

IN THE SUPREME COURT OF MISSOURI

THEODORE J. HOFFMAN and)	
DEBORAH L. HOFFMAN,)	
)	
Plaintiffs/Appellants,)	
)	Appeal No. SC86716
vs.)	
)	
UNION ELECTRIC COMPANY, d/b/a)	
AMERENUE, a Missouri corporation)	
)	
Defendant/Respondent.)	

SUBSTITUTE BRIEF OF RESPONDENT UNION ELECTRIC COMPANY

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SUBSTITUTE BRIEF OF RESPONDENT UNION ELECTRIC COMPANY

JURISDICTIONAL STATEMENT

Plaintiffs Theodore J. Hoffman and Deborah L. Hoffman timely appealed from a summary judgment in favor of Defendant Union Electric Company. In an opinion of January 4, 2005, the Missouri Court of Appeals, Eastern District, reversed the summary judgment and remanded for further proceedings. The Majority Opinion held that “as a matter of law UE had a duty to communicate to emergency personnel at the scene of this accident the information in its possession regarding the status” of a downed power line, so that the rescue workers could decide whether to risk approaching an overturned vehicle before the line was removed. (Majority Opinion, pp. 4-5).

The Dissent observed that the Majority had created a duty “unprecedented in Missouri law and with potentially dire consequences.” (Dissent, p. 13). The Dissent

would have held that AmerenUE “did not have a duty to advise...the rescue personnel at the scene of that accident that the power line was not energized and thus safe for removal, when there were conditions unknown to AmerenUE that could render this advisement false and thus place the lives of the rescue personnel in danger.” *Id.*

Defendant filed its motions for rehearing or transfer in the Court of Appeals on January 19, 2005. Following the denial of those motions on March 23, 2005, defendant filed its application for transfer in this Court on April 7, 2005. This Court granted transfer on March 30, 2005 and has jurisdiction to decide this appeal, pursuant to Article V, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

Procedural Background

This is an appeal from a summary judgment in favor of defendant Union Electric Company, doing business as AmerenUE (“AmerenUE”). Plaintiffs Theodore J. Hoffman and Deborah L. Hoffman seek damages for the death of Mrs. Hoffman’s daughter, Tiffany Hoffman, who was a passenger in an automobile that struck a utility pole off the left side of the road and overturned. The pole broke, and an electric line fell onto the undercarriage of the overturned car. Plaintiffs allege that Tiffany Hoffman sustained burn and pulmonary injuries that resulted in her death. (L.F. 14-18).

Plaintiffs initially asserted that AmerenUE “was negligent in failing to anticipate a collision with the pole and in failing to maintain devices known as fault protectors and

circuit breakers in proper working condition which, under the circumstances described above, would have broken the circuit and disconnected the electrical power in the downed line and thereby have prevented the death of the decedent.” (L.F. 15, ¶ 7).

Deposition testimony in February 2003 established that the circuit had “locked open” and the lines were de-energized within less than a minute. (L.F. 78-79, Ramer Depo., pp. 10, 15-16). On April 28, 2003, plaintiffs were granted leave to file a First Amended Petition, adding a second count. (L.F. 8, 14-18). In Count II, plaintiffs allege that AmerenUE knew within minutes after the accident that the circuit had locked open and that AmerenUE was negligent in not advising emergency personnel “that it was safe to render medical care to decedent at the scene of the crash.” (L.F. 16, 17 ¶¶ 10, 15).

On July 2, 2003, plaintiffs dismissed Count I of their Petition without prejudice, leaving Count II as their only remaining claim, and AmerenUE moved for summary judgment. (L.F. 23-197). The pleadings, depositions, affidavits and exhibits submitted to the trial court in connection with AmerenUE’s motion for summary judgment showed the following facts.

The Accident

On the evening of September 18, 1998, Tiffany Hoffman, Mike Jones and Ethalinda Herzog were passengers in a 1990 Pontiac Sunbird driven by Randi Simpson. (L.F. 53, Herzog Depo., pp. 37-38; L.F. 66, Rodenberg Depo., p. 8). Trooper Gilbert Lee Rodenberg of the Highway Patrol was working radar on US 69 and observed the Sunbird

exceeding the speed limit. (L.F. 58, Herzog Depo., p. 88; L.F. 66, Rodenberg Depo., p. 8). Trooper Rodenberg pulled out, overtook the vehicle and activated his lights and siren. (L.F. 66, Rodenberg Depo., p. 9). The driver would not pull over; instead, he sped up. (L.F. 54-55, 58-59, Herzog Depo., pp. 43-46, 92-93). Trooper Rodenberg stayed with the vehicle to the city limits of Excelsior Springs, where the Sunbird turned south, or right, on McCleary Road. (L.F. 66, Rodenberg Depo., p. 10). McCleary is a two-lane road, which at the time was paved for about .2 to .3 miles, and then became gravel, except for two strips of asphalt, perhaps one hundred feet each, on either side of a railroad crossing. (L.F. 66-67, Rodenberg Depo., pp. 10-11).

The Sunbird jumped the railroad tracks, became airborne, hit the ground, hit the left guardrail and bounced off to the right, bounced back on the left, went up and hit a utility pole in the grassy area off the left side of the road. (L.F. 55, 60, Herzog Depo., pp. 48, 97-98). The impact sheared off the pole at the ground level and moved it. (L.F.166, Merritt Depo., p. 20). The car overturned, spun in circles, and slid to a stop on the top of its roof. (L.F. 56, 60, Herzog Depo., pp. 49, 98). An electric line fell onto the undercarriage of the overturned car. (L.F. 70, Rodenberg Depo., p. 26).

Operation of Circuit Breaker and AmerenUE Response

The pole that broke carried eight lines: three 34.5 kv conductors; three 12.5 kv conductors (serving businesses and households in the immediate vicinity); a system neutral and a static wire for lightning protection. (L.F. 116-17, Merritt Depo., pp. 20-21).

The 34.5 kv circuit (three wires) and the 12.5 kv circuit (three wires) each were equipped with a three-phase circuit breaker. (L.F. 287, Brooks Depo., p. 40).

AmerenUE's regional dispatcher, Ron Ramer in Jefferson City, received an alarm on AmerenUE's computer monitoring system, with respect to the 34.5 kv circuit at 21:56:22, shortly after 9:56 p.m. (L.F. 78-79, Ramer Depo., pp. 10, 15-16). The monitoring system indicated that the circuit locked open, so that no current was being transferred over the wires, less than a minute later, at 21:57:08, just after 9:57 p.m. (L.F. 79, Ramer Depo., p. 15). Approximately four to five minutes later, Steve Littrell, an AmerenUE supervisor, called Ron Ramer from his home and advised that his lights were blinking, and he would call a troubleman. (L.F. 81, Ramer Depo., pp. 24-25). Mr. Ramer also received calls from customers that lights were out, indicating an outage on the 12.5 kv circuit in this area. (L.F. 81, Ramer Depo., p. 22).

