

IT IS HEREBY ORDERED that Plaintiff's motion to strike (ECF No. 79) is **DENIED**.

IT IS FURTHER ORDERED that Defendant's motion for summary judgment (ECF No. 68) is **DENIED**.

IT IS FURTHER ORDERED that Plaintiff's motion for summary judgment (ECF No. 76) is **DENIED**.

IT IS SO ORDERED.

Date: November 15, 2021

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge