

**IN THE SUPREME COURT OF MISSOURI**

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**SC NO: 88573**

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**STATE ex rel UNION ELECTRIC COMPANY d/b/a AMEREN UE,  
Relator,**

**v.**

**THE HONORABLE DAVID A DOLAN,  
Respondent.**

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**REPLY BRIEF OF RELATOR STATE ex rel UNION ELECTRIC COMPANY  
d/b/a AMEREN UE**

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**ARGUMENT**

**Introduction**

In its Reply Brief, Relator Union Electric Company d/b/a Ameren UE (hereinafter

“Ameren UE” or “Relator”), will limit its arguments to the most salient points contained in the Respondent’s Brief filed by The Honorable David A. Dolan (hereinafter “Respondent”). Such limitation, however, should not be understood as an abandonment of any argument previously asserted by Ameren UE.

## I

### **REPLY TO RESPONDENT'S ARGUMENT THAT RELATOR AMEREN UE HAS AN ADEQUATE REMEDY TO CHALLENGE RESPONDENT'S ORDERS OVERRULING AMEREN UE'S MOTION TO DISMISS AND MOTION TO RECONSIDER COURT'S ORDER OF AUGUST 25, 2006, AND THAT AMEREN UE WILL NOT SUFFER IRREPARABLE INJURY IF THE COURT DOES NOT MAKE ITS PRELIMINARY WRIT OF PROHIBITION ABSOLUTE.**

Respondent argues that a writ of prohibition does not lie herein, since any purported error may be corrected by summary judgement, at trial, or on appeal. (Respondent’s Brief,13). In his Brief, Respondent acknowledges that a writ of prohibition is appropriate if the party seeking the writ shows that it will suffer considerable hardship and expenses if the writ is not issued. (Respondent’s Brief,14). What Respondent fails to recognize, however, is that this is the precise situation herein.

Relying upon the decisions in *State ex rel Cohen v. Riley*, 994 S.W.2d 546 (Mo.banc.1999); and *State ex rel Morash v. Kimberlin*, 654 S.W.2d 889 (Mo.banc.1983), Respondent contends that if any error was committed below, that error could be remedied at a subsequent stage in the proceedings, such as a motion for summary judgment, or an appeal

following trial. (Respondent's Brief,15). The decision in *Cohen* is distinguishable from the instant facts and does not support Respondent's contention. *Cohen*, 994 S.W.2d at 549, did not involve the propriety of the issuance of an extraordinary writ where a judge refused to dismiss a petition, despite the defendant's argument that the petition failed to state a cause of action against it, depriving the trial court of jurisdiction. Rather, *Cohen* addressed the issue of whether a writ of prohibition or mandamus was proper to set aside a preliminary injunction, preventing a defendant law firm from contacting any of the clients of the plaintiff's law firm. *Id.*

Moreover, the decision in *Morash*, 654 S.W.2d at 891, relied on by Respondent<sup>1</sup>, supports this Court's issuance of its Preliminary Writ of Prohibition and demonstrates that the issuance of an absolute Writ is appropriate. *Morash* holds that where a petition reveals that the pleader has not stated, and cannot state, a cause of action of which the circuit court would have jurisdiction, prohibition will lie. *Id.* Application of *Morash* to the instant case requires that this Court make its Preliminary Writ of Prohibition absolute.

Count II of the Petition in the underlying action fails to allege or demonstrate that Ameren UE retained control over the job site and the manner in which the work was to be performed, so as to have a duty of care to decedent while he was working on the project. *Anheuser Busch v. Mummert*, 887 S.W.2d 736, 738-739 (Mo.App.E.D.1994); *Matteuzzi v. The Columbus Partnership*, 866 S.W.2d 128, 132 (Mo.banc.1993); *Logan v. Show-Me*

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<sup>1</sup>Respondent's Brief,15.

*Power Elect. Coop.*, 122 S.W.3d 670, 674 (Mo.App.S.D.2003). Thus, it fails to state a cause of action against Ameren UE. *Id.* Where, as here, a petition fails to state a cause of action, the defect is jurisdictional. *State ex rel MFA Ins. v. Murphy*, 606 S.W.2d 661, 663 (Mo.banc.1980); *Lowery v. Air Support Int'l*, 982 S.W.2d 326, 328 (Mo.App.S.D.1998). Under these circumstances, prohibition is the appropriate remedy. *Morash*, 654 S.W.2d at 891; *Anheuser Busch*, 887 S.W.2d at 738-739.

In fact, prohibition is the **only** viable remedy by which Relator can challenge Respondent's Orders overruling its Motion To Dismiss and its Motion To Reconsider The Court's Order Of August, 25, 2006. The error committed by Respondent below, in refusing to dismiss Count II of the Plaintiff's Petition against Ameren UE, cannot be remedied at a subsequent stage of the proceedings. Since Count II of Plaintiff's Petition in the underlying action failed to state a cause of action against Ameren UE, it did not confer subject matter jurisdiction on the trial court or Respondent, to litigate that claim against Relator. *Lowery*, 982 S.W.2d at 328. Under these circumstances, the only power Respondent had was to dismiss Count II of the Petition against Ameren UE. Respondent has no jurisdiction to proceed further against Ameren UE in the underlying action. *Id*; *Phillips v. Bradshaw d/b/a Distinctive Exteriors Co.*, 859 S.W.2d 232, 234 (Mo.App.S.D.1993).

Moreover, prohibition is appropriate, since the issuance of an absolute Writ by this Court is required to prevent unnecessary, inconvenient, and expensive litigation. *Mo. St. Bd. of Registration For The Healing Arts v. Brown*, 121 S.W.3d 234, 236 (Mo.banc.2003). Ameren UE and its counsel have already expended significant amounts of time, money, and

resources in defending against Count II of Plaintiff's Petition in the underlying action, despite the fact that it does not, and cannot, state a cause of action against Relator. The time, attorney's fees, and expenses incurred by Ameren cannot be recovered. Missouri Courts adhere to the American Rule regarding expenses and attorney's fees. *Lee v. Investors Title Co.*, 2007 WL 4234614 (Mo.App.E.D.2007). Under the American rule, each party is responsible for the payment of its own expenses and attorney's fees. *Id*; *State ex rel Nixon v. Patriot Tobacco Co.*, 220 S.W.3d 889, 891 (Mo.App.E.D.2007). Thus, Ameren UE will not be able to recoup the attorney's fees and expenses it has incurred in defending against Count II of Plaintiff's Petition against it. *Id*. Moreover, allowing the underlying action against Ameren UE to continue to a subsequent stage, such as a motion for summary judgment or to trial, will only serve to increase, rather than reduce, the injury and damages suffered by Ameren UE. Relator will be forced to expend additional resources and time, and incur additional attorney's fees for depositions, discovery, and trial preparation. The only way to prevent Ameren UE from incurring these additional damages is through an absolute writ, precluding Plaintiff from proceeding further against Ameren UE in the underlying action. *Mo. St. Bd. of Regis.*, 121 S.W.3d at 236.

Respondent contends that the decisions on which Ameren UE relies are distinguishable, and do not support the issuance of a writ of prohibition herein. (Respondent's Brief,17-18). In making this assertion, however, Respondent ignores the decision in *Anheuser Busch v. Mummert*, 887 S.W.2d at 738-739, which is directly on point, and requires that this Court make its Preliminary Writ of Prohibition absolute. In

*Anheuser Busch*, an employee of an independent contractor sought damages for injuries he sustained from electrocution while working near an electrical junction box on Anheuser Busch's property. After the plaintiff entered into a workers' compensation settlement with his employer, the employer filed a third-party petition against Anheuser Busch, alleging that it was negligent in causing or allowing the electrical junction box to exist in a defective and unreasonably dangerous condition and that Anheuser Busch had a non-delegable duty to keep the premises reasonably safe for use by the plaintiff and others, but breached that duty, resulting in plaintiff's injuries. *Anheuser Busch*, 887 S.W.2d at 737. After its motion for summary judgment was denied, Anheuser Busch sought a writ of prohibition. Finding that Anheuser Busch did not exercise substantial control over the construction by directing the manner in which the work was performed, or otherwise directing the activities of the independent contractor or its employees, the Court found that Anheuser Busch was entitled to judgment as a matter of law. *Anheuser Busch*, 887 S.W.2d at 738-739. The Eastern District made its preliminary order in prohibition absolute. *Anheuser Busch*, 887 S.W.2d at 738.

As in *Anheuser Busch*, Plaintiff Angela Friley has failed to allege that Ameren UE exercised substantial control over the physical activities of the employees of Asplundh, including decedent, or directed the details of the manner in which the work was to be performed by Asplundh and its employees. *Id.* Thus, the allegations contained in Count II of Plaintiff's Petition in the underlying action cannot, as a matter of law, show that Ameren UE retained control over the job site or the manner in which the work was to be performed, so as to impose on it a duty of care to the decedent. *Anheuser Busch*, 887 S.W.2d at 738-

739. *Anheuser Busch v. Mummert*, which Respondent conveniently overlooks in his Brief, demonstrates that the issuance of an absolute Writ Of Prohibition is the only appropriate remedy herein. *Id.*

Contrary to what Respondent would have this Court believe, *State ex rel Dick Proctor Imports v. Gaertner*, 671 S.W.2d 273, 275-276 (Mo.banc.1984), is not dispositive on whether the issuance of a remedial writ herein is proper. (Respondent's Brief,16). Unlike *Anheuser Busch v. Mummert* and the instant case, *Dick Proctor Imports* did not address the propriety of the issuance of a remedial writ where an alleged landowner challenges a suit filed against it by a person who was injured while working on the premises, asserting that the alleged landowner did not exercise control over the physical activities of the independent contractor or the details of the manner in which the work was to be done. *Anheuser Busch*, 887 S.W.2d at 738-739. Rather, *Dick Proctor Imports* dealt with the issue of venue and pretensive joinder. See, *Dick Proctor Imports*, 671 S.W.2d at 275-276. Accordingly, that decision is not relevant to the issue of whether this Court should make its Preliminary Writ of Prohibition absolute. Respondent's reliance on *Dick Proctor Imports* is misplaced.

Respondent contends that the action complained of by Relator herein-the denial of Ameren UE's Motion To Dismiss and Motion To Reconsider The Court's Order Of August 25, 2006-are actions which preserve the factual and legal issues for trial and, therefore, Ameren does not lack an adequate remedy at law. Further, Respondent posits that Ameren UE will not suffer irreparable harm if this Court does not make its Preliminary Writ of Prohibition absolute. (Respondent's Brief,18-19).

In asserting that there are “several points in the underlying litigation at which the alleged error of the Respondent may be remedied”, Respondent ignores two important facts. First, since Count II of Plaintiff’s Petition fails to state a cause of action against Relator Ameren UE, it conferred no subject matter jurisdiction on the trial court, and, concomitantly Respondent. Thus, the only action that Respondent could properly take was to dismiss Count II of the Petition against Relator. *Lowery*, 982 S.W.2d at 328; *Phillips*, 859 S.W.2d at 234. That being the case, further proceedings in the underlying action will not remedy the errors of which Ameren UE complains. In fact, it will only serve to compound those errors. Ameren UE’s grievances herein cannot be adequately addressed in the ordinary course of judicial proceedings. *State ex rel Douglas Toyota, III v. Keeter*, 804 S.W.2d 750, 752 (Mo.banc.1991).

Second, by arguing that any errors occurring in the underlying case can be rectified in further proceedings therein, Respondent seeks to distract the Court away from the irreparable harm already suffered by Ameren UE as a result of prior proceedings in the underlying action. The harm that Ameren UE has suffered, in the form of expenses, attorney’s fees, lost resources, and time, cannot be recouped or reduced by allowing Plaintiff to proceed further against Ameren UE in the underlying action. Rather, Ameren UE will only incur additional attorney’s fees, expenses, and lost resources should it be forced to continue to defend against Count II of Plaintiff’s Petition. There can be little doubt that Ameren UE will suffer considerable hardship and expense as a consequence of allowing Count II of Plaintiff’s Petition against it to stand, and in permitting Plaintiff to proceed further against Relator.

Under these circumstances, prohibition will issue to prevent Ameren UE from suffering further damages as a result of the Respondent's erroneous decisions. See *State ex rel Riverside Joint Venture v. Mo. Gaming Cmsm.* 969 S.W.2d 218, 221 (Mo.banc.1998); *State ex rel Horn v. Ray*, 138 S.W.2d 729, 731 (Mo.App.E.D.2002). The issuance of an absolute Writ of Prohibition is necessary herein to preserve the orderly and economical administration of justice. *Hansen v. State of Mo. Dept. of Social Services*, 226 S.W.3d 137, 141 (Mo.banc.2007).

Moreover, contrary to Respondent's assertion, Ameren UE lacks an adequate remedy at law. (Respondent's Brief,18-19). While prohibition cannot be substituted for an appeal, the right of appeal must be a full and adequate remedy before its availability will preclude resort to the remedy of prohibition. *State ex rel Vogel v. Campbell*, 505 S.W.2d 54, 58 (Mo.banc.1974); *State ex rel Berbiglia v. Randall*, 423 S.W.2d 765, 770 (Mo.banc.1968). What constitutes adequate relief is addressed to the discretion of the reviewing Court. *State ex rel McCullouch v. Shiff*, 852 S.W.2d 392, 394 (Mo.App.E.D.1993). The mere availability of an appeal, in and of itself, does not constitute an adequate remedy at law. *Southwestern Bell Telephone Co. v. Mo. Cmsm. on Human Rights*, 863 S.W.2d 682, 686-687 (Mo.App.E.D.1993).

As Respondent acknowledges<sup>2</sup>, Ameren UE cannot file a direct appeal at this juncture in the proceedings in the underlying action, to challenge Respondent's Orders overruling

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<sup>2</sup> Respondent's Brief,19.

Relator's Motion To Dismiss and its Motion To Reconsider The Court's Order Of August, 25, 2006. A party may only appeal from a final judgment, and the denial of a motion to dismiss does not constitute a final judgment for purposes of appeal. *Bell Scott, L.L.C. v. Wood, Wood & Wood Investments*, 169 S.W.2d 552, 554 (Mo.App.E.D.2005). It necessarily follows that Respondent's Orders denying Relator's Motion To Dismiss and its Motion To Reconsider The Court's Order Of August, 25, 2006 are not final and appealable orders or judgments. *Id.* While Ameren UE can challenge the Respondent's Orders denying those Motions after a final resolution of the case, such as a trial on the merits, that remedy will not be adequate, and will not prevent Ameren UE from incurring additional damages. *State ex rel Vogel*, 505 S.W.2d at 58. That being the case, the fact that Ameren UE may challenge Respondent's Orders after a final resolution of the case on the merits does not constitute a full or adequate remedy, barring this Court from making its Preliminary Writ of Prohibition absolute. *Southwestern Bell Telephone Co.*, 863 S.W.2d at 686-687; *State ex rel Berbiglia*, 423 S.W.2d at 770. The only *adequate* remedy available to Ameren UE to challenge the Orders issued by Respondent is that of an extraordinary writ. Any other remedy will necessarily result in Ameren UE incurring further damages. The issuance of a writ is appropriate to prevent additional, unnecessary, and expensive litigation. *Mo. St. Bd. of Registration For The Healing Arts*, 121 S.W.3d at 236. The facts and circumstances herein demonstrate that there exists an extreme necessity for preventative action. *State ex rel McCullouch*, 852 S.W.2d at 394. Finally, the issuance for a writ is the proper herein, since the instant Court has already issued its Preliminary Writ, and the parties before the Court

have fully briefed the issues for this Court's determination. *State ex rel Webster County v. Hutcherson*, 199 S.W.3d 866, 872 (Mo.App.S.D.2006).

Contrary to Respondent's assertion, if this Court chooses to make its Preliminary Writ absolute, the appellate courts in this State will not be inundated with petitions for prohibition or mandamus. (Respondent's Brief,19). Relator Ameren UE does not suggest that an extraordinary writ is the appropriate remedy in any and all cases where a trial court overrules a motion to dismiss for failure to state a cause of action. Rather, Relator suggests that a writ of prohibition is the only appropriate remedy under the facts and circumstances of the instant case. Accordingly, the issuance of an absolute Writ of Prohibition by this Court will not serve to substantially increase the number of writ applications made to the Missouri appellate courts.

## II

### **RELY TO RESPONDENT'S ARGUMENT THAT RESPONDENT DID NOT ACT IN EXCESS OF HIS JURISDICTION IN OVERRULING AMEREN UE'S MOTION TO DISMISS AND ITS MOTION TO RECONSIDER THE COURT'S ORDER OF AUGUST 25, 2006.**

In his Brief, Respondent asserts that prohibition is not the appropriate remedy, since in ruling on Relator Ameren UE's Motion To Dismiss and Motion To Reconsider The Court's Order Of August, 25, 2006, he was required to exercise his discretion, and he did not abuse his discretion in denying those Motions. (Respondent's Brief,21-23). Relying on *Anglim v. Mo. Pacific R.R. Co.*, 832 S.W.2d 298 (Mo.banc.1992), Respondent posits that this Court must presume that his "discretionary ruling is correct". (Respondent's Brief,21).<sup>3</sup> h

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<sup>3</sup>However, *Anglim* is not controlling herein. At issue in *Amglim* was whether a

his Brief, Respondent contends that in the underlying action, there are multiple theories of liability which support his denial of Ameren's Motion To Dismiss and its Motion To Reconsider The Court's Order Of August 25, 2006. Each of these theories of liability will be addressed separately below.

First, Respondent argues that Relator Ameren UE may be held liable under a theory of premises liability. (Respondent's Brief,24). Relying on *Kibbons v. Union Elect. Co.*, 823 S.W.2d 485, 488 (Mo.1992), Respondent contends that liability flows not only from the ownership of land, but also from having an easement over the property in question. (Respondent's Brief,24). Respondent posits that the Petition in the underlying action raises such allegations, by asserting that decedent was working on the power distribution network owned by Ameren UE. (Respondent's Brief,24).

In making this argument, Respondent relies on paragraphs 17 and 18 in Count II of the Petition in the underlying action. Those paragraphs state, in relevant part, as follows:

"17. That defendant Ameren owns and operates an electrical power generator transmission and distribution network and, in

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trial court abused its discretion in denying a railroad's motion to dismiss on the ground of forum non-conveniens. *Anglim*, 832 S.W.2d at 301. A FELA case, *Anglim* has no bearing on Relator's liability, if any, under *Logan*, 122 S.W.3d at 670; *Matteuzzi*, 866 S.W.2d at 132; *Halmick v. SBC Corp. Svcs.*, 832 S.W.2d 925, 927 (Mo.App.E.D.1992), and similar authorities. Respondent's reliance on that decision is misplaced.

furtherance of its business operations, contracted with Asplundh to erect, install, alter, replace and repair transmission lines of Ameren, and Ameren thus has certain non-delegable duties to hire contractors who have employees with the skills, knowledge, training, tools and protective equipment necessary to perform Ameren's work safely, and Ameren must also insure the safety of the work place where Asplundh was installing Ameren's new lines.

...

18. Ameren was careless and negligent in insuring that the job site at which decedent Will was working was safe and protected, and also that safe work practices were being carried out, and that such carelessness and negligence caused or contributed to cause the death of Will." (See Separate Appendix To Relator's Appellant's Brief, A21-A22).

What is significant, however, is what Plaintiff did **not** allege in Count II of the Petition. Specifically, Plaintiff did not allege that Ameren was the landowner of the premises on which decedent's fatal accident took place-County Road 472. Absent such an allegation, Ameren UE could have no legal duty to the decedent. *Logan*, 122 S.W.3d at 674.

Nor did Plaintiff allege or aver that Ameren UE had been granted an easement as to that property, conferring on Relator exclusive use and control of the premises. (Separate

Appendix A21-A22). The absence of such allegations in the Petition stands in stark contrast to the allegations and evidence before the Supreme Court in *Kibbons*. Therein, there was clear and specific evidence, demonstrating that an easement was granted to the defendant utility, and the particulars of that easement were in evidence. *Kibbons*, 823 S.W.2d at 487. Herein, Plaintiff's Petition in the underlying action contains no allegation that any easement on the property was conveyed to Ameren UE. *Kibbons*, 823 S.W.2d at 487. Even assuming, *arguendo*, that the existence of an easement in favor of Ameren UE could reasonably be inferred, there has been no allegation or proof that Ameren UE had sole control of the property in question. *Kibbons*, 823 S.W.2d at 487.

In short, Plaintiff has failed to allege that Ameren UE either owned the premises in question or that Ameren UE was the holder of an easement over those premises, and that it exercised sole control over the easement property. *Kibbons*, 823 S.W.2d at 487; *Logan*, 122 S.W.3d at 674. That being the case, Ameren UE had no duty of care to the decedent. *Id.*

Next, Respondent contends that Ameren UE may be held liable on a theory that it controlled the job site and the activities of its independent contractor. Respondent asserts that for liability, total control by the owner or possessor is unnecessary, and that only substantial control is required. Further, Respondent argues that liability may be established where a possessor of land and an independent contractor jointly possess the premises. (Respondent's Brief,24-25). However, the Petition in the underlying action contains no allegation that Ameren and Asplundh jointly possessed the premises where decedent's fatal injuries took place. For this reason, Respondent's reliance on *Donovan v. General Motors*,

762 Fd2d 701, 705 (8<sup>th</sup> Cir.1985), is misplaced.

As Respondent observes, the Petition alleges that Ameren UE was a “host employer”, responsible for the safety of the project. (Respondent’s Brief,25). What Respondent fails to acknowledge, however, is the fact that no decision cited by the Respondent in his Brief holds or finds the employer of an independent contractor liable for injury to an employee of that independent contractor, based upon a “host employer” theory of recovery. (Respondent’s Brief,24-28). The reason for this lack of authority is simple: Missouri Courts have not adopted a “host employer” theory of recovery, of the nature relied on by Respondent in his Brief and by Plaintiff in the Petition in the underlying action.

In his Brief, Respondent attempts to distinguish *Logan, Wilson*, and *Schumacher v. Baker*, 948 S.W.2d 166 (Mo.App.E.D.1997), addressing landowner liability to employees of an independent contractor. (Respondent’s Brief,25-27). Respondent seeks to distinguish these authorities on two bases. First, that the decisions were procedurally different from the instant facts. (Respondent’s Brief,25). Second, Respondent contends that none of these cases “stand for the proposition that the underlying petition fails to state a cause of action”. (Respondent’s Brief,27).

In making this argument, Respondent ignores the crucial fact that decisions such as *Logan, Wilson, Anheuser Busch*, and *Schumacher*, along with *Matteuzzi* and *Halmick*<sup>4</sup> clearly delineate the law in the State of Missouri regarding when a landowner has a duty to

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<sup>4</sup>Respondent’s Brief,27.

prevent injuries to an invitee, in particular, an employee of an independent contractor who has permission to use a landowner's premises or facilities. *Matteuzzi*, 866 S.W.2d at 132; *Schumacher*, 948 S.W.2d at 169; *Logan*, 122 S.W.3d at 674. These cases hold that if a landowner relinquishes possession and control of the premises to an independent contractor during the period of construction, the duty to use reasonable and ordinary care to prevent injury shifts to the independent contractor and thus, the landowner is relieved of potential liability. *Logan*, 122 S.W.3d at 674; *Matteuzzi*, 866 S.W.2d at 132; *Wilson*, 996 S.W.2d at 693. In this situation, the independent contractor is deemed to be the possessor of the land, and the duty to use reasonable care to prevent injury shifts from the landowner to the independent contractor. *Logan*, 122 S.W.3d at 674; *Anheuser Busch*, 887 S.W.2d at 738; *Halmick*, 832 S.W.2d at 927. Moreover, these cases establish that to demonstrate that the landowner retained possession and control of the premises and the attendant duty of care, a plaintiff must allege that the landowner controlled the job site and the activities of the independent contractor. The landowner's involvement in overseeing the work must be substantial, and must go beyond simply securing compliance with the contract between the landowner and the independent contractor. *Matteuzzi*, 866 S.W.2d at 132; *Halmick*, 832 S.W.2d at 929; *Logan*, 122 S.W.3d at 675; *Wilson*, 996 S.W.2d at 694. It is for these rules of law that Relator Ameren UE relies on *Matteuzzi*, *Logan*, *Wilson*, and *Halmick* in its Appellant's Brief. (See Appellant's Brief, 25-38).

Contrary to what Respondent would have this Court believe, Relator Ameren UE does not rely on these authorities to argue that a landowner can never be liable to the injured

employee of an independent contractor, or that there are no situations under which a landowner has a duty of care to such an employee. (Respondent's Brief,27). Instead, it is Relator's position that when the legal rules set forth in these decisions are applied to the allegations contained in Plaintiff's Petition, Ameren UE can have no liability to Plaintiff, since Plaintiff has failed to aver that Ameren UE owned the premises on which decedent's fatal injuries occurred, had an easement over that property which granted it exclusive control over the premises in question, jointly possessed the premises along with Asplundh, or otherwise alleged facts sufficient to show that Ameren UE controlled the physical activities of the employees of the independent contractor, Asplundh, or the details of the manner in which Asplundh was to perform its work in repairing, replacing and installing electrical transmission lines. *Matteuzzi*, 866 S.W.2d at 132; *Halmick*, 832 S.W.2d at 929; *Logan*, 122 S.W.3d at 675; *Wilson*, 996 S.W.2d at 693-694; *Anheuser Busch*, 887 S.W.2d at 739. While Plaintiff bore the burden of establishing that as the alleged landowner, Ameren UE retained substantial control of the premises and the work, *Schumacher*, 948 S.W.2d at 169, she has failed to allege facts sufficient to satisfy that burden of proof. *Matteuzzi*, 866 S.W.2d at 132; *Logan*, 122 S.W.3d at 674; *Wilson*, 996 S.W.2d at 687; *Halmick*, 832 S.W.2d at 929.

In his Brief, Respondent faults Ameren UE for not citing a Missouri case with the exact or identical factual circumstances and procedural posture as the case instanter. (Respondent's Brief,22-28). No such case presently exists. However, the authorities cited by Ameren UE in its Petition In Prohibition/Alternative Petition In Mandamus, Suggestions In Support, and Appellant's Brief, including *Matteuzzi*, 866 S.W.2d at 132; *Halmick*, 832

S.W.2d at 929; *Logan*, 122 S.W.3d at 675; *Wilson*, 996 S.W.2d at 694; and *Anheuser Busch*, 887 S.W.2d at 739, are relevant to the legal question before the Court and, therefore, Relator properly relies upon these decisions. Moreover, *Anheuser Busch v. Mummert*, 887 S.W.2d at 738-739, is factually analogous to the instant case. While it does not involve the precise facts as those at issue herein, it is factually similar. *Id.* Thus, *Anheuser Busch*, along with the above cited authorities are not distinguishable, and are directly relevant to the issue of whether Count II of Plaintiff's Petition fails to state a cause of action against Ameren UE.

In his Brief, Respondent contends that the Petition in the underlying action contains "greater allegations of control" than those at issue in *Matteuzzi* and *Halmick*. (Respondent's Brief,27). However, Respondent fails to reference any particular paragraph(s) in the Petition to support this proposition. (Respondent's Brief,27). The reason for this failure is obvious. If the Court reviews Plaintiff's Petition in the underlying action, it will find that the Petition contains no allegation that Ameren UE's involvement in overseeing the repair and replacement of electrical transmission lines was substantial, that Ameren UE controlled the physical activities of Asplundh or decedent, or that Ameren UE controlled the details of the manner in which the work of repairing and replacing electrical transmission lines was to be performed by Asplundh and/or decedent. (Separate Appendix,A17-A23).

Rather than alleging specific conduct and activities on Ameren UE's behalf which could show substantial involvement in the project at issue, Plaintiff chooses instead to allege that Ameren UE had a duty to ensure a safe work place, to assess hazards related to the work,

to inform Asplundh of such hazards, and to prevent unsafe working conditions. (Separate Appendix,A21-A22). Essentially, Plaintiff alleges that Ameren UE had a duty to use reasonable care to prevent injury to decedent, but fails to allege facts and circumstances which could give rise to such a duty on Ameren UE's behalf. (Separate Appendix,A21-A22). Count II of the Plaintiff's Petition in the underlying action fails to state a cause of action against Ameren UE, since it fails to allege any facts showing that Ameren UE retained possession and control of the premises on which decedent's fatal injuries occurred or that Ameren UE controlled the activities of its independent contractor, as would give rise to an attendant duty of care to decedent. *Matteuzzi*, 866 S.W.2d at 132; *Halmick*, 832 S.W.2d at 929; *Logan*, 122 S.W.3d at 675; *Anheuser Busch*, 887 S.W.2d at 738-739. For this reason, Respondent exceeded his jurisdiction in overruling Ameren UE's Motion To Dismiss and its Motion To Reconsider Court's Order Of August, 25, 2006. See, *Arnold v. Erkmann*, 934 S.W.2d 621, 626 (Mo.App.E.D.1996) (where a petition in a civil action contains only conclusions and does not contain ultimate facts, or any allegations from which to infer those facts, a motion to dismiss is properly granted).

Additionally, Respondent argues that Ameren UE may be held liable under a theory that the work to be performed was inherently dangerous. (Respondent's Brief,28-29). Relying on *Ballinger v. Gascosage Elect. Coop.*, 788 S.W.2d 506 (Mo.1990), Respondent asserts that working around electricity is an inherently dangerous activity, that the work contracted for by Asplundh with Ameren UE was on electric transmission lines, and thus, was a dangerous activity; that the Petition includes "various allegations that the

instrumentalities used to carry out the job were not carefully constructed and maintained”; and that Ameren UE failed to use the highest duty of care. (Respondent’s Brief,29). Respondent’s reliance on *Ballinger*, and the inherently dangerous activity theory of recovery, is misplaced.

Unlike the instant case, *Ballinger* addresses the issue of vicarious liability. Under that theory of recovery, an employer is liable for the negligence of an independent contractor, irrespective of whether the employer itself has been at fault. Liability does not rest on the personal negligence of the employer. *Ballinger*, 788 S.W.2d at 510. As the Court in *Ballinger* observed, persons were usually held liable for negligence on the part of those they hire to accomplish their purposes. However, there was an exception for the hiring of independent contractors responsible to the employer for the result bargained for, but not subject to control as to the means of accomplishment of the work. *Id.* *Ballinger* held that this exception did not apply if the work contracted for is an inherently dangerous activity. For activities of this kind, the owner remained liable for the torts of the contractor, simply for commissioning the activity. *Id.* Liability attached without any need for showing that the employer was negligent in any respect. Liability was purely vicarious. See *Ballinger*, 788 S.W.2d at 511.

Respondent errs in relying on *Ballinger*. Subsequent decisions have rejected the rule of vicarious liability for inherently dangerous activities, as articulated in *Ballinger*. See, *Zueck v. Oppenheimer Gateway Properties*, 809 S.W.2d 384, 390 (Mo.banc.1991), holding that the inherently dangerous exception did not apply to injuries sustained by an employee of

an independent contractor covered by workers' compensation and, therefore, owners and possessors of land were not vicariously liable for injuries sustained by a contractor's employee while performing an inherently dangerous activity. See also, *Scott v. Edwards Transportation Co.*, 889 S.W.2d 1474, 146 (Mo.App.S.D.1994).

In his Brief, Respondent fails to acknowledge that subsequent cases have done away with the inherently dangerous exception articulated by *Ballinger*. Compounding this error, Respondent fails to recognize that where, as here, an alleged landowner relinquishes possession and control of the premises to an independent contractor during the period of construction, the duty to use reasonable and ordinary care to prevent injury shifts to the independent contractor, *regardless* of whether the employee of the independent contractor is engaged in an inherently dangerous activity, and regardless of whether the liability sought be imposed is vicarious or direct. See *Horner v. Hammons*, 916 S.W.2d 810, 814 (Mo.App.W.D.1995); *Halmick*, 832 S.W.2d at 928; *Matteuzzi*, 866 S.W.2d at 131. Further, in arguing that Ameren UE could be held liable under the theory that the work to be performed was inherently dangerous, Respondent ignores the fact that the Petition in the underlying action, in particular, Count II of the Petition, contains no allegation that the work performed by Asplundh construction and its employees was inherently dangerous. (Appendix,A17-A23). For these reasons, Ameren UE cannot be held liable under the inherently dangerous activity theory of recovery.

In addition, Respondent argues that Ameren UE may be held liable on the theory that it failed to provide regulated safeguards. (Respondent's Brief,29-30). Relying on *Brannock*

*v. Elmore*, 21 S.W. 451 (Mo.1983), Respondent asserts that an employer who is by statute or administrative regulation under a duty to provide specified safeguards or precautions for the safety of others, is subject to liability for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions. Respondent states that Asplundh was cited in an OSHA report for violating Section 5(a)(2) of the OSHA Act of 1970. He contends that Ameren UE had a duty to provide for precautions that would have prevented this violation and thus, imposition of liability on Ameren UE may be proper under this theory of recovery. (Respondent's Brief,29-20). Respondent's argument is without merit, and must be rejected.