Dean Merritt, an AmerenUE construction supervisor, had just walked into his home when he received a call from the Excelsior Springs police dispatcher around 22:06 (10:06 p.m.), advising that there had been an accident with people trapped in a car and lines reported down. (L.F. 113-14, Merritt Depo., pp. 8-10). Merritt immediately got in his truck and drove to the accident site. (L.F. 114, Merritt Depo., p. 11). The truck, Merritt's personal vehicle, was equipped with a radio that Merritt used to contact Ron Ramer and tell him there had been an accident. (L.F. 114, Merritt Depo., pp. 11-13; L.F. 81, 82, Ramer Depo., pp. 22, 26). Merritt asked Ramer to contact the on-call

supervisor and was told that Steve Littrell had been called and had called for a line service worker. (L.F. 114, Merritt Depo., pp. 11-12). Merritt asked that additional workers be called and said that he was headed to the scene. (L.F. 114, p. 12).

Merritt was the first AmerenUE employee at the scene, arriving around 22:25 (10:25 p.m.). (L.F. 116, 117, Merritt Depo., pp. 19, 24). He found that the pole was broken off at the base but was still standing and that the road phase of the 34.5 kv line (the 34.5 kv line closest to the road) was in contact with the 12.5 kv line and also was looped over the car. (L.F. 116-17, 122, Merritt Depo., pp. 20-22, 44). Because Merritt had come to the scene directly from his home and AmerenUE vehicles had not yet arrived, he had no equipment with which to remove the downed line. (L.F. 115, Merritt Depo. p. 15). He assessed the situation, then walked back and talked to the fire captain, inquired if one of the fire trucks had a fiberglass stick, received an affirmative response, walked back to the truck, got a stick, walked back down to the overturned car and removed the line at approximately 22:33 (10:33 p.m.), about eight minutes after he arrived. (L.F. 120, Merritt Depo., pp. 33-34). Mr. Merritt coiled the line up, using the stick, and did not touch the wire with his hands. (L.F. 165, 180-181). Emergency personnel then removed Tiffany Hoffman from the vehicle, and she was transported by helicopter from the accident site. (L.F. 349-50, Fales Depo., pp. 48-52). She died on October 15, 1998.

Plaintiffs' Expert's Testimony

Plaintiffs' electrical expert, Wayne Roelle, testified that in his opinion, to a reasonable degree of engineering certainty, AmerenUE's 34.5 kv system was properly designed, the protective devices on the system were appropriate, and all of the protective devices operated appropriately after the accident. (L.F. 138, Roelle Depo., pp. 58-59). He also has no criticism of Dean Merritt's timeliness in arriving at the scene and removing the line from the vehicle. (L.F. 136-37, Roelle Depo., pp. 52-53). Roelle, however, has two criticisms of AmerenUE. He believes that Ron Ramer should have called the police dispatcher after he spoke with Dean Merritt by radio and told the police dispatcher that the indications were that the 34.5 kv line was de-energized. (L.F. 131, 135, Roelle Depo., pp. 31-32, 47-48). He also believes that Dean Merritt, on arriving at the scene, should have told the emergency personnel that the downed line was de-energized, "and then it would be their call according to their own work practices what they would want to do." (L.F. 131, 134, Roelle Depo, pp. 31-32, 42-45). Mr. Roelle acknowledged that he would have to tell the emergency personnel that they could be injured or killed, but he felt that was a very remote possibility. (L.F. 134-35, Roelle Depo., pp. 43-44).

Mr. Roelle acknowledged that on the night of the accident Ramer did not know for sure whether the circuit breaker on the 12.5 kv circuit had operated, because it was not shown on his computer screen. (L.F. 132, 135, Roelle Depo., pp. 35-36, 47-48; L.F. 90, Ramer Depo., p. 64). Roelle also admitted that with the circuits opened, and even if the

switches had been opened, there is a possibility that a crossing line could fall or be flipped into the previously de-energized line, and that someone holding the line “would receive a shock and either be injured or killed.” (L.F. 131, 134, Roelle Depo., pp. 30, 41-42). In contrast, after Merritt removed the line from the car, there was no possibility of electrical injury to the rescue workers. (L.F. 134, Roelle Depo., p. 44).

Roelle also recognized that a pike pole, such as the one that Mr. Merritt used to remove the line, would not be cared for or used in the same way an electric utility would use a hot stick if the utility employee was going to work on a high voltage line. (L.F. 130, Roelle Depo., p. 28). A utility tests hot sticks periodically to make sure they can withstand voltage, and when not in use, the hot sticks are secured in an airtight, watertight compartment. (L.F. 130-31, Roelle Depo., pp. 28-29). Any contamination on the surface of a stick or pole would provide a path for electrical current to come right down to the operator’s hands. (L.F. 131, Roelle Depo., p. 29).

Despite his recognition of the potential that the line could be re-energized, Mr. Roelle felt that re-energization would be a very remote possibility and a “purely very accidental-type happening.” (L.F. 131, Roelle Depo., p. 30). He assumed that the emergency personnel, if told that the line was de-energized, would have gone ahead and tried to render assistance. (L.F. 133, Roelle Depo., pp. 39-40).

Firefighters' Testimony

One firefighter paramedic, Doug Fales, testified that he would have approached the vehicle if someone from the power company told him that “the power line was dead, no current on the power line.” (L.F. 348, Fales Depo., pp. 44-45). Mr. Fales was under the command of Joseph Lee Maddick, the fire captain. (L.F. 143-44, 178; L.F. 341, 352, Fales Depo, pp. 18, 59). Mr. Maddick explained that neither he nor his firefighters had training in the use of hot sticks or pike poles to remove electric lines. (L.F. 169-70, 174). Fiberglass pike poles, of the type Mr. Merritt used to remove the line, are used by firefighters to “pull sheet rock down out of ceilings in structure fires.” (L.F. 174). Mr. Maddick testified that even if he had been told by a utility employee that the line was dead and there was no current on the line, someone would have to “prove to me that that’s not a live line, because I am not going to injure any of my firefighters or anybody else doing something like that. It’s an unsafe scene.” (L.F. 168). He testified further that even if someone from the utility told him the line was dead, that person would “have to remove the line from the car” before treatment could be provided. (L.F. 169). Brad Randall, then a firefighter/EMT on an ambulance that arrived at the scene, also testified that he would not have rendered assistance until the line was removed, even if told that there was no current on the line. (L.F. 192, Randall Depo., pp. 29-30).

AmerenUE's Practices Concerning Downed Lines

Under AmerenUE's Workmen's Protection Assurance Policy, a worker is not to work on an electric line until switches have been opened, tags have been placed on the switches to tell people not to close them, and the lines have been grounded. (L.F. 84-86 Ramer Depo., pp. 34-36, 39-42; L.F. 117, Merritt Depo., pp. 23-24). This is also the practice in the electric utility industry. (L.F. 280-83, Brooks Depo., pp. 11-24).

The designed mechanism of operation of a three-phase circuit breaker is that when the breaker "locks open," all three of the conductors it protects are de-energized, under normal operating circumstances. (L.F. 287, 291, Brooks Depo., pp. 40, 53). As AmerenUE's expert testified, however, it "doesn't always happen that way." (L.F. 291, Brooks Depo., p. 53). There is a possibility of equipment malfunction in which the computer report shows that the circuit breaker is open, when one of the three contacts has stuck, so that one conductor remains energized. (L.F. 295, Brooks Depo., p. 69). Dean Merritt explained that because workers "cannot see the inner operations" of a mechanical device, such as a circuit breaker, they are taught not to "work against the mechanical device," in case there is still a hot phase, even though the breaker is showing lockout. (L.F. 119-20, Merritt Depo., pp. 32-33).

There is also the possibility that a circuit can become re-energized. (L.F. 294-95, Brooks Depo., pp. 68-70). Dean Merritt testified that he did not tell the emergency personnel that it was okay to approach the vehicle while the line was contacting it, because "they won't approach a vehicle with lines down until somebody clears it" and

because the line had “the potential to come back any time.” (L.F. 118, Merritt Depo., p. 27). Mr. Merritt explained that if another vehicle accident occurred down the road on a different circuit, that line could have fallen into this line, and that would be “a freak deal, but it could have happened.” (L.F. 119, Merritt Depo., p. 28). When asked whether, after the recloser shut off for the last time, “it was safe for these rescue people to approach the car and pull these folks out,” Mr. Merritt answered “No.” (L.F. 119, Merritt Depo., p. 30). AmerenUE’s expert, Rick Brooks, agreed, stating that “a downed utility line can be considered safe only when it is isolated and grounded.” (L.F. 297, Brooks Depo., p. 78). Mr. Brooks referenced National Electric Safety Code (NESC) Section 420-D, stating: “Employees shall consider electric supply equivalent [sic – should read “equipment”] and lines to be energized unless they are positively known to be de-energized.” (L.F. 284, Brooks Depo., pp. 27-28).

Ron Ramer testified that he had never directed or authorized firemen or policemen to use a hot stick to move a line because they probably would not be trained to do it, and he would not want to be responsible for “getting somebody hurt or killed or something.” (L.F. 87-88, Ramer Depo., pp. 52-53). Mr. Ramer explained that even when the circuit has locked open, it is possible for another line down the road to fall into it or for lightning to hit the line and energize it. (L.F. 88, Ramer Depo., pp. 55-56). He was aware of a situation in which a line had been re-energized and “just burned a couple of guys and one

of them happened to be a good friend of mine, so I know that happens.” (L.F. 88, Ramer Depo., p. 56).

In addition, there is the possibility that a customer’s generator can come on line in response to a power outage and re-energize a previously de-energized line. As AmerenUE’s expert, Rick Brooks, explained: “[A] generator can backfeed through a distribution transformer and re-energize the line at 12,500 volts, which is a specific hazard to anyone that might be touching the line at the time the generator does come on. It can cause death.” (L.F. 295, Brooks Depo., p. 10).

The Motion for Summary Judgment

AmerenUE moved for summary judgment (L.F. 23-26) on the ground that, as a matter of law, it had no duty to encourage emergency personnel to risk serious injury or death, risks that AmerenUE employees would not take, or to provide emergency personnel with some information from which they could try to decide whether to take such risks. AmerenUE further argued that plaintiffs’ electrical expert’s theory, that AmerenUE should have told the emergency personnel that the circuit was de-energized, was based simply on the expert’s personal opinion, which was insufficient to create a triable issue. In addition, AmerenUE noted that plaintiffs’ theory was based on the assumption that emergency personnel, if told that the circuit was de-energized, would have proceeded to extract Tiffany Hoffman from the vehicle before the line was removed from the car, but the fire captain’s testimony showed that he would not have put his

firefighters at risk, and would have required utility employees to remove the line. (L.F. 23-26).

Plaintiffs responded to the motion and submitted additional exhibits and depositions, including the deposition of AmerenUE's expert, Rick Brooks, that had been taken after the motion was filed. (L.F. 198-108, 278-309). Mr. Brooks referred to OSHA regulations and provisions of the National Electric Safety Code ("NESC") and expressed the opinion that Dean Merritt's and Ron Ramer's actions were consistent with good safety practices and accepted utility operating procedures. (L.F. 296, Brooks Depo., pp. 73-76). He testified:

Specifically, the obligation of the electric utility and electric utility personnel to protect the public, to safeguard the public, to take into account the safety of the public when operating the electric system further points to the appropriateness of his not telling the EMS that the line was deenergized based upon both the NESC an [sic] OSHA requirements that the line be considered to be energized until such certain procedures had been performed, that being isolation and grounding. . . . He just absolutely could not have given those on the scene the indication that this line was deenergized and safe because it

wasn't. It wasn't proven to be and the rules require that it be proven to be.

(L.F. 296, Brooks Depo., p. 76).

After briefing and argument, the court, on February 26, 2004, granted summary judgment in favor of AmerenUE. (L.F. 439-46). The court noted that Wayne Roelle's opinion was not based upon any regulations or industry standards and that, under § 490.065 RSMo., an expert's opinion "must be based upon established standards and not upon a personal standard." (L.F. 444). The court also observed that both fire captain Maddick and Brad Randall, the firefighter/EMT in charge of the ambulance, testified that they would not have approached the vehicle so long as the line was present, even if told the line was de-energized. (L.F. 444). The court noted that Doug Fales testified that he would have approached if told by AmerenUE that the line was de-energized, but that he was under the command of Maddick, who considered the scene to be unsafe until the line was removed and did not want to risk any emergency personnel getting injured. The court also observed that "Fales did not testify that he would have approached if told there was still a possibility that he could be injured or killed." (L.F. 445). The court concluded that "the courts have never held that the law imposes a duty on an electrical company to encourage emergency personnel to take risks that an electrical company's own employees, by their work practices, are forbidden to take." (L.F. 446).

Plaintiffs timely filed their notice of appeal on March 8, 2004. (L.F. 447). After briefing and argument, the Missouri Court of Appeals, Eastern District, issued its opinion

on January 4, 2005, reversing the summary judgment and remanding the case to the trial court for further proceedings. The Majority Opinion held that “[a]s a matter of law, UE had a duty to communicate to emergency personnel at the scene of this accident the information in its possession regarding the status of the power line.” (Majority Opinion, p. 5). Specifically, the court held that AmerenUE should have informed the emergency personnel “that the circuits were locked open and de-energized, that the line could be re-energized under certain circumstances, that UE employees, as a practice, do not work on a line until it has been grounded and the circuit tagged so as to prevent anyone from manually closing an open circuit.” (Majority Opinion, p. 4).

The Majority held that, with this information, the emergency personnel could have assessed the risks of proceeding with the rescue prior to AmerenUE’s arrival. (Majority Opinion, pp. 4-5). The Majority also held that paramedic Doug Fales’ testimony was “sufficient to show that, had UE provided emergency personnel with the information in its possession, at least one of the workers on the scene would have been willing to proceed with assisting Hoffman without waiting for UE to remove the line.” *Id.* In addition, the Majority stated that “any speculation about what he would have done if told of the remote possibility that the line could re-energize” goes only to the weight of Mr. Fales’ testimony, as does Captain Maddick’s testimony that the line would have to be removed, regardless of what anyone said, because he was not going to injure any of his firefighters or anybody else. (Majority Opinion, p. 6).

