IN THE SUPREME COURT OF MISSOURI

SC NO: 88573

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

v.

THE HONORABLE DAVID A DOLAN,
Respondent.

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

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JURISDICTIONAL STATEMENT

Angela Friley, individually and as best friend for Dakota Renee Friley and William Wyatt Edward Friley IV, filed a Petition against Linda M. Hampton and Union Electric Company d/b/a Ameren UE in the Circuit Court of Scott County, seeking recovery for damages-wrongful death (hereinafter "underlying action"). In her Petition, Plaintiff alleged that on 10/20/05, her husband was working for and employed by Asplundh Construction Corporation, an independent contractor, which had contracted with Union Electric Company d/b/a Ameren UE (hereinafter "Ameren UE"), to demolish or remove previously existing electrical transmission lines and to erect and replace electrical transmission lines in Scott County, Missouri. Further, Plaintiff averred that on 10/20/05, decedent was pulling an overhead electrical wire across County Road 472, while Defendant Linda Hampton was driving her vehicle east on that Road, and struck the electrical wire, resulting in William Friley's death. Plaintiff's Petition in the underlying action sought to recover against Ameren UE under the theory that Ameren UE was a "host employer" and, therefore, had a duty to make the job site safe for decedent.

On 4/3/06, Ameren UE filed a Motion To Dismiss in the underlying action. Ameren UE asserted that Plaintiff's Petition failed to state a claim against it upon which relief could be granted, since Missouri law did not hold a landowner or property owner liable under a host theory of recovery, and since Plaintiff failed to allege that Ameren UE controlled the job site and the activities of the decedent and his employer. On 8/25/06, Respondent The

Honorable David A. Dolan, entered his Judgment and Order, overruling Ameren UE's Motion To Dismiss. Thereafter, Ameren UE filed its Motion To Reconsider The Court's Ruling Of 8/25/06. On 11/22/06, Respondent overruled Ameren UE's Motion To Reconsider.

On 5/18/07, Ameren UE filed a Petition In Prohibition/Alternative Petition In Mandamus with the Missouri Court of Appeals, Southern District. On 5/18/07, the Court of Appeals denied Ameren UE's Petition In Prohibition/Alternative Petition In Mandamus.

On 6/6/07, Ameren UE filed its Petition In Prohibition/Alternative Petition In Mandamus with the instant Court. On 6/18/07, Respondent, The Honorable David A. Dolan, filed his Suggestions In Opposition to the Petition In Prohibition/Alternative Petition In Mandamus. On 10/30/07, this Court issued its Preliminary Writ in Prohibition. On 11/29/07, Respondent filed his Written Return with the instant Court. This Court has jurisdiction over the present matter, pursuant to Article V, Section 4 of the Constitution of the State of Missouri.

STATEMENT OF FACTS

Introduction

At issue herein is whether Respondent exceeded his jurisdiction in refusing to dismiss Count II of Plaintiff's Petition against Ameren UE, and in overruling Ameren UE's Motion To Dismiss and Motion To Reconsider. Ameren UE submits that Plaintiff's Petition fails to state a cause of action against it, since Plaintiff failed to allege that Ameren UE owned the premises on which decedent's fatal injuries occurred, or that Ameren UE controlled the job site and the activities of its independent contractor, Asplundh. Under these circumstances, the Respondent was without subject matter jurisdiction to adjudicate the merits of Count II of Plaintiff's Petition against Ameren UE. This Court's Preliminary Writ of Prohibition should be made absolute.

Procedural History

Proceedings In Underlying Action

On 3/03/06, Angela Friley (hereinafter "Plaintiff"), individually and as best friend for Dakota Renee Friley and William Wyatt Edward Friley IV, filed a Petition against Linda M. Hampton and Ameren UE in the Circuit Court of Scott County, 33rd Judicial Circuit, State of Missouri, seeking recovery for damages-wrongful death. In her Petition in the underlying action, Plaintiff Angela Friley alleged that on 10/20/05, her husband, William Friley, was working for and employed by Asplundh Construction Corporation (hereinafter "Asplundh"), an independent contractor, which had contracted with Ameren UE to demolish or remove

previously existing electrical transmission lines and to erect and replace electrical transmission lines in Scott County, Missouri. (A19).[1] Further, Plaintiff averred that on 10/20/05, William Friley (hereinafter "decedent"), was pulling an overhead electrical wire across County Road 472, while Defendant Linda Hampton was driving her vehicle east on that Road, and struck the electrical wire, resulting in William Friley's death. (A19-A20). In her Petition, Plaintiff sought to recover against Ameren UE under the theory that Ameren UE was a "host employer" and, thus, had a duty to make the job site safe for decedent. Moreover, Plaintiff alleged that because Ameren UE owned the power lines and associated equipment, it had a duty to assess hazards, inform its contractor of those hazards, monitor and observe its contractor to prevent unsafe working conditions, and compel its contractor to comply with all safety rules. (A19,A21-A23).

On 4/3/06, Ameren UE filed a Motion To Dismiss in the underlying action. (A25-A27). In its Motion To Dismiss, Ameren UE requested that the Court dismiss Count II of Plaintiff's Petition, since Plaintiff's Petition failed to state a claim against Ameren UE, upon which relief could be granted. Specifically, Ameren UE averred that there were no reported cases in Missouri, holding a landowner or property owner liable under a "host employer" theory of recovery. Ameren UE alleged that, for Plaintiff to state a cause of action against it, she was required to allege that Ameren UE controlled the job site and the activities of the

[1]Matters referred to herein that are contained in Ameren UE's Separate Appendix shall be designated as (A____).

decedent and his employer, Asplundh. However, Plaintiff's Petition failed to allege that Ameren UE controlled the job site or the activities of the decedent and his employer. Relatedly, Plaintiff's Petition failed to allege that Ameren UE's involvement in overseeing the construction was substantial and that Ameren UE controlled the physical activities of Asplundh, or the details of the manner in which the work was to be performed. Therefore, Ameren UE argued, Count II of Plaintiff's Petition in the underlying action had to be dismissed for failure to state a claim upon which relief could be granted. (A25-A27).

On 8/25/06, Respondent The Honorable David A. Dolan entered his Judgment and Order, Overruling Ameren UE's Motion To Dismiss. (A28).

On September 25, 2006, Ameren UE filed its Motion To Reconsider The Court's Order of 8/25/06. (A29-A33). Therein, Ameren UE asserted that the language in the Contract between Ameren UE and Asplundh, whereunder Ameren UE reserved the right to immediately suspend the work if, in Ameren UE's opinion, the work was being performed in a hazardous and dangerous manner, was not sufficient to impose a duty on Ameren UE or to allow liability to attach to Ameren UE for the accident that led to the decedent's death. (A29-A33). On 11/22/06, Respondent, The Honorable David A. Dolan, entered his Order, Overruling Ameren UE's Motion To Reconsider The Court's Order Of 8/25/06. (A34).

On 5/18/07, Ameren UE filed a Petition In Prohibition/Alternative Petition In Mandamus, along with Suggestions In Support, in the Missouri Court of Appeals, Southern District. On 5/18/07, the Southern District Court of Appeals denied Ameren UE's Petition

In Prohibition/Alternative Petition In Mandamus. (A39).

On 6/6/07, Relator Ameren UE filed its Petition In Prohibition/Alternative Petition In Mandamus with the instant Court. On 6/18/07, Respondent, The Honorable David A. Dolan, filed his Suggestions In Opposition to the Petition In Prohibition/Alternative Petition In Mandamus. On 10/30/07, this Court issued its Preliminary Writ In Prohibition. On 11/29/07, Respondent filed his Written Return with the instant Court.

Contract Provisions

On 2/15/05, Union Electric entered into a Contract with Asplundh. (A35-A38). Paragraph 22 of the "General Terms and Conditions "of the Contract states as follows:

> "a) The Contractor shall perform the Work in a proper, safe and secure manner to prevent loss, injury or damage to the Company's property, the property on the Premises, existing structures and facilities in the vicinity of the Work and to lives or persons and shall comply with all applicable safety laws, rules and regulations of any Governmental Authority, including without limitation, those contained in or issued pursuant to the Occupational Safety and Health Act of 1970, as a amended, the regulations and standards promulgated by the Secretary of Labor thereunder, and with all safety procedures of Company.
>
> ...

c) Contractor shall furnish all safety equipment and safeguards suitable to the occupational hazards involved and conforming, in all respects, to the safety regulations on the Project.

...

e) The Company may suspend Work which interferes or threatens to interfere with the operation of the Company's equipment until the interference is eliminated. All equipment or tools used by Contractor on the Premises shall be subject to inspection.

f) The Company may immediately suspend Work if, in the sole opinion of the Company, the Contractor's Work is being performed in a hazardous and dangerous manner. Work shall not thereafter proceed until Contractor agrees to conduct the Work in a safe manner satisfactory to Company. The Contractor shall be entitled to no additional compensation or extension of time for performance of this Contract in the event the Company suspends Contractor's Work pursuant to this paragraph. Failure of the Company to inspect, observe or detect a hazardous or dangerous Work condition or procedure on behalf of Contractor's Work being performed shall not be construed as an

act of omission or negligence by the Company. Company's right to suspend the Work as provided in this Paragraph does not constitute that Company is in charge of the Work of Contractor, its agents, employees, servants or Subcontractors." (A35-A38).

POINT RELIED ON

I

THE SUPREME COURT SHOULD MAKE ITS PRELIMINARY WRIT OF PROHIBITION ABSOLUTE, FOR THE REASONS THAT:

A.

THE RESPONDENT ACTED 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. PLAINTIFF'S PETITION FAILED TO STATE A CAUSE OF ACTION AGAINST AMEREN UE UPON WHICH RELIEF COULD BE GRANTED, IN THAT PLAINTIFF FAILED TO ALLEGE THAT AMEREN UE WAS THE LANDOWNER OF THE PREMISES ON WHICH DECEDENT'S FATAL INJURIES OCCURRED; PLAINTIFF'S PETITION FAILED TO ALLEGE THAT AMEREN UE CONTROLLED THE JOB SITE AND THE ACTIVITIES OF ITS INDEPENDENT CONTRACTOR, ASPLUNDH, AND DECEDENT'S INJURIES WERE COVERED BY ASPLUNDH'S WORKERS' COMPENSATION INSURANCE; THE PROVISIONS OF THE CONTRACT BETWEEN AMEREN UE AND ASPLUNDH DO NOT IMPOSE LIABILITY ON AMEREN UE; AND AMEREN UE OWED NO DUTY OF CARE TO THE DECEDENT, SINCE THE DANGERS POSED TO HIM BY THE ELECTRICAL TRANSMISSION WIRES WERE OPEN AND OBVIOUS. SINCE PLAINTIFF'S

PETITION FAILED TO STATE A CAUSE OF ACTION, RESPONDENT HAD NO SUBJECT MATTER JURISDICTION TO ADJUDICATE COUNT II OF PLAINTIFF'S PETITION AGAINST AMEREN UE.

B.

AMEREN UE HAS NO ADEQUATE REMEDY TO CHALLENGE THE RESPONDENT'S ORDERS OVERRULING ITS MOTION TO DISMISS AND ITS MOTION TO RECONSIDER THE COURT'S ORDER OF AUGUST 25, 2006, BY APPEAL OR OTHERWISE; AND ABSENT THE ISSUANCE OF AN ABSOLUTE WRIT OF PROHIBITION BY THIS COURT, AMEREN UE WILL SUFFER IRREPARABLE INJURY.

State ex rel Anheuser Busch v. Mummert, 887 S.W.2d 736 (Mo.App.E.D.1994)

Werdehausen v. Union Elect. Co., 801 S.W.2d 358 (Mo.App.E.D.1990)

Logan v. Sho-Me Power Elect. Coop., 122 S.W.3d 670 (Mo.App.S.D.2003)

Matteuzzi v. The Columbus Partnership, 866 S.W.2d 128 (Mo.banc.1993)

STANDARD OF REVIEW[2]

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. ***Nazeri v. Missouri Valley College***, 860 S.W.2d 303, 306 (Mo.banc.1993); ***Grewell v. State Farm Mutual Automobile Ins. Co.,*** 102 S.W.3d 33, 36 (Mo.banc.2003). It assumes that all of plaintiff's factual averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. ***Id***. In reviewing a trial court's ruling on a motion to dismiss, no attempt is made by the appellate Court to weigh any facts alleged, as to whether they are credible or persuasive. ***Id.*** Rather, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case. ***Id.***

A petition is sufficient to withstand a motion to dismiss if it invokes substantive principles of law, entitling plaintiff to relief, and alleges ultimate facts informing the defendant of that which plaintiff will attempt to establish at trial. ***Grewell***, 102 S.W.3d at 36; ***Shapiro v. Columbian Union Nat'l Bank & Trust Co.***, 576 S.W.2d 310, 312 (Mo.banc.1978). The petition must contain allegations of fact in support of each essential element of the cause sought to be pleaded. A motion to dismiss for failure to state a claim is well taken where the facts essential to recovery are not pleaded. ***Braymon v. U-Haul***, 945 S.W.2d 676, 679 (Mo.App.E.D.1997).

A pleading which states no cause of action confers no subject matter jurisdiction on

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[2]This Standard of Review applies to the Argument under Point I, *infra*.

a court, and is subject to dismissal. ***Lowery v. Air Support Int'l***, 982 S.W.2d 326, 328 (Mo.App.S.D.1998); ***Phillips v. Bradshaw d/b/a Distinctive Exteriors Co.***, 859 S.W.2d 232, 234 (Mo.App.S.D.1993). The only power a court without subject matter jurisdiction possesses is the power to dismiss the action before it. ***Sisco v. James***, 820 S.W.2d 348, 351 (Mo.App.S.D.1991); ***Phillips***, 859 S.W.2d at 234.

ARGUMENT

I

THE SUPREME COURT SHOULD MAKE ITS PRELIMINARY WRIT OF PROHIBITION ABSOLUTE, FOR THE REASONS THAT:

A.

THE RESPONDENT ACTED 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. PLAINTIFF'S PETITION FAILED TO STATE A CAUSE OF ACTION AGAINST AMEREN UE UPON WHICH RELIEF COULD BE GRANTED, IN THAT PLAINTIFF FAILED TO ALLEGE THAT AMEREN UE WAS THE LANDOWNER OF THE PREMISES ON WHICH DECEDENT'S FATAL INJURIES OCCURRED; PLAINTIFF'S PETITION FAILED TO ALLEGE THAT AMEREN UE CONTROLLED THE JOB SITE AND THE ACTIVITIES OF ITS INDEPENDENT CONTRACTOR, ASPLUNDH, AND DECEDENT'S INJURIES WERE COVERED BY ASPLUNDH'S WORKERS' COMPENSATION INSURANCE; THE PROVISIONS OF THE CONTRACT BETWEEN AMEREN UE AND ASPLUNDH DO NOT IMPOSE LIABILITY ON AMEREN UE; AND AMEREN UE OWED NO DUTY OF CARE TO THE DECEDENT, SINCE THE DANGERS POSED TO HIM BY THE ELECTRICAL TRANSMISSION WIRES WERE OPEN AND OBVIOUS. SINCE PLAINTIFF'S

PETITION FAILED TO STATE A CAUSE OF ACTION, RESPONDENT HAD NO SUBJECT MATTER JURISDICTION TO ADJUDICATE COUNT II OF PLAINTIFF'S PETITION AGAINST AMEREN UE.

Introduction:

Nature Of The Remedies Of Prohibition And Mandamus

Prohibition is an independent action to prevent judicial proceedings that lack jurisdiction.[3] ***State ex rel McCulloch v. Schiff***, 852 S.W.2d 392, 393 (Mo.App.E.D.1993); ***State ex rel Raack v. Cohn***, 720 S.W.2d 741, 743 (Mo.banc.1986). Prohibition will lie, where necessary, to prevent a usurpation of judicial power, to remedy an excess of jurisdiction, or to prevent absolute, irreparable harm to a party. ***State ex rel Director of Revenue v. Gaertner***, 32 S.W.3d 564, 566 (Mo.banc.2000); ***State ex rel Birdsong v. Adolph***, 724 S.W.2d 731, 732 (Mo.App.E.D.1987) (prohibition is a means to prevent usurpation of judicial power, to confine inferior courts to their proper jurisdiction, and to prevent them from acting without or in excess of their jurisdiction). Prohibition lies to undo acts done in excess of a court's jurisdiction, so long as some part of the court's duties in the matter remain to be performed. ***Birdsong***, 724 S.W.2d at 733. Moreover, prohibition will lie to restrain the further enforcement of orders that are beyond, or in excess of, the authority of a court. ***State ex rel Munn v. McKelvey***, 733 S.W.2d 765, 771 (Mo.banc.1987).

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[3]Facts stated in a petition for prohibition will be taken as true. ***McCarney v. Nearing, Staats, Prelogar & Jones***, 866 S.W.2d 881, 886 (Mo.App.W.D.1993)

A writ of prohibition does not issue as a matter of right. ***State ex rel Ballenger v. Franklin***, 114 S.W.3d 883, 885 (Mo.App.W.D.2003); ***State ex rel J. E. Dunn Construction Co. v. Fairness In Construction***, 960 S.W.2d 507, 511 (Mo.App.W.D.1997). Whether a writ should be issued in a particular case is a question left to the sound discretion of the court to which the application has been made. ***Id***.

Generally, a writ of prohibition will issue: 1) to prevent usurpation of judicial power, because a court lacked either personal or subject matter jurisdiction; 2) to remedy an excess of jurisdiction or an abuse of discretion, such that the lower court lacked the power to act as contemplated; or 3) where there is no adequate remedy by way of appeal and irreparable harm will come to a litigant, if justiciable relief is not made available to respond to a court's order. ***State ex rel Chassing v. Mummert***, 887 S.W.2d 573, 577 (Mo.banc.1994); ***State ex rel Premiere Marketing v. Kramer***, 2 S.W.3d 118, 121 (Mo.App.W.D.1999); ***State ex rel Ford Motor Co. v. Westbrooke***, 12 S.W.3d 386, 392 (Mo.App.S.D.2000) (if an abuse of discretion is so great as to be in excess of jurisdiction and is such to create an injury that cannot be remedied on appeal, prohibition is appropriate). Where unnecessary, inconvenient, and expensive litigation can be avoided, prohibition is the appropriate remedy. ***State ex rel Anheuser Busch v. Mummert***, 887 S.W.2d 736, 737 (Mo.App.E.D.1994); ***State ex rel Springfield Underground Inc. v. Sweeney***, 102 S.W.3d 7, 8 (Mo.banc.2003). The discretionary authority of an appellate court to issue a writ of prohibition is exercised where the facts and circumstances of a particular case demonstrate that there exists an extreme need

for preventative action. ***Premiere Marketing***, 2 S.W.3d at 120.

Mandamus lies to correct an act done without jurisdiction. ***State ex rel Svejda v. Roldan***, 88 S.W.3d 531, 532 (Mo.App.W.D.2002). Generally, mandamus will lie where a court has acted unlawfully, or wholly outside of its jurisdiction or authority, or where a court has exceeded its jurisdiction. ***State ex rel Keystone Laundry v. McDonnell***, 426 S.W.2d 11, 14 (Mo.1968). A writ of mandamus will lie to compel a court to do that which it is obligated by law to do, and to undo that which a court was prohibited by law from doing. ***State ex rel Planned Parenthood v. Kinder***, 79 S.W.3d 905, 906 (Mo.banc.1998).

Plaintiff Has Failed To State A Cause Of Action For Negligence Against Ameren UE

To make a submissible case of negligence, plaintiff must establish that the defendant had a duty to protect the plaintiff from injury, that defendant failed to perform that duty, and that defendant's failure to perform the duty owed to plaintiff proximately caused injury to plaintiff. ***Boggs v. Lay***, 164 S.W.3d 4, 15 (Mo.App.E.D.2005); ***Lopez v. Three Rivers Elect. Coop.***, 26 S.W.3d 151, 155 (Mo.banc.2000); ***Hefferman v. Reinhold,*** 73 S.W.3d 659, 665 (Mo.App. E.D.2002) (to succeed in a wrongful death claim on a theory of negligence, plaintiff must establish that defendant owed a duty of care to the decedent; that defendant breached that duty; that the breach was the proximate cause of his death; and, as a result of the breach, plaintiff sustained damages). Each of these elements must be satisfied in order for a plaintiff to prevail on his or her negligence claim. ***Id.***

To establish tort liability in a negligence action, there must be a legal duty on the part of the defendant to the plaintiff. ***Claxton v. City of Rolla***, 900 S.W.2d 635, 636 (Mo.App.S.D.1995). Within this context, "**duty**" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff. ***Boggs***, 164 S.W.3d at 15; citing William L. Prosser, *Law of Torts*, Section 53 Page 324 (4th Ed., 1971) It is an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another in light of the apparent risk. ***Boggs***, 164 S.W.3d at 14. As Prosser states:

> "The existence of duty. In other words, whether, upon the facts in evidence, such a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of the other-or, more simply, whether the interest of the plaintiff which has suffered invasion was entitled to legal protection at the hands of the defendant. ***Id; Strickland v. Taco Bell Corp***., 849 S.W.2d 127, 131 (Mo.App.E.D.1993); quoting William L. Prosser, *Law of Torts*, Section 36 (3rd Ed., 1964).

This Court has articulated the issue of duty in the following manner: a fundamental test of whether one person has a cause of action in tort against another is whether the person sought to be held liable owed to the person seeking to recover any duty, to do something he did not do, or not to do something that he did do. If so, the defendant's failure to do what he

ought to have done or his doing what he ought not to have done constitutes a legal wrong. ***Vanacek v. St. Louis Public Service Co.***, 358 S.W.2d 808, 810 (Mo.banc.1962). An action for negligence will not lie unless it appears that there existed, at the time of the injury, some legal duty or obligation on the part of the defendant towards the plaintiff, which the defendant did not perform. ***Vanacek***, 358 S.W.2d at 811.

Whether a duty exists is purely a question of law. ***Lopez***, 26 S.W.3d at 155; ***Boggs***, 164 S.W.3d at 15; ***Hoffman v. Union Elect. Co.***, 176 S.W.3d 706, 708 (Mo.banc.2005). A duty to exercise care may be imposed by a controlling statute or ordinance, imposed by the law based on the relationship between the parties or because the defendant must exercise due care to avoid a foreseeable injury because of a particular set of circumstances, or where a party has assumed a duty, for example, pursuant to a contract. ***Boggs***, 164 S.W.3d at 15; ***Hallquist v. Smith***, 189 S.W.3d 173, 178 (Mo.App.E.D.2006). The judicial determination of the existence of duty rests on sound public policy. ***Boggs***, 164 S.W.3d at 15; ***Hoffman***, 176 S.W.3d at 708. In considering whether a duty exists in a particular case, the court must weigh the foreseeability of the injury, the likelihood of the injury, the magnitude of the burden of guarding against the injury, and the consequences of placing that burden on the defendant. ***Hoffman***, 176 S.W.3d at 708; ***Parra v. Building Erection Svcs.***, 982 S.W.2d 278, 283 (Mo.App.W.D.1998); ***Bunker v. Assoc. of Mo. Electric Coop***., 839 S.W.2d 608, 611 (Mo.App.W.D.1992). The common denominator that must be present is the existence of a relationship between plaintiff and defendant that the law recognizes as the basis of a duty

of care. ***Parra,*** 982 S.W.2d at 283; ***Bunker***, 839 S.W.2d at 611. In making a determination as to whether a duty exists, the court refers to the body of statutes, rules, principles and precedents which make up the law. ***Parra,*** 982 S.W.2d at 283. Where no duty is indicated by Missouri statute, caselaw, or otherwise, a fundamental prerequisite to establish negligence is absent. ***Ford v. GACS Inc***., 265 F.3d 670, 682 (8th Cir.,2001). That is the situation herein.

Plaintiff Did Not Allege That Ameren UE Was The Landowner Of The Premises In Question

In her Petition For Damages-Wrongful Death in the underlying action, Plaintiff has failed to allege facts that would give rise to a duty on behalf of Ameren UE to the decedent. Specifically, Plaintiff alleged that Asplundh was an independent contractor hired by Ameren UE pursuant to a contract to perform the replacement and repair of electrical transmission lines at various locations in the Ameren service area, including County Road 472 in Scott County, Missouri. (A19). Moreover, Plaintiff averred that decedent was an employee of Asplundh at the time of the injuries giving rise to his death on 10/20/05. (A19). The Petition states that Ameren was a "'host' employer or contractor responsible for the safety" of the project. (A19).

It is crucial to note what Plaintiff failed to allege in the Petition in the underlying action. Namely, Plaintiff has not alleged that Ameren UE employed the decedent. Nor does Plaintiff make any allegation that Ameren UE owned the land or the premises upon which

decedent's fatal injuries occurred. (A17-A23). Instead, the Petition in the underlying action avers that decedent sustained his fatal injuries while working on County Road 472, at or near its intersection with Bohannon Street in Scott County, Missouri. (A19-A20).

Assuming the allegations contained in the Petition in the underlying action to be true[4], those allegations fail to show that Ameren UE was the landowner of the premises in question. Because Ameren UE was not the landowner of the premises on which decedent's fatal injuries occurred, it could have no legal duty to the decedent as the owner of property upon which work was being performed. ***Logan v. Sho-Me Power Elect. Coop.,*** 122 S.W.3d 670, 674 (Mo.App.S.D.2003).

Plaintiff Did Not Allege That Ameren UE Controlled The Job Site And The Activities Of Asplundh

Even assuming, *solely for the sake of argument*, that Ameren UE was the landowner of the premises in question, Plaintiff's claim against Ameren UE still fails. In her Petition in the underlying action, Plaintiff failed to allege that Ameren UE controlled the job site and the activities of the decedent and his direct employer, Asplundh. (A17-A23).

Missouri has long recognized the general common law rule that a landowner has the duty to use reasonable and ordinary care to prevent injuries to an invitee on the landowner's premises. ***Gillespie v. St. Joseph's Light & Power Co.***, 937 S.W.2d 373, 375

[4]***Nazeri***, 860 S.W.2d at 306.

(Mo.App.W.D.1996); ***Logan,*** 122 S.W.3d at 674; ***Matteuzzi v. The Columbus Partnership***, 866 S.W.2d 128, 132 (Mo.banc.1993); ***Schumacher v. Barker***, 948 S.W.2d 166, 169 (Mo.App.E.D.1997). This rule has been articulated by the Restatement (Second) of Torts as follows:

> "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he:
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or have failed to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger." Restatement (Second) of Torts, Section 343; as cited in ***Gillespie,*** 937 S.W.2d at 375.

An employee of an independent contractor who has permission to use a landowner's premises or facilities is a an invitee. ***Gillespie,*** 937 S.W.2d at 375; ***Matteuzzi***, 866 S.W.2d at 132; ***Enloe v. Pittsburgh Plate Glass***, 427 S.W.2d 519, 522 (Mo.1968).

However, there is an exception to this rule. If a landowner relinquishes possession and control of the premises to an independent contractor during a period of construction, the

duty to use reasonable and ordinary care to prevent injury shifts to the independent contractor.[5] Under these circumstances, the landowner is no longer considered the possessor of the land and, therefore, is relieved of potential liability. ***Logan***, 122 S.W.3d at 674; ***Matteuzzi***, 866 S.W.2d at 132; ***Wilson v. River Market Venture***, 996 S.W.2d 687, 693 (Mo.App.W.D.1999). This exception recognizes that 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 v. SBC Corp. Svcs***., 832 S.W.2d 925, 927 (Mo.App.E.D.1992).

To establish 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. ***Matteuzzi***, 866 S.W.2d at 132. For control[6] to be sufficient to impose liability on a landowner, the landowner's involvement in overseeing the work must be substantial, and the landowner's control must go beyond simply

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[5]This is the rule, regardless of whether or not the employee was engaged in an inherently dangerous activity. ***Horner v. Hammons***, 916 S.W.2d 810, 814 (Mo.App.W.D.1995).

[6]Landowner liability rests not on the nature of the activity performed, but on the degree of control that the landowner maintains over the construction project. ***Logan***, 122 S.W.3d at 675.

securing compliance with the contract between the landowner and the independent contractor, or generally describing the nature of the work to be performed by 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. The right to ensure proper performance of the contract between the landowner and the independent contractor is insufficient, in and of itself, to justify the imposition of liability. ***Halmick***, 832 S.W.2d at 929; ***Logan***, 122 S.W.3d at 675. Rather, to impose liability on the landowner, it must control the physical activities of the employees of the independent contractor, or the details of the manner in which the work is to be performed. ***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. The plaintiff bears the burden of establishing control of the landowner. ***Schumacher,*** 948 S.W.2d at 169.

Plaintiff's Petition fails to allege facts showing that Ameren UE controlled the job site, in this case County Road 472, or the activities of the decedent or his employer, Asplundh. Conspicuously absent in the Petition in the underlying action is **any** allegation that Ameren UE's involvement in overseeing the repair and replacement of electrical transmission lines was substantial, or that Ameren UE controlled the physical activities of Asplundh, or the decedent, or controlled the details of the manner in which the work of repairing and replacing electrical transmission lines was to be performed, either by Asplundh or by decedent. (A17-A23). Absent such allegations, Plaintiff's Petition fails to state a claim against Ameren UE for landowner liability upon which relief could be granted. ***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.

Anheuser Busch v. Mummert, 887 S.W.2d at 738-739 is instructive, and requires that this Court make its Preliminary Writ of Prohibition absolute. Therein, Anheuser Busch sought a writ of prohibition following the denial of its summary judgment motion. Anheuser Busch was a third-party defendant in a suit filed by the employee of an independent contractor doing work on Anheuser Busch's property. In his petition, plaintiff sought damages for injuries allegedly sustained from electrocution while working near an electrical junction box located on Anheuser Busch's property. Plaintiff alleged that Guarantee Electric Company (hereinafter "GEC"), defendant/third party plaintiff in the underlying case, negligently installed high-voltage wiring under the electrical junction box, which resulted in his injuries. Plaintiff entered into a workers' compensation settlement with his employer. ***Anheuser Busch***, 887 S.W.2d at 737.

Subsequently, GEC filed a third-party petition against Anheuser Busch, alleging that any deficiencies in the wiring in the electrical junction box existed prior to its installation by GEC. GEC contended that Anheuser Busch 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 nondelegable duty to keep the premises reasonably safe for use by plaintiff and others, but breached that duty, resulting in plaintiff's injuries. ***Id***. Anheuser Busch filed a motion for summary judgment or, alternatively, a motion to dismiss for lack

of subject matter jurisdiction. When these motions were denied, Anheuser Busch sought a writ of prohibition from the Court of Appeals. Finding that Anheuser Busch was not liable as a matter of law, the Eastern District made its preliminary order in prohibition absolute. ***Anheuser Busch***, 887 S.W.2d at 738.

Evidence in the record reflected that Anheuser Busch was in the process of renovating certain buildings at its brewery and hired several independent contractors to facilitate that renovation. Plaintiff was the employee of an independent contractor hired to do electrical work. Following the general rule, the court found that the duty to take reasonable and ordinary care to prevent injury shifted to the independent contractors, who had possession and control of the property. The court could find no reason why the duty should not shift to the independent contractor before it, as a matter of law. ***Anheuser Busch***, 887 S.W.2d at 738. The only question was whether Anheuser Busch maintained possession and control over the property and whether that possession and control, as a matter of law, was sufficient to impose liability. The court found that it was not. ***Anheuser Busch***, 887 S.W.2d at 738-739.

As the court observed, in order to impose liability upon a landowner in such a case, the landowner's involvement must be "substantial". ***Anheuser Busch***, 887 S.W.2d at 739. The landowner must control the physical activities of the employees of the independent contractor, or the details of the manner in which the work is to be done. ***Id***. An affidavit submitted by Anheuser Busch on behalf of the project manager for the renovations stated that

at the time of the accident, Anheuser Busch was not controlling the physical activities of the plaintiff or the details of the manner in which the work he was doing was to be performed. Under these facts, Anheuser Busch was entitled to judgment as a matter of law. Other than an allegation in plaintiff's petition that Anheuser Busch owned, leased, operated, possessed or controlled the property in question, the record was devoid of any evidence showing that Anheuser Busch exerted control over the project. This bald assertion did not show that Anheuser Busch exercised substantial control over the construction by directing the manner in which work was performed, or otherwise directing the activities of the independent contractor or its employees. ***Id***. The Eastern District made its preliminary order in prohibition absolute, and remanded the case to the trial court, with instructions to enter summary judgment in favor of Anheuser Busch. ***Id***.

In Count II of the Petition in the underlying action, Plaintiff alleges that Ameren UE was required to provide a safe workplace where Asplundh was installing electrical transmission wires and that Ameren UE was careless and negligent in ensuring that the job site at which the Decedent was working was safe and protected and that safe work practices were being carried out. (A21-A23). However, general allegations that Ameren UE had a duty to make the job site safe for its independent contractor and employees of that independent contractor are not sufficient to demonstrate that Ameren UE exercised substantial control over the physical activities of the employees of Asplundh or directed the details of the manner in which the work was to be performed by Asplundh and its employees.

Id; Logan, 122 S.W.3d at 674-675; ***Matteuzzi***, 866 S.W.2d at 132. The allegations set forth in Count II of the Petition in the underlying action cannot, as a matter of law, demonstrate that Ameren UE retained control of the job site and the manner in which the work was to be performed, so as to have a duty of care to the decedent while he was working on the project. ***Anheuser Busch***, 887 S.W.2d at 739; ***Logan***, 122 S.W.3d at 674; ***Matteuzzi***, 866 S.W.2d at 132; ***Halmick***, 832 S.W.2d at 929. Any duty owed to the decedent to provide a safe work place was owed by Asplundh, not by Ameren UE. The duty of care shifted to Asplundh. ***Id***.

The Contract Between Ameren UE and Asplundh Does Not Impose A Duty On Ameren UE

Nor do the provisions of the Contract between Ameren UE and Asplundh serve to impose liability on Ameren UE. See, ***Werdehausen v. Union Elect. Co.***, 801 S.W.2d 358 (Mo.App.E.D.1990). Therein, the Eastern District considered the precise nature and extent of control that a landowner had to exercise over a subcontractor to subject the landowner to liability, and whether the language contained in a contract between a landowner and an independent contractor served to impose a duty on the landowner for injuries to the contractor's employees. Pursuant to a written contract, Union Electric (hereinafter, "UE"), hired Daniel International Corporation (hereinafter "Daniel"), to do construction work on UE's Callaway Nuclear Power Plant. Werdehausen, a piperfitter, was injured on the construction site, while working for Daniel. He was walking under a scaffold, when a man

on the scaffold unintentionally kicked a large piece of wood off the scaffold. The wood fell 30 feet, and broke through Werdehausen's hard hat, cutting his head, and injuring his cervical spine. ***Werdehausen***, 801 S.W.2d 361. After the trial court found in favor of Werdehausen, UE appealed. The Court of Appeals reversed. ***Id.***

On appeal, UE contended that plaintiff failed to show that it had a duty of care to him and, therefore, failed to make a submissible case. While the record did not clearly reveal Werdehausen's theory of recovery, plaintiff's instructions appeared to submit a claim under Section 414 of the Restatement (Second) of Torts. ***Werdehausen***, 801 S.W.2d 361. Those instructions sought to impose a duty of care on UE to plaintiff, derived from UE's retained contractual power to stop any unsafe work of the independent contractor, Daniel. ***Id.***

The Court addressed whether plaintiff could recover under Section 414 of the Restatement (Second) of Torts. ***Werdehausen***, 801 S.W.2d 362-363. While both parties *assumed* that Missouri had adopted Section 414 of the Restatement in detail, no Missouri Court had expressly adopted that provision of the Restatement. Moreover, no Missouri Court had approved an employer's liability under Section 414 of the Restatement to include liability to the employees of an independent contractor. ***Werdehausen***, 801 S.W.2d 363. However, for purposes of its analysis, the Court assumed that Section 414 applied and that the duty of employers under Section 414 ran to the employees of its independent contractors. ***Id***.

UE contended that Werdehausen failed to show that it owed him a duty of care. ***Id***.

As the Court observed, at common law, an employer of an independent contractor was not liable for the physical harm caused to another by the conduct of the contractor. ***Id***. The employer's freedom from liability was based primarily on his lack of control over the manner in which the independent contractor performed its work. One exception to this rule was that set forth in Section 414 of the Restatement (Second) of Torts. Under this exception, liability was imposed on an employer who hires an independent contractor to do work, but retains control over any part of the work, and then fails to exercise his control with reasonable care, causing injury to others. ***Id.***

The nature and extent of the retained control necessary to create exposure to liability was defined in the Comments to Section 414. Those Comments stated that for an employer of an independent contractor to be liable, it must have retained at least some degree of control over the manner in which the work is to be done. It is not enough that the employer of the independent contractor merely has a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. ***Werdehausen***, 801 S.W.2d 364. Thus, while liability *may* be based on the power to prevent the work from being done in a dangerous manner, it is not enough that the employer of the independent contractor merely has a general right to order that the work be stopped or resumed. ***Id***.

Moreover, if the contract between the employer of the independent contractor and the independent contractor contained only standard boilerplate provisions with respect to safety

inspections and requirements, but the employer of the independent contractor assumed no affirmative duties with respect to safety and never directed the method of performance, there was insufficient control to render it liable for injury caused by unsafe performance of the work. ***Id***. Conversely, if the employer of the independent contractor assumed an affirmative duty to implement safety precautions, by contract or conduct, it was liable for injuries caused to others by the unsafe performance of the work, if it negligently allowed the work to continue. ***Id***.

At issue was Section 40 of the contract between UE and Daniel. That Section required Daniel to employ a safety supervisor acceptable to UE, to take precautions against unsafe conditions created during construction, to continuously inspect work, materials and equipment, to determine and correct unsafe conditions and to comply with all applicable safety laws and regulations, including the rules, regulations and standards of OSHA. ***Id***. Under Section 40, UE retained the power to stop the operations of Daniel or any subcontractor, upon its failure to comply with these requirements. ***Id.*** Plaintiff argued that the fact that UE retained authority under Section 40 to stop any work operation of Daniel which failed to comply with OSHA standards, showed that UE retained sufficient control over Daniel's work to expose it to possible liability to plaintiff. As the Court noted, there was a split of authority as to whether, under Section 414 of the Restatement, an employer of an independent contractor exposed itself to liability by retaining the power to forbid or stop the work of a contractor the employer believes to be unsafe. Several courts had held that

merely retaining the power to forbid or stop work from being done in an unsafe manner did not constitute a sufficient degree of retained control to expose the employer of the independent contractor to liability. The Eastern District adopted this rule. ***Id***.

Applying the rule to the facts before it, the court held that the nature and extent of control retained or exercised by UE was insufficient to impose a duty on UE to the plaintiff. The contract between UE and Daniel made Daniel responsible for the safe performance of its work. ***Werdehausen***, 801 S.W.2d at 366. Although UE retained the power to stop work which did not comply with safety rules and regulations, Daniel was free to choose any safe method for performing its work. Relatedly, plaintiff did not cite, and review of the record did not disclose, any examples of UE actually stopping unsafe work or any examples of other conduct by UE which would create an assumed duty to control the detail of the manner of performing Daniel's work safely. ***Werdehausen***, 801 S.W.2d 366. Moreover, liability could not be imposed on UE, even though it instituted a surveillance program on various safety related items on the job site. UE was merely implementing its retained power to forbid work from being done in violation of applicable safety rules and regulations. It did not attempt to dictate, nor did it dictate, the manner in which unsafe work was to be corrected. ***Werdehausen***, 801 S.W.2d 367-368.

Similary, ***Smith v. Inter-County Telephone Co.***, 559 S.W.2d 518, 521 (Mo.banc.1977) ruled that a provision in a contract between a telephone company and its general contractor, giving the telephone company, on its own and through an engineering

firm, the right to inspect and take steps necessary to secure the proper performance of the job, which included laying underground telephone cables, did not destroy the relationship of owner and independent contractor, so as to confer liability on the telephone company for injuries sustained by an employee of the general contractor.

Viewed in light of these authorities, the language of the contract between Ameren UE and Asplundh is not sufficient to impose a duty on Ameren UE, or to otherwise expose Ameren UE to liability for the fatal injuries sustained by the decedent. Like the contractual provisions at issue in ***Werdehausen***, the Contract between Ameren UE and Asplundh makes Asplundh responsible for the safe performance of its work. ***Werdehausen***, 801 S.W.2d 366. Paragraph 22 of the General Conditions of Contract states that the contractor (Asplundh) shall perform the work in a proper, safe and secure manner to prevent loss, injury or damage to the Company (Ameren UE's) property, the property on the premises, existing structures and facilities in the vicinity of the work and to lives of persons, and shall comply with all applicable safety laws, rules and regulations of any governmental authority. (A35-A38).

Paragraph 22 of the contract provides that Ameren UE may immediately suspend work if, in the sole opinion of Ameren UE, Asplundh's work is being performed in a hazardous and dangerous manner. (A35-A38). That Ameren UE retained the power to 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 project to subject Ameren UE to liability for the decedent's fatal injuries and death. ***Werdehausen***, 801 S.W.2d 364; ***Smith***,

559 S.W.2d at 521. Moreover, the Petition in the underlying action fails to allege any instances of Ameren UE actually stopping any unsafe work performed by Asplundh, or any other conduct by Ameren UE which would create an assumed duty on Ameren UE's behalf to control the manner of performing Asplundh's work safely. (A17-A23). ***Werdehausen***, 801 S.W.2d 366.

Defendant's Fatal Injuries Were Covered By Asplundh's Workers' Compensation Insurance

Further, Plaintiff's Petition in the underlying action fails to state a cause of action against Ameren UE, since decedent's direct employer, Asplundh, was covered by workers' compensation insurance at the time of the injuries giving rise to the decedent's death. An employee of an independent contractor who is injured on a landowner's premises and who is covered by the independent contractor's workers' compensation insurance cannot bring a negligence action against the landowner under Section 343 of the Restatement (Second) of Torts, governing premises liability for an invitee. See ***Callahan v. Alumax Foils Inc***., 973 S.W.2d 488, 490 (Mo.App.E.D.1998); Restatement (Second) of Torts, Section 343.

On 10/20/05, Asplundh Construction was insured for its workers' compensation liability by Liberty Mutual Insurance Company. Following the death of the decedent on 10/20/05, his wife, Angela Friley (Plaintiff herein) filed a Claim For Compensation, Injury Number 05-107438, against Asplundh and Liberty Mutual Insurance Company. Angela

Friley has received, and is presently receiving, death benefits from Asplundh and its workers' compensation carrier on this Claim For Compensation. Plaintiff's Petition fails to allege that Ameren UE controlled the job site and the activities of Asplundh and its employees, including decedent. Under these circumstances, Plaintiff's Petition in the underlying action fails to state a claim against Ameren UE on which relief can be granted. ***Callahan*** , 973 S.W.2d at 490.

The Danger Posed To The Decedent Was Open And Obvious

Moreover, Ameren UE had no duty to the decedent, since the danger posed to him was open and obvious. Generally, an owner or occupier of land does not have a duty to protect invitees against conditions that are open and obvious as a matter of law. ***Heffernan***, 73 S.W.3d at 666; ***Harris v. Niehaus***, 857 S.W.2d 222, 226 (Mo.banc.1993); Restatement (Second) of Torts, Section 343. When the dangerous condition is so open and obvious that the invitee should reasonably be expected to discover it and realize the danger, a landowner does *not* breach the standard of care owed to invitees, unless the possessor should anticipate the harm despite such knowledge or obviousness. ***Harris***, 857 S.W.2d at 226; ***Crow v. Kansas City Power & Light Co.***, 174 S.W.3d 523, 534 (Mo.App.W.D.2005) (a possessor's actions do not fall below the applicable standard of care if the possessor fails to protect invitees against conditions that are open and obvious as a matter of law). A landowner is not an insurer of the well-being of its invitees. ***Crow***, 174 S.W.3d at 534; ***Maune v. City of***

Rolla, 203 S.W.3d 802, 805 (Mo.App.S.D.2006); ***Harris***, 857 S.W.2d at 226.

A possessor of land may reasonably rely on its invitees to see and appreciate the risk presented by an open and obvious yet dangerous condition on the land, and may reasonably rely on its invitees' normal sensibilities to protect against such a condition. ***Crow***, 174 S.W.3d at 537; ***Harris***, 857 S.W.2d at 227; ***Maune***, 203 S.W.3d at 805. A landowner is entitled to expect that invitees will exercise ordinary perception, intelligence and judgment to discover open and obvious conditions, appreciate the risk they present, and take the minimal steps necessary to protect themselves. ***Crow***, 174 S.W.3d at 537; ***Maune***, 203 S.W.3d at 805. The duty to keep premises safe for invitees applies only to defects or conditions which are in the nature of hidden dangers, traps, snares, pit falls and the like, in that they are not known to the invitee, and would not observed by him in the exercise of ordinary care. ***Hokanson v. Jacquline Rendering Co.***, 509 S.W.2d 107, 111 (Mo.1974). An invitee assumes all normal, obvious or ordinary risks attendant on the use of the premises, and the owner is under no duty to reconstruct or alter the premises so as to obviate known and obvious dangers. ***Id.*** Thus, when the dangers are obvious and known to the invitee, he consents to the risk and the invitor owes no duty. ***Id***.

That is the situation herein. The dangers presented to the decedent, and other employees of Asplundh, in repairing and replacing electrical lines was open and obvious. ***Crow***, 174 S.W.3d at 537-538. Persons of ordinary intelligence are presumed to know the dangers attending contact with electrically charged wires. ***Crow***, 174 S.W.3d at 538.

Decedent, a person of ordinary intelligence, was presumed to understand the dangers attendant to repair and replacement of the transmission lines on which he was working on 10/20/05. See ***Crow***, 174 S.W.3d at 538, ruling that overhead electrical power lines at the rear of a unit of an apartment complex constituted an open and obvious condition as a matter of law, such that the owner of the apartment complex and management company that managed the apartment complex were not liable for a painter's death by electrocution when his ladder came into contact with the power line, even if the painter did not actually see the power line and did not know the danger. The painter had a duty to look, and would have discovered the presence of the power line had he carried out that duty, and the painter was a person of ordinary intelligence, such that he was presumed to have appreciated the dangers relating to contact with electrically charged wires. The owner and management company were entitled to rely on the painter to employ the simple means at this disposal to prevent harm from occurring to him, and the incident could have been avoided if the painter had simply carried the ladder in a horizontal, rather than a vertical position. ***Crow***, 174 S.W.3d at 538-539.