*Brannock* is not dispositive on Ameren UE's liability in the underlying action. In *Brannock*, a plaintiff sought to recover damages for personal injuries caused by the alleged negligence of a contractor in blasting rock on a lot in Kansas City, Missouri, near a public street. The petition against the owner of the lot alleged that employees of the lot owner were making excavations and blasting in violation of a city ordinance, and that plaintiff was injured when a stove was thrown against her when employees of the defendant, without observing the requirements of the ordinance, discharged a blast of explosives without warning. *Brannock*, 21 S.W.2d at 452-453. At issue in *Brannock* was the obligation or duty which a landowner owed to outsiders or members of the general public. *Brannock* did not extend this obligation to a servant or employee of the independent contractor hired by the landowner. See, *Salmon v. Kansas City*, 145 S.W. 16, 25 (Mo.1912). Decedent was not a member of the general public. Rather, he was an employee of Asplundh, the independent

contractor hired by Ameren UE to perform work on electrical transmission lines. Accordingly, *Brannock* has no application to the instant facts. *Id.* Moreover, in her Petition, Plaintiff did not allege that Ameren UE was negligent, based on any violation of OSHA or similar regulations, or for its failure to prevent its independent contractor, Asplundh, from engaging in such a violation. (Separate Appendix, A17-A23). In the absence of such allegations, liability cannot be imposed on Ameren UE based upon this theory of recovery.

Next, Respondent contends that Ameren UE may be held liable on the theory that it negligently hired an independent contractor. Citing *Sullivan v. St. Louis Station Assoc.*, 770 S.W.2d 352 (Mo.App.E.D.1989), Respondent argues that the Petition in the underlying action is sufficient to state a cause of action against Ameren UE for the negligent hiring of Asplundh. He references allegations in the Petition, averring that “Ameren thus has certain non-delegable duties to hire contractors who have employees with the skills, knowledge, training, tools and protective equipment necessary to perform Ameren’s work safely.” (Respondent’s Brief,30). Again, it is important to note what the Petition does **not** allege. Namely, that the contractor Ameren UE hired-Asplundh Construction-was not competent or did not have the requisite skills, knowledge, training, tools and equipment necessary to perform the work in a safe manner. In fact, the Petition in the underlying action contains no allegation of negligent hiring. (Separate Appendix,A17-A23). Even assuming, *arguendo*, that Asplundh was negligent in performing its work under the Contract it entered into with Ameren UE, such negligence does not create a presumption that Ameren UE was negligent in selecting and hiring Asplundh. *Sullivan*, 770 S.W.2d at 356. Thus, contrary to Respondent’s

contention, liability cannot be imposed on Ameren UE for the negligent hiring of Asplundh.

Respondent argues that the Contract between Ameren UE and Asplundh was sufficient to impose a duty on Relator. Specifically, Respondent asserts that the Contract shows that Ameren UE retained substantial control of the workers' physical activities, the manner in which their work was to be done, and the right to possess the job site. (Respondent's Brief,31). In support of this contention, Respondent points to certain provisions of the Contract between Asplundh and Ameren UE. Those provisions referenced by Respondent relate to times of work, providing detailed invoices and maintaining up-to-date drawings and specifications, delivery to Ameren UE of certificates of approval from governmental inspections, notifying Ameren UE if Asplundh believes that any plan or specification does not comply with applicable rules or regulations, furnishing samples, cooperating with other contractors, so as not to interfere with Ameren UE's business operations; abiding by all rules Ameren UE has in effect at the premises where the work is to be performed; performing the work in a proper, safe and secure manner; permitting visitors on the premises without prior consent of Ameren UE; and assigning any of Asplundh's rights or obligations under the contract without Ameren UE's prior consent. (Respondent's Brief,31-33).

As is readily apparent, most of these Contract provisions pertain not to safety, but rather, to business details such as hours of work, detailed invoices, and cooperation with other companies performing Ameren UE's business. Moreover, the Contract provisions referenced by Respondent which address safety and safe performance of the work are general

in nature, essentially requiring that Asplundh abide by Ameren UE's rules and perform the work contracted for in a safe and secure manner. These contract provisions are merely standard, boilerplate provisions with regard to safety inspections and requirements. *Werdehausen v. Union Elect.*, 801 S.W.2d 358, 364 (Mo.App.E.D.1990).

Moreover, Respondent notes that under the Contract, Ameren UE can reject any part of the work found to be defective or not in accordance with the Contract, obtain substitute service as a remedy for service delays by Asplundh, suspend work which interferes or threatens to interfere with the operation of Ameren UE's equipment, order changes to be made in the work, reject any sub-contractor that Ameren UE considers incompetent or unable to perform the portion of the work involved, interrupt, suspend, or delay any part of the work for any reason upon written notice; and immediately suspend the work if in Ameren UE's opinion, the contractor's work is being performed in a hazardous or dangerous manner. (Respondent's Brief,33-34). Again, these sections are nothing more than standard, boilerplate provisions with respect to safety inspections and requirements. *Id.* That Ameren UE had the authority, under Paragraph 22 of the General Conditions of Contract, to forbid or stop work from being done by Asplundh in an unsafe manner does not, as a matter of law, constitute a sufficient degree of retained control over the work to subject Ameren UE to liability or to impose a duty on it to protect decedent from injury. *Werdehausen*, 801 S.W.2d at 364; *Smith v. Inter-County Tel. Co.*, 559 S.W.2d 518, 521 (Mo.banc.1977).

Respondent has failed to point to any portion of the Contract, or any allegations in the Petition in the underlying action, showing that Ameren UE assumed any affirmative duties

with respect to safety or that Ameren UE, in fact, directed the method in which Asplundh was to perform its work under the Contract. Accordingly, there exists insufficient control to render Ameren UE liable for any injury caused by unsafe performance of the work. *Werdehausen*, 801 S.W.2d at 364. When the provisions of the Contract between Ameren UE and Asplundh are viewed in light of *Werdehausen* and *Smith*, it becomes readily apparent that the control reserved by Ameren UE under that Contract did not go beyond the mere authority to stop the work or to ensure compliance with Contract specifications. *Werdehausen*, 801 S.W.2d at 364; *Smith*, 559 S.W.2d at 521.