The Dissent noted that the Majority Opinion created a duty “unprecedented in Missouri law and with potentially dire consequences.” (Dissent, p. 13). The Dissent stated that imparting the information required by the Majority would “inevitably cause some rescue workers to attempt to remove a re-energized line in the future,” with disastrous results. The Dissent would have held that AmerenUE “did not have a duty to advise by radio or telephone or some other remote means, the rescue personnel at the scene of that accident that the power line was not energized and thus safe for removal, when there were conditions unknown to AmerenUE that could render this advisement false and thus place the lives of the rescue personnel in danger.” *Id.*

AmerenUE timely filed its motions for rehearing or transfer, which were denied. AmerenUE then timely filed its application for transfer in this Court, which granted the application on April 26, 2005.

POINTS RELIED ON

- I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF AMERENUE, BECAUSE AS A MATTER OF LAW, AMERENUE HAD NO DUTY TO INFORM THE EMERGENCY PERSONNEL THAT THE CIRCUIT WAS DE-ENERGIZED, IN THAT THE UNCONTROVERTED FACTS SHOWED THAT AMERENUE WOULD NOT TREAT THE CIRCUIT AS DE-ENERGIZED SINCE THERE REMAINED A POSSIBILITY THAT THE CIRCUIT WAS OR COULD BECOME ENERGIZED WITH RESULTANT

INJURY TO EMERGENCY PERSONNEL WHO CONTACTED THE LINE OR THE VEHICLE, AND MISSOURI LAW DOES NOT IMPOSE ON ELECTRIC UTILITIES A DUTY TO PROVIDE PERSONS WITH LITTLE OR NO ELECTRICAL TRAINING INFORMATION FROM WHICH THEY CAN DECIDE TO TAKE RISKS ASSOCIATED WITH THE PROPERTIES OF ELECTRICITY.

Utilicorp United, Inc. v. Director of Revenue, 75 S.W.3d 725 (Mo. banc 2001)

Foote v. Scott-New Madrid-Mississippi Elec. Co-op., 359 S.W.2d 40 (Mo. App. 1962)

Virgin v. Hopewell Center, 66 S.W.3d 21 (Mo. App. 2001)

City of St. Louis v. Jameson, 972 S.W.2d 302 (Mo. App. 1998)

- II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF AMERENUE FOR THE ADDITIONAL REASON THAT PLAINTIFF'S THEORY OF LIABILITY WAS BASED ON PURPORTED EXPERT TESTIMONY THAT DID NOT MEET THE REQUIREMENTS OF SECTION 490.065 RSMO, IN THAT MR. ROELLE'S TESTIMONY THAT AMERENUE EMPLOYEES SHOULD HAVE TOLD THE EMERGENCY PERSONNEL THAT THE LINE WAS DE-ENERGIZED AND THAT IT WOULD THEN BE UP TO THE EMERGENCY PERSONNEL TO DECIDE

WHAT THEY WANTED TO DO WAS BASED SOLELY ON HIS PERSONAL OPINION, RATHER THAN ON ANY ESTABLISHED STANDARD.

State Board of Registration for the Healing Arts, 123 S.W.3d 146 (Mo. banc 2003)

Dine v. Williams, 830 S.W.2d 453 (Mo. App. 1992)

Section 490.065, RSMo 2002

III. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF AMERENUE FOR THE FURTHER REASON THAT PLAINTIFFS CANNOT ESTABLISH CAUSATION, BECAUSE PLAINTIFFS CANNOT SHOW THAT EMERGENCY PERSONNEL WOULD HAVE PROVIDED TREATMENT EARLIER, EVEN IF TOLD THAT THE LINE WAS DE-ENERGIZED, IN THAT THE FIRE CAPTAIN TESTIFIED THAT THE SCENE WAS UNSAFE, HE WOULD NOT PUT HIS FIREFIGHTERS AT RISK, AND UTILITY PERSONNEL WOULD HAVE TO REMOVE THE LINE, AND NO EMERGENCY PERSONNEL TESTIFIED THAT THEY WOULD HAVE APPROACHED THE LINE IF TOLD THERE WAS STILL SOME RISK THAT THEY COULD BE INJURED OR KILLED, INFORMATION THAT PLAINTIFF'S EXPERT ACKNOWLEDGED THEY WOULD HAVE TO BE GIVEN.

City of St. Louis v. K & K Investments, Inc., 21 S.W.3d 891 (Mo. App. 2000)

Martin v. City of Washington, 848 S.W.2d 487 (Mo. banc 1993)

Stanley v. City of Independence, 995 S.W.2d 485 (Mo. banc 1999)

Zafft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. banc 1984)

ARGUMENT

Standard of Review

Review of a summary judgment is essentially *de novo*. The court uses the same criteria that the trial court used in its initial determination of the propriety of the judgment. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). A defendant may establish a right to judgment by showing that the plaintiff is not able to produce sufficient evidence to establish one or more of the essential elements of the plaintiff's claim. *Id.* at 378. Summary judgment will be upheld on appeal if there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. *Id.* at 377; *American Standard Ins. Co. v. Hargrave*, 34 S.W.3d 88, 89 (Mo. banc 2001).

In response to a motion for summary judgment, the non-movant cannot rest upon mere allegations or denials but, by affidavit or otherwise, must set forth specific facts showing that there is a genuine issue for trial. *ITT Commercial Finance Corp.*, 854 S.W.2d at 381.

The central issue on this appeal is whether plaintiffs set forth specific facts which, under the law, would impose on AmerenUE a duty to tell the emergency personnel that it was "safe" to approach the line, when AmerenUE personnel did not consider it safe and when industry practice and AmerenUE's own work practices required the line to be treated as energized until it had been grounded. The courts have never imposed such a

duty, and its imposition would be inconsistent with and contrary to the Missouri courts' repeated holdings concerning the duties of an electric utility.

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF AMERENUE, BECAUSE AS A MATTER OF LAW, AMERENUE HAD NO DUTY TO INFORM THE EMERGENCY PERSONNEL THAT THE CIRCUIT WAS DE-ENERGIZED, IN THAT THE UNCONTROVERTED FACTS SHOWED THAT AMERENUE WOULD NOT TREAT THE CIRCUIT AS DE-ENERGIZED SINCE THERE REMAINED A POSSIBILITY THAT THE CIRCUIT WAS OR COULD BECOME ENERGIZED WITH RESULTANT INJURY TO EMERGENCY PERSONNEL WHO CONTACTED THE LINE OR THE VEHICLE, AND MISSOURI LAW DOES NOT IMPOSE ON ELECTRIC UTILITIES A DUTY TO PROVIDE PERSONS WITH LITTLE OR NO ELECTRICAL TRAINING INFORMATION FROM WHICH THEY CAN DECIDE TO TAKE RISKS ASSOCIATED WITH THE PROPERTIES OF ELECTRICITY.

Plaintiffs Did Not Demonstrate the Existence of a Triable Issue

As the Dissent observed (at p. 4), “[n]egligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.” (citing *Gibson v. Brewer*, 952 S.W.2d 239, 246 (Mo.banc 1997)). To make a submissible case of negligence, a plaintiff must establish: (1) the existence of a duty

owed by the defendant to the plaintiff; (2) the defendant's failure to perform the duty; and (3) that the defendant's breach of duty was the proximate cause of the plaintiff's injury. *See Martin v. City of Washington*, 848 S.W.2d 487, 493 (Mo. banc 1993).