Similarly, ***Harris***, 857 S.W.2d at 226-227 held that, in a wrongful death action brought by parents against trustees of subdivision alleging negligent failure to warn of, or protect their children from an unreasonably dangerous slope of a subdivision road, a finding that the natural dangerous condition of the road was open and obvious as a matter of law to all who would encounter it was supported by evidence that the lake was plainly visible from

the parking place the mother chose, the road obviously slopped down towards the lake, the only visible barrier between the road and the lake were a substantial number of trees, and that the distance from the parking lot to the lake was less than 300 feet.

Since the danger arising from the electrical transmission lines was open, obvious and known to the decedent, he consented to any risk arising from those electrical lines and thus, Ameren UE owed no duty to the decedent. ***Crow***, 174 S.W.3d at 538-539; ***Hokanson***, 509 S.W.2d at 111; ***Maune***, 203 S.W.3d at 805. Any failure of Ameren UE to protect the decedent from the open and obvious dangers posed by the electrical transmission lines on which he was working, did not violate the applicable standard of care. ***Harris***, 857 S.W.2d at 226.

Respondent Was Without Suject Matter Jurisdiction To Adjudicate Plaintiff's Claim Against Ameren UE

The Petition in the underlying action failed to state a cause of action against Ameren UE, since its averments do not invoke principles of substantive law that entitled Plaintiff to relief, and since the facts alleged in the Petition do not establish a recognized cause of action. ***Grewell***, 102 S.W.3d at 36. Plaintiff's failure to state a claim upon which relief could be granted against Ameren UE deprived the trial court, and concomitantly, Respondent of subject matter jurisdiction to adjudicate the merits of the underlying action against Ameren UE, as set forth in Count II of the Petition, and deprived Respondent of the jurisdiction to

grant the relief sought by Plaintiff. ***Williams v. Barnes & Noble***, 174 S.W.3d 556, 559 (Mo.App.W.D.2005); ***State ex rel M.F.A. Insurance v. Murphy***, 606 S.W.2d 661, 663 (Mo.banc.1980) (where a petition fails to state a cause of action, the defect is jurisdictional); ***Lowery***, 982 S.W.2d at 328. Respondent, the Honorable David A Dolan, was without jurisdiction to take *any* action in the matter, other than to dismiss Count II of the Petition against Ameren UE. ***Williams***, 174 S.W.3d at 559; ***Sisco***, 820 S.W.2d at 351; ***Phillips***, 859 S.W.2d at 234. In failing to dismiss Count II of Plaintiff's Petition against Ameren UE, the Respondent exceeded his jurisdiction. ***Id; Murphy,*** 606 S.W.2d at 663. Compounding this error, Respondent acted without jurisdiction, or 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. ***Williams***, 174 S.W.3d at 559; ***Murphy,*** 606 S.W.2d at 663.

B.

AMEREN UE HAS NO ADEQUATE REMEDY TO CHALLENGE THE RESPONDENT'S ORDERS OVERRULING ITS MOTION TO DISMISS AND ITS MOTION TO RECONSIDER THE COURT'S ORDER OF AUGUST 25, 2006, BY APPEAL OR OTHERWISE; AND ABSENT THE ISSUANCE OF AN ABSOLUTE WRIT OF PROHIBITION BY THIS COURT, AMEREN UE WILL SUFFER IRREPARABLE INJURY.

Ameren UE has no adequate remedy, by way of appeal or otherwise. The Orders of

Respondent, The Honorable David A Dolan, that Ameren UE challenges are those overruling Ameren UE's Motion To Dismiss and Ameren UE's Motion To Reconsider The Court's Order Of August 25, 2006. A party may only appeal from a final judgment. ***Bell Scott L.L.C. v. Wood, Wood & Wood Investments***, 169 S.W.3d 552, 554 (Mo.App.E.D.2005). A final judgment is one that disposes of all the parties and the claims in the case, and which leaves nothing for future determination. ***Id***; ***Superlube Inc. of Camdenton v. Innovative Real Estate Inc***., 147 S.W.3d 880, 881 (Mo.App.S.D.2004); ***Eggemeyer v. Connoly***, 986 S.W.2d 516, 517 (Mo.App.E.D.1999). The denial of a motion to dismiss is not a final judgment, and is not appealable. ***Bell Scott L.L.C.***, 169 S.W.3d at 554; ***Iowa Steel & Wire v. Sheffield Steel Corp***., 227 S.W.3d 549, 557 (Mo.App.W.D.2007). Thus, Respondent's Judgment and Order Overruling Ameren UE's Motion To Dismiss and Respondent's Order Overruling Ameren UE's Motion To Reconsider The Court's Order Of August 25, 2006, do not constitute final and appealable orders or judgments. ***Id***. Unless the instant Court makes its Preliminary Writ of Prohibition absolute, Ameren UE will incur irreparable injury, and will be subjected to unnecessary, inconvenient, and expensive litigation, even though it could have no liability to the Plaintiff under Missouri law. Under these facts, prohibition is the appropriate remedy. ***Anheuser Busch***, 887 S.W.2d at 737.

CONCLUSION

This Court should make its Preliminary Writ of Prohibition absolute. Plaintiff's Petition fails to state a cause of action against Ameren UE, in that Plaintiff failed to allege that Ameren UE owned the premises where decedent's fatal injuries occurred and in that Plaintiff failed to allege that Ameren UE controlled the job site and the activities of its independent contractor, Asplundh. Since Plaintiff's Petition failed to state a cause of action against Ameren UE, Respondent had no subject matter to adjudicate the merits of the claim asserted against Ameren UE in Count II of the Petition. 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, and in refusing to dismiss Count II of Plaintiff's Petition against Ameren UE. Ameren UE has no remedy by way of appeal, and will suffer irreparable injury unless the Preliminary Writ of Prohibition is made absolute.

Respectfully submitted,
EVANS & DIXON

By: _____

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CERTIFICATE OF SERVICE

A copy of the foregoing was mailed this 10th day of January, 2008, to: Respondent, The Honorable David A. Dolan, Presiding Circuit Court Judge, 33rd 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 9299 words. To the best of my knowledge and belief, the enclosed disk been scanned and is virus-free.

_____
Mary Anne Lindsey

IN THE SUPREME COURT OF MISSOURI

SC NO: 88573

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

v.

THE HONORABLE DAVID A DOLAN,
Respondent.

SEPARATE APPENDIX OF RELATOR STATE ex rel UNION ELECTRIC COMPANY d/b/a AMEREN UE

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APPENDIX

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed this _____ day of January, 2003, to: Respondent, The Honorable David A. Dolan, Presiding Circuit Court Judge, 33rd 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