Significantly, the Petition in the underlying action fails to allege any instances during which Relator actually stopped any unsafe work performed by Asplundh, or any other conduct on behalf of Ameren UE which could create an assumed duty on Ameren UE's behalf to control the manner of performing Asplundh's work safely. (Separate Appendix, A17-A23). *Werdehausen*, 801 S.W.2d at 366. Paragraph 22 of the General Conditions of Contract does not impose a duty on Ameren UE. *Id.* Nor do the additional Contract provisions referenced by Respondent in his Brief add to Ameren UE's "level of control", as Respondent suggests. These additional sections are merely boilerplate provisions which, of themselves, do not create an assumed duty on behalf of Relator. *Werdehausen*, 801 S.W.2d at 364-365. Thus, Respondent's argument that the Contract between Ameren UE and Asplundh was sufficient to impose a duty on Ameren UE must be rejected. (Respondent's Brief, 31).

Further, Respondent argues that it is appropriate to hold Ameren UE liable since it had

expertise in the type of work that its contractor was performing.<sup>5</sup> Respondent cites *Mullins v. Tyson Foods Inc.*, 143 Fd3d 1153 (8<sup>th</sup> Cir.1998), for this proposition. (Respondent's Brief,34-35). However, *Mullins* is not dispositive on whether Ameren UE had a duty of care to decedent. Therein, the Eighth Circuit held that a landowner owed a duty to an employee to use reasonable and ordinary care to prevent injury to that employee caused by dangerous conditions created by the landowner in an area of the landowner's premises that was controlled by the landowner, and which was not an area where the employee was performing the contracted work. *Mullins*, 143 Fd3d at 1157-1158. Unlike *Mullins*, the instant case does not involve the duty of care owed to invitees in common areas of which a landowner has exclusive control, and which are unrelated to the performance of the contracted work. *Mullins*, 143 Fd3d at 1157.

In asserting that he did not err in overruling Ameren UE's Motion To Dismiss and Motion To Reconsider The Court's Order Of August, 25, 2006, Respondent relies on theories of recovery, such as inherently dangerous activity, failure to provide regulated safeguards, and negligent hiring, which are not pled in Plaintiff's Petition in the underlying action. In her Petition, Plaintiff does not seek to hold Ameren UE liable under any of any of these theories. Nor has Plaintiff alleged ultimate facts in her Petition which could support these theories of recovery. (Separate Appendix, A17-A23). Accordingly, Respondent acted in excess of his jurisdiction in failing to grant Ameren UE's Motion To Dismiss. *Arnold*, 934 S.W.2d at 626.

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<sup>5</sup>Respondent's Brief,34-35.

In fact, the conclusory allegations contained in Plaintiff's Petition are not sufficient to demonstrate that Ameren UE had any duty to decedent. That being the case, a fundamental prerequisite to establish negligence on behalf of Relator is absent. *Ford v. GACS Inc.*, 265 Fd.3d 670, 682 (8<sup>th</sup> Cir.2001). Since Plaintiff's Petition failed to state a cause of action against Ameren UE, Respondent was without subject matter jurisdiction to adjudicate the claim against Relator, as set forth in Count II of the Petition. *Williams v. Barnes & Noble*, 174 S.W.3d 556, 559 (Mo.App.W.D.2005). The issue here is not one simply of the proper exercise of Respondent's discretion. Rather, in failing to dismiss Count II of Plaintiff's Petition against Ameren UE, Respondent acted without or in excess of his jurisdiction. *Id.* Under these circumstances, the issuance of an absolute Writ of Prohibition is appropriate. *Id.*; *Anheuser Busch*, 887 S.W.2d at 739.

### CONCLUSION

This Court must make its Preliminary Writ of Prohibition absolute. Count II of Plaintiff's Petition in the underlying action does not, and cannot, state a cause of action against Ameren UE. Thus, Respondent did not possess subject matter jurisdiction over the claim against Relator. Respondent acted in excess of his jurisdiction in overruling Ameren UE's Motion To Dismiss and Motion To Reconsider The Court's Order Of August, 25, 2006. Relator has no adequate remedy at law to address the errors made by Respondent. It has

incurred irreparable damage as a result of those errors, and such damage will only increase if an absolute Writ is not granted.

Respectfully submitted,  
**EVANS & DIXON**

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**CERTIFICATE OF SERVICE**

A copy of the foregoing was mailed this 18<sup>th</sup> day of February, 2008, to: Respondent, The Honorable David A. Dolan, Presiding Circuit Court Judge, 33<sup>rd</sup> Judicial Circuit, at P.O. Box 256, Benton, MO 63736, Phone No: 573/545-3131, Fax No; 573/545-3000; Mr. Richard G. Steele, Attorney for Linda Hampton, Bradshaw, Steele, Cochrane & Berens, L.C., 3113 Independence, P.O. Box 1300, Cape Girardeau, MO 63702-1300, Phone No: 573/334-0555, Fax No: 573/334-2947; and to Mr. Maurice B. Graham, Attorney for Plaintiffs, Gray, Ritter & Graham, P.C., 701 Market Street, Suite 800, St. Louis, MO 63101, Phone No: 314/241-4140, Fax No: 314/241-5620.

\_\_\_\_\_  
Mary Anne Lindsey

**CERTIFICATE OF COMPLIANCE**

This Brief complied with Rule 360 and contains 7,355 words. To the best of my knowledge and belief, the enclosed disk been scanned and is virus-free.

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Mary Anne Lindsey