Whether a duty exists is purely a question of law. *See Like ex rel. Like v. Glaze*, 126 S.W.3d 783, 785 (Mo. App. 2004). A duty is "generally measured by whether or not a reasonably prudent person would have anticipated danger and provided against it." *Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc.*, 700 S.W.2d 426, 431 (Mo. banc 1985). In determining whether to impose a duty, the courts "must weigh the foreseeability of the injury, the likelihood of the injury, the magnitude of the burden of guarding against it and the consequences of placing that burden on the defendant." *Rothwell v. West Central Elec. Co-op., Inc.*, 845 S.W.2d 42, 43 (Mo. App. 1992). The trial court properly granted summary judgment for AmerenUE because, as a matter of law, plaintiffs cannot establish that AmerenUE owed or breach a duty to Tiffany Hoffman.

Plaintiffs make no complaint about the design or operation of AmerenUE's 34.5 kv system, including its protective devices, or about the speed with which AmerenUE personnel arrived at the scene and removed the line from the vehicle. It is undisputed that AmerenUE employee Dean Merritt removed the line about eight minutes after his arrival at the scene. (L.F. 30, ¶ 24; L.F. 202, ¶ 24). As AmerenUE's expert testified, Mr. Merritt took some personal risks in using a fiberglass pike pole belonging to

the fire department rather than waiting for AmerenUE's own tested, rated "hot work equipment" to arrive. (L.F. 293, Brooks Depo., p. 62).

Plaintiffs' sole contention is that AmerenUE, although aware of a possibility that the line could remain energized or become reenergized, had a duty to tell emergency personnel "that it was safe to render medical care to decedent at the scene of the crash" while the line remained in contact with the car. (L.F. 17, ¶ 15). The courts have never recognized such a duty. Advising emergency personnel that it was "safe" to approach the line would have been contrary to AmerenUE's own work practices, to the industry practice of treating an electric line as energized until the line has been grounded, and to AmerenUE's own belief that it was not safe to approach the line. (L.F. 117,119, Merritt Depo., pp. 23-24, 30; L.F. 284, Brooks Depo., pp. 27-28). That practice is based on industry experience that a line may be or become energized even after the computer system shows the circuit breaker as having locked open. (L.F. 88, Ramer Depo., pp. 55-56; L.F. 134, Roelle Depo., pp. 41-42; L.F. 294-95, Brooks Depo., pp. 68-71). Imposing a duty to provide information enabling others to approach downed lines before the utility has implemented its safe work practices would be inconsistent with industry practice, federal regulations and Missouri law.

Missouri courts have repeatedly recognized that electricity, while extremely useful, can also present a risk of sudden injury or death. *See Utilicorp United, Inc. v. Director of Revenue*, 75 S.W.3d 725, 728 (Mo. banc 2001) ("Electricity can be touched,

and when a person does so and thereby completes an electrical circuit, it may be the last earthly sensation he or she feels.”)

In accord with this recognition, the courts have held that an electric utility must exercise the highest degree of care either to insulate its electric lines adequately or to isolate them effectively from reasonably foreseeable contact. *See Foote v. Scott-New Madrid-Mississippi Elec. Coop.*, 359 S.W.2d 40, 43 (Mo. App. 1962). The courts have never held that an electric utility acts negligently by having its own personnel remove a downed line, rather than encouraging untrained persons to approach the line before the possibility of danger has been eliminated.

AmerenUE Had No Duty to Inform Emergency Personnel That It Was Safe to Approach the Line When AmerenUE Employees Believed It was Unsafe

There are absolutely no facts to support plaintiffs’ claim that “Union Electric knew rescue personnel could safely render medical treatment to Tiffany Hoffman.” (App. Brf., p. 16). The uncontradicted facts show that AmerenUE had no such knowledge. Both Ron Ramer, the AmerenUE dispatcher, and Dean Merritt, the AmerenUE construction supervisor, recognized risks to emergency personnel who might approach the vehicle before the line was removed. Neither could tell them it was safe to approach.

Ron Ramer testified that he had never authorized firemen or policemen to use a hot stick to remove any electric line, because they probably would not be trained to do it, and he would not want to be responsible for “getting somebody hurt or killed or

something.” (L.F. 87, Ramer Depo., pp. 52-53). Dean Merritt testified that he did not tell the emergency personnel at the scene that it was okay to approach the vehicle, because the line had “the potential to come back any time” and could have become re-energized “if there was another vehicle accident on another - down the road on a different circuit or something.” (L.F. 118, Merritt Depo., pp. 27-28). Mr. Merritt testified that that would be “a freak deal, but it could have happened.” (L.F. 118, Merritt Depo., p. 28).

When asked whether, after the recloser shut off for the last time, “it was safe for these rescue people to approach the car and pull these folks out,” Mr. Merritt replied unequivocally, “No.” (L.F. 119, Merritt Depo., p. 30). He explained that because workers “cannot see the inner operations” of a mechanical device, such as a circuit breaker, they are taught not to “work against the mechanical device,” in case there is still a hot phase, even though the breaker is showing lockout. (L.F. 119-20, Merritt Depo., pp. 32-33).

Plaintiffs contend that AmerenUE was negligent in not advising emergency personnel that it was “safe” to approach the line. There is no legal support for that theory. It is now apparent, in retrospect, that the circuit breakers operated properly and there is no indication that the line was re-energized. (L.F. 287, 294, Brooks Depo., pp. 39, 66-68). On the night of the accident, however, Dean Merritt and Ron Ramer could not have assured emergency personnel either that there was no equipment malfunction or

that the line would not become re-energized. Telling them it was “safe” would have been highly irresponsible.

Ron Ramer had only the information provided by his computer screen, which showed only the operation of the circuit on the 34.5 kv line – not the circuit on the 12.5 kv line. (L.F. 90, Ramer Depo., p. 64). Dean Merritt, because he went directly to the accident site, had not gone to either substation to verify that the circuit breakers, in fact, had opened. (L.F. 121, Merritt Depo., p. 37). Only eight minutes elapsed between his arrival at the scene and his removal of the line. Plaintiffs’ expert, Wayne Roelle, acknowledged that he would not expect Mr. Merritt to be able to visualize every line crossing to eliminate the possibility of another line falling into this one. Mr. Roelle testified that “under those conditions to run through his mind all the potential crossing sites, I don’t think he could have done it probably.” (L.F. 137, Roelle Depo., p. 54).

Moreover, there were other possible scenarios that could have resulted in the line’s being energized. In addition to equipment malfunctions, induced voltage and an energized line falling into these lines, there was the possibility that a customer’s generator would come on line in response to a power outage and re-energize a previously de-energized line. There was no way that Ron Ramer or Dean Merritt – or any other AmerenUE employee – could have ruled out that possibility before grounding and isolating the line. As defendant’s expert, Rick Brooks, explained: “[A] generator can backfeed through a distribution transformer and put, re-energize the line at 12,500 volts,

which is a specific hazard to anyone that might be touching the line at the time the generator does come on. It can cause death.” (L.F. 295, Brooks Depo., p. 10).

Plaintiffs rely on *Lopez v. Three Rivers Electric Coop., Inc.*, 26 S.W.3d 151 (Mo. banc 2000) and *Pierce v. Platte-Clay Elec. Coop., Inc.*, 769 S.W.2d 769 (Mo. App. 1989) for the proposition that AmerenUE “had a duty to communicate information that was solely in its possession,” *i.e.*, that the line was de-energized. (App. Brf., p. 15). Neither case announces such a holding. Both decisions simply apply the common law principle that one may owe a duty of ordinary care to mark obstructions that are not readily visible. In *Pierce*, the obstruction was an unmarked guy wire that was struck by a tractor. In *Lopez*, it was an unmarked overhead line that had been struck 20 years earlier by a fixed-wing plane and was struck again by a helicopter. In each case, the court recognized only a duty of ordinary care to warn of the presence of an obstruction that was not readily apparent.

The Majority Opinion’s reliance (at p. 5, n.2) on *Grattan v. Union Electric Co.*, 151 S.W.3d 59 (Mo. banc 2004) is equally misplaced. This Court held in *Grattan* that once an electric line falls, an electric utility has a duty “to discover the danger and shut off the power within a reasonable time.” *Id.* at 65. Neither *Grattan*, *Lopez*, nor *Pierce* in any way suggests that utility employees could be found negligent for failing to tell emergency personnel that a downed line was “de-energized,” when the utility personnel did not know for certain that the line was de-energized and did not consider it to be safe.

The Record Does Not Show the Evidence of Foreseeability

Required for Imposition of a Duty

“Foreseeability is established when a defendant is shown to have actual or constructive knowledge that there is some probability of injury such that an ordinary person would take precautions to avoid it.” *Chemical Design, Inc. v. American Standard, Inc.*, 847 S.W.2d 488, 490 (Mo. App. 1993). The Majority Opinion (at p. 4) holds that it was “foreseeable that emergency personnel would delay their attention to the victims of this accident until being informed of the status of the electric current in the power line.” There was no evidence, however, that the emergency personnel were waiting to be informed of the status of the electric current, nor was there any evidence that AmerenUE could have anticipated that emergency personnel would have been willing to attempt a rescue before the line was removed.

All of the testimony was that the emergency personnel were waiting for the removal of the line – not for information. The only evidence of what AmerenUE could have anticipated was Dean Merritt’s testimony that rescue personnel “won’t approach a vehicle with lines down until somebody clears it” and Ron Ramer’s testimony that firemen or the police “probably in no way would be trained” to use a hot stick, and that he would not want to be responsible for “getting somebody hurt or killed or something.” (L.F. 118, Merritt Depo., p. 27; L.F. 87-88, Ramer Depo., pp. 52-53).

The firefighters' testimony was consistent with AmerenUE's expectations. Fire Captain Maddick testified that neither he nor his firefighters had training in the use of hot sticks or pike poles to remove electric lines and that even if someone from the utility told him the line was dead, the line would have to be removed from the car before treatment could be provided. (L.F. 169-70, 174). Firefighter/EMT Brad Randall also testified that he would not have rendered assistance until the line was removed, even if told that there was no current on the line. (L.F. 192, Randall Depo., pp. 29-30). Although paramedic Doug Fales said that he would have approached the vehicle if someone from the power company had told him that "the power line was dead, no current on the power line" (L.F. 348, Fales Depo., pp. 44-45), he did not testify that he would have approached the line if AmerenUE had provided the additional information concerning risks, which the Majority Opinion holds was required. There was likewise no evidence from which a jury could find that AmerenUE should have anticipated Mr. Fales' willingness to approach the line, contrary to his Fire Captain's safety practices. In short, the record fails to show the evidence of foreseeability that is necessary for the imposition of a duty.

Imposing on a Utility a Duty to Inform Rescue Workers that Circuits Have Locked

Open and the Line is "De-Energized" is Contrary to Public Policy

Plaintiffs urge the Court to require electric utility employees to inform rescue workers confronted with a downed electric line at an accident scene that the circuits are locked open and the line is de-energized (App. Brf., p. 18) – even though the utility

employees cannot say with certainty that the line is in fact de-energized. The Court of Appeals adopted plaintiffs' position and held, as a matter of law, that AmerenUE had a duty to inform rescue personnel "that the circuits were locked open and de-energized, that the line could be re-energized under certain circumstances, that UE employees, as a practice, do not work on a line unless it has been grounded and the circuit tagged so as to prevent anyone from manually closing an open circuit." (Majority Opinion, pp. 4-5).

The imposition of such a duty is contrary to public policy. It exposes emergency personnel to a risk of serious injury or death from which the utility protects its own employees. It is undisputed that AmerenUE employees, for their own safety and the safety of others, are trained to treat a line as energized until the switches are opened and the line is mechanically grounded to disconnect it from energy sources. (L.F. 117, Merritt Depo., p. 24; L.F. 283, Brooks Depo., pp. 21-22). Requiring an electric utility, as a matter of law, to take a different approach with emergency personnel is contrary to public policy.

Had Mr. Ramer or Mr. Merritt made the statements to which they testified in deposition – including Mr. Ramer's knowledge of an incident in which people were burned by a re-energized line – it is unimaginable that rescue workers would have approached the line prior to its removal by AmerenUE personnel. The Majority Opinion, however, requires utility personnel to state affirmatively that the circuit is "de-energized" when the utility employees do not know that to be true. Although the Majority Opinion

contemplates that the utility would mention its own work practices and the possibility of re-energization, it scripts a neutral-sounding communication that minimizes the risks known to utility employees.

The Majority Opinion also ignores the dangers of communicating such information by radio or telephone, when the utility employees have not had the opportunity to view and assess conditions at the scene. Under emergency conditions, a rescue worker might well hear only the statement that the circuits are locked open and de-energized and could then approach a re-energized line without waiting for the warning about possible re-energization. A rescue worker, untrained in working with electricity, might also try to distinguish, as plaintiffs do, between the risks involved working on a line (in which case plaintiffs concede that tagging out, grounding and isolating the line are appropriate) and the risks in moving a line at an accident scene. The fallacy in that approach is that if the line has remained energized or becomes re-energized, the length of time one is exposed to it is immaterial. As experts for both plaintiffs and defendant recognized, a single contact with an energized line can cause injury or death. (L.F. 131, 134, Roelle Depo., pp. 30, 41-42; L.F. 295, Brooks Depo., p. 10).

In deciding whether to impose a new duty, the courts have considered the effects of such an imposition on public policy and on the public interest. *See Virgin v. Hopewell Center*, 66 S.W.3d 21, 25-27 (Mo. App. 2001) (declining, on public policy grounds, to impose on psychiatrists a duty to warn the public concerning a patient); *City of St. Louis*

v. Jameson, 972 S.W.2d 302, 305 (Mo. App. 1998) (declining, for policy reasons, to allow drivers to second-guess whether an emergency vehicle, with flashing lights, is actually responding to an emergency). Creating a duty to provide information from which rescue workers, untrained in working with electrical lines, can decide to assume the risk of approaching such lines before trained utility personnel have eliminated the danger, is likely to have calamitous consequences for emergency personnel. (*See* Dissent, p. 7). As the Dissent recognized: “Imparting such information will inevitably cause some rescue workers to attempt to remove a re-energized line in the future. Such consequences will be disastrous.” *Id.*

It is undisputed that on the night of the accident, neither Ron Ramer, in his office in Jefferson City, nor Dean Merritt, on his way to the accident scene (or even upon his arrival), could rule out the possibility that the line was, or could become, energized. As AmerenUE’s expert observed: “There could be no audible and no visible indication and the line could still be energized.” (L.F. 294, Brooks Depo., p. 65). Providing the information urged by plaintiffs and required by the Majority Opinion is likely to cause some rescue workers to attempt removal of a line which, despite the opening of a circuit breaker, is energized. The injury or death of a rescue worker at the scene of an accident would not only be disastrous for that individual, but would be likely to slow or hamper the initial rescue effort and would also be a loss to the community at large. The courts

should not require utilities to expose rescue workers to safety risks from which the utilities protect their own employees.

Although plaintiffs argue (App. Brf., p. 13) that the magnitude of the burden on AmerenUE would be low because all it would have to do would be “communicate information about the status of the power line,” this view ignores the risk of serious injury or death to the rescue workers and AmerenUE’s potential liability to them or their survivors. Neither Ron Ramer nor Dean Merritt considered it safe for the rescue workers to approach the line after the circuit breaker operated, but before the line had been isolated. Both expressed concern about the safety of the rescue workers. Ramer testified explicitly that he would not want to be responsible for “getting somebody hurt or killed or something.” (L.F. 88, Ramer Depo., p. 53). Merritt testified unequivocally that it was not safe for the rescue people to approach the car and pull folks out, and recognized that the line had “the potential to come back any time.” (L.F. 118-19, Merritt Depo., pp. 27-28, 30).

The Majority Opinion requires utility employees – like Ramer and Merritt – to tell rescue workers that a line is “de-energized” despite the utility employees’ admitted inability to ascertain that the line is de-energized until it has been grounded and isolated and despite the utility workers’ belief that contact with the line is dangerous. This requirement subjects utilities to conflicting duties and liabilities. On the one hand, the utility risks liability to accident victims or their survivors if no rescue is effected. On the

other, it may be liable to rescue workers or their survivors if an attempted rescue results in a rescue worker's injury or death. Imposing a duty to provide information "about the status of the power line" (Majority Opinion p. 4) puts electric utilities in the untenable position of being required, within a short period of time, under emergency conditions, without having actually observed the conditions at the scene of the accident, and contrary to their own safe work practices, to provide rescue workers with sufficient telephoned or radioed information about the electrical system and the properties of electricity to enable them to decide whether to risk attempting a rescue before trained personnel arrive. The communication advocated by plaintiffs and required as a matter of law by the Majority Opinion is "more akin to reckless endangerment of the rescue personnel than fulfillment of a duty." (Dissent, p. 8). Requiring such a communication is contrary to public policy.

The Duty Argued for by Plaintiffs and Imposed by the Majority Opinion
is Contrary to Prior Precedent

The Missouri courts have held consistently that, because of the dangers associated with electricity, electric utilities have the duty to exercise the highest degree of care either to insulate their lines adequately or to isolate them effectively from reasonably foreseeable contact. *See, e.g., Grattan v. Union Electric Co.*, 151 S.W.3d 59, 63 (Mo. banc 2004); *Gladden v. Missouri Public Service Co.*, 277 S.W.2d 510, 515 (Mo. 1955); *Foote v. Scott-New Madrid-Mississippi Elec. Coop.*, 359 S.W.2d 40, 43 (Mo. App. 1962). As the court observed in *Merrick v. Southwest Electric Coop.*, 815 S.W.2d 118, 122 (Mo.

App. 1991), “[t]he test of foreseeability of injury in these cases is whether, in the exercise of the highest degree of care, the electric company reasonably could have anticipated that some injury was likely to have occurred to one lawfully near its transmission line.”

Contrary to these consistent holdings, plaintiffs and the Majority Opinion minimize this long-established duty in favor of a newly-created duty of ordinary care to “provide information.” Although plaintiffs and the Majority Opinion suggest that the risk of injury to the firefighters was “remote” and therefore did not require the taking of the precautions institutionalized in AmerenUE’s safety practices, the exercise of the highest degree of care required AmerenUE to do exactly what it did – remove the line, using its own trained personnel, before advising others that it was safe to approach the car. To do otherwise would expose emergency personnel to serious injury or death and AmerenUE to liability.

As a matter of law, AmerenUE had no duty to tell emergency personnel that the line was “de-energized” or “that it was safe to render medical care to Decedent at the scene of the crash” before AmerenUE’s employee removed the line from the vehicle. Imposing such a duty would erode the law’s requirement that utilities must exercise the highest degree of care to insulate or isolate their electric lines. Creating even a slight risk of injury or death to emergency personnel would not serve the purposes of public safety.

Summary judgment was properly entered in favor of AmerenUE, because it did not owe the duty plaintiffs seek to impose. The summary judgment should be affirmed.

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF AMERENUE FOR THE ADDITIONAL REASON THAT PLAINTIFF'S THEORY OF LIABILITY WAS BASED ON PURPORTED EXPERT TESTIMONY THAT DID NOT MEET THE REQUIREMENTS OF SECTION 490.065 RSMO, IN THAT MR. ROELLE'S TESTIMONY THAT AMERENUE EMPLOYEES SHOULD HAVE TOLD THE EMERGENCY PERSONNEL THAT THE LINE WAS DE-ENERGIZED AND THAT IT WOULD THEN BE UP TO THE EMERGENCY PERSONNEL TO DECIDE WHAT THEY WANTED TO DO WAS BASED SOLELY ON HIS PERSONAL OPINION, RATHER THAN ON ANY ESTABLISHED STANDARD.

Although the determination of whether a duty exists is a question of law for the court, and therefore not dependent on expert testimony, plaintiffs relied upon Mr. Roelle's opinion to support their claim that AmerenUE breached a duty to Tiffany Hoffman.

The Missouri statutes, at § 490.065 RSMo 2002, provide that "in any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise." § 490.065, RSMo (2002). *See also State Board of Registration for the Healing Arts*, 123 S.W.3d 146, 156 (Mo. banc 2003).

Mr. Roelle's opinion, however, is not based on any regulations or industry standards; rather it is simply his personal view. While § 409.065 "permits an expert to give testimony in opinion form ... the opinion must be based upon the established standard of care and not upon a personal standard." *Dine v. Williams*, 830 S.W.2d 453 (Mo. App. 1992).

In this case, there was no statutory or common law support for plaintiffs' theory that AmerenUE breached a duty to Tiffany Hoffman by not telling the rescue workers that the line was "de-energized." The courts have not recognized a general duty to "provide information." In fact, the plaintiff in *Virgin v. Hopewell Center*, 66 S.W.3d 21 (Mo. App. 2001) urged the imposition of a duty to provide information (about the potential danger posed by a psychiatric patient), and the court declined to do so, for reasons of public policy.

In this case, Mr. Roelle's opinion provided the only support for plaintiffs' theory that AmerenUE breached a duty of care. Mr. Roelle's personal opinion is insufficient to create a triable issue of breach of duty, and the court properly granted summary judgment in favor of AmerenUE for this additional reason.

III. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF AMERENUE FOR THE FURTHER REASON THAT PLAINTIFFS CANNOT ESTABLISH CAUSATION, BECAUSE PLAINTIFFS CANNOT SHOW THAT EMERGENCY PERSONNEL WOULD HAVE PROVIDED

TREATMENT EARLIER, EVEN IF TOLD THAT THE LINE WAS DE-ENERGIZED, IN THAT THE FIRE CAPTAIN TESTIFIED THAT THE SCENE WAS UNSAFE, HE WOULD NOT PUT HIS FIREFIGHTERS AT RISK, AND UTILITY PERSONNEL WOULD HAVE TO REMOVE THE LINE, AND NO EMERGENCY PERSONNEL TESTIFIED THAT THEY WOULD HAVE APPROACHED THE LINE IF TOLD THERE WAS STILL SOME RISK THAT THEY COULD BE INJURED OR KILLED, INFORMATION THAT PLAINTIFF'S EXPERT ACKNOWLEDGED THEY WOULD HAVE TO BE GIVEN.

A summary judgment will be affirmed on any ground supported by the record.

See ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 387-388 (Mo. banc 1993); *City of St. Louis v. K & K Investments, Inc.*, 21 S.W.3d 891, 893 (Mo. App. 2000). Causation is one of the essential elements of a negligence claim. *See Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 244 (Mo. banc 1984) (“Actionable negligence requires a causal connection between the conduct of the defendant and the resulting injury to the plaintiff.”); *Morton v. Mutchnick*, 904 S.W.2d 14, 16 (Mo. App. 1995) (“In Missouri, causation is an essential element of a cause of action for wrongful death.”).

When a plaintiff cannot produce evidence from which the trier of fact could find that the alleged negligence of the defendant proximately caused the injury or death, the

defendant is entitled to summary judgment. *See Martin v. City of Washington*, 848 S.W.2d 487, 493-94 (Mo. banc 1993) (affirming summary judgment because plaintiffs could not establish causation). To establish a triable issue of causation in the present case, plaintiffs had to point to specific facts showing that the emergency personnel, if given the information their expert said should have been provided, would have removed Tiffany Hoffman from the vehicle without waiting for AmerenUE to remove the line, and that her death would have been prevented. They failed to meet that burden.

Although Mr. Roelle assumed that the emergency personnel would have approached the vehicle if told by someone from AmerenUE that the line was de-energized, the record does not support his assumption. The fire captain, Joseph Lee Maddick, testified that even if he had been told by a utility employee that the line was dead and there was no current on the line, someone would have to “prove to me that that’s not a live line, because I am not going to injure any of my fire fighters or anybody else doing something like that. It’s an unsafe scene.” (L.F. 168). He testified further that even if someone from the utility told him the line was dead, that person would “have to remove the wire from the car” before emergency personnel would provide treatment. (L.F. 169).

Plaintiffs and the Majority Opinion rely on paramedic Doug Fales’ answer “Yes, sir” to a question whether he would have approached the vehicle if someone from the utility had told him the “the power line is dead, no current on the line.” (L.F. 348, Fales

Depo., pp. 44-45). Fales, however, was under the command of Captain Maddick. Moreover, Fales did not testify that he would have approached the line if told that there was any risk of injury or death from the line's remaining or becoming energized. Plaintiffs' expert, Wayne Roelle, acknowledged that that information would have to be provided. (L.F. 134, Roelle Depo., pp. 42-43).

The Majority Opinion inverts the burden of proof on causation, by holding that Fales' testimony was sufficient, and that "any speculation about what he would have done if told of the remote possibility that the line could re-energize" goes only to the weight of his testimony. (Majority Opinion, p. 6). The Majority also characterized as going only to the weight of the testimony Captain Maddick's statement that even if he had been told by a utility employee that the line was dead and there was no current on the line, someone would have to "prove to me that that's not a live line, because I am not going to injure any of my firefighters or anybody else doing something like that." *Id.*

This Court in *Martin v. City of Washington*, 848 S.W.2d 487 (Mo. banc 1993) held that "the simplest test for proximate cause is whether the facts show that the injury would not have occurred in the absence of the negligent act." 848 S.W.2d at 493. The Court in *Martin* affirmed summary judgment for the defendant because the plaintiffs could not present the necessary evidence to make a submissible case on the issue of causation. *See also Stanley v. City of Independence*, 995 S.W.2d 485, 488 (Mo. banc 1999).

The Majority Opinion unsettles Missouri law on causation. While requiring AmerenUE to advise emergency personnel of certain risks, the Majority holds that the plaintiffs established causation by showing that someone who was not told of any risks would have been willing to approach the line, if assured the line was “de-energized.” The Majority’s treatment of the missing evidence as simply going to the weight of the paramedic’s testimony is inconsistent with existing law. *See Coonrod v. Archer-Daniels-Midland*, 984 S.W.2d 529, 533 (Mo. App. 1998) (court may not supply missing evidence).

On this record, even if plaintiffs had established a duty – which they did not – they could not establish causation, because there is no evidence that emergency personnel would have approached the vehicle and extricated Tiffany Hoffman before the line was removed if they had been given the information that plaintiffs’ expert says should have been given – that the line was de-energized but there was still a risk of injury or death. The trial court properly granted summary judgment for this additional reason.

CONCLUSION

Nothing in Missouri law imposes on AmerenUE a duty to provide emergency personnel with information enabling them to take risks that AmerenUE's work practices forbid its own employees to take. That the courts have not imposed such a duty is not surprising. Creating even a slight risk of injury or death to emergency personnel would not serve the purposes of public safety. The trial court properly granted summary judgment in favor of AmerenUE because, as a matter of law, AmerenUE had no duty to tell emergency personnel that the computer showed the line as de-energized, and for the additional reasons that plaintiffs' expert's testimony, setting forth his personal standard for safety, would not be admissible under § 490.065 RSMo, and that plaintiffs could not establish that the firefighters would have approached the line if told it was de-energized but that some risk still remained. The summary judgment in favor of AmerenUE should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Substitute Brief of Respondent Union Electric Company and a disk containing that brief was sent via first class mail, postage prepaid on this ____ day of June, 2005 to: Stephen F. Meyerkord and Steven D. Rineberg of Meyerkord, Rineberg & Graham, P.C., 1717 Park Avenue, St. Louis, Missouri 63104, attorneys for Appellants.

CERTIFICATE OF COMPLIANCE

In accordance with Rule 84.06 and Local Rules 360 and 361, the undersigned certifies that this Substitute Brief of Respondent Union Electric Company complies with the limitations contained in Rule 84.06(b) and that the number of words in this Brief is 10,776 words, as counted by the word processing system used in preparing this Brief, Microsoft Word 2002. The undersigned further certifies that the disk accompanying this Brief has been scanned for viruses and that it is virus-free.

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APPENDIX