IN THE SUPREME COURT OF MISSOURI

SC 88573

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

v.

THE HONORABLE DAVID A. DOLAN,
PRESIDING CIRCUIT JUDGE,
33rd JUDICIAL CIRCUIT in SCOTT COUNTY, MISSOURI,
Respondent.

ON PETITION FOR WRIT OF PROHIBITION OR IN THE ALTERNATIVE, FOR WRIT OF MANDAMUS

BRIEF OF THE RESPONDENT

Maurice B. Graham # 18029
Thomas K. Neill # 51959
GRAY, RITTER & GRAHAM, PC
701 Market Street, Suite 800
St. Louis, MO 63101
(314) 421-5620
(314) 421-4140 (Fax)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Missouri Rules of Civil Procedure

Treatises

STATEMENT OF FACTS

I. INTRODUCTION

Where a Relator requests the Supreme Court to prohibit a Circuit Judge from exercising his discretion in denying a Motion to Dismiss, such a request must be denied. Here, Relator Ameren UE asks this Court for a Writ prohibiting the Honorable David A. Dolan from taking any further action regarding the underlying cause, except to set aside his Orders denying Ameren UE's Motion to Dismiss for failure to state a claim upon which relief can be granted, as well as Ameren UE's Motion to Reconsider the same. Because a Writ does not lie following the denial of a Motion to Dismiss, and because the trial court properly exercised its discretion in denying Ameren UE's motions, this Court should quash its Preliminary Writ in Prohibition.

II. PROCEDURAL POSTURE

On March 3, 2006, plaintiff filed the underlying action, a Petition for Wrongful Death, in the Circuit Court of Scott County. Exhibit A. On April 3, 2006, Ameren UE filed a Motion to Dismiss for Failure to State a Claim upon which relief can be granted, to which plaintiff filed a brief in opposition. Exhibits B and H. After Judge Dolan, the present respondent, denied that Motion on August 25, 2006, defendant Ameren UE filed a Motion to Reconsider which was also denied. Exhibits C, D, and E.

On May 18, 2007, Ameren UE filed a Petition in Prohibition/Alternative Petition in Mandamus with the Court of Appeals, Southern District, which was denied that same day. Exhibit G.

Ameren UE filed its Petition in Prohibition/Alternative Petition in Mandamus in this Court on June 6, 2007. Appendix A4-16. On June 18, 2007, respondent filed his Suggestions in Opposition to the Petition. Exhibit I. After this Court issued its Preliminary Writ in Prohibition, respondent filed his Written Return to the Petition. Exhibits J and K.

III. FACTS SET FORTH IN THE UNDERLYING PETITION

On the day of his death, October 20, 2005, William Friley was working as an employee of Asplundh Construction, Corp. ("Asplundh"). Exhibit A. At that time, Asplundh was an independent contractor retained by Ameren UE to remove previously existing electric transmission lines and to install new electrical transmission lines and associated equipment at various locations in Ameren UE's service area. *Id*.

Mr. Friley was working near County Road 472 in Scott County, Missouri on that day. Specifically, Mr. Friley was pulling an overhead electric wire across County Road 472. In doing so, Mr. Friley was attached to a pull rope, which went to the top of a new utility pole and back down to a device that attached it to the electric wire. *Id*.

At the same time, Linda Hampton was driving her 1996 Ford Thunderbird along County Road 472 when she struck the electric wire which was connected to Mr. Friley and which was extended across the roadway. As a result, Mr. Friley was jerked to the top of the utility pole, struck the top portion of the pole, and then fell to the ground, fatally injured. *Id*.

IV. CLAIMS ALLEGED IN THE UNDERLYING PETITION

Angela Friley, the widow of Mr. Friley, is the plaintiff in the underlying wrongful death action brought in her own name and as the next friend of their young children. In that suit, Ameren UE and Ms. Hampton are named as co-defendants. *Id.*

Plaintiff's petition alleges that Ameren UE was "a 'host' employer or contractor responsible for the safety" of the project involving the removal of old lines and installation of new lines by Asplundh. *Id*. The petition further alleges that Ameren UE, as the owner and operator of an electrical power distribution network, "has certain non-delegable duties to hire contractors who have employees with the skills, knowledge, training, tools and protective equipment necessary to perform Ameren's work safely, and also to ensure the safety of the workplace where Asplundh was installing Ameren's new lines." In furtherance of those duties, the petition alleges that Ameren UE:

a. is required to assess hazards related to the work being performed by contractors contracted by Ameren;

b. is required to inform contract employers, such as Asplundh, of hazards that Asplundh or its employees might fail to recognize so that Asplundh can take measures to protect its employees from hazards posed by Ameren's job site;

c. is required to monitor and observe employees of Asplundh from time to time as they perform their work at the job site and to prevent unsafe working conditions;

d. is required to take appropriate measures to enforce the terms of any contract between Ameren and Asplundh with respect to safe work practices; and

e. is required to compel Asplundh to enforce compliance with all safety rules imposed by the contract.

Plaintiff further alleges that her husband's death was negligently caused in the following ways by Ameren:

a. failing to install or make arrangements for the installation of traffic warning signs at the work site;

b. failing to warn employees of Asplundh of the risks of injury in allowing the electrical line being erected to be extended across the roadway upon which vehicles were traveling;

c. failing to place a clear, conspicuous and comprehensible warning sign(s) on or around the work site itself which would have alerted persons operating vehicles on the roadway, including defendant Hampton, of the fact that work was being performed at the site;

d. failing to adequately block, barricade or otherwise guard the work area as the work was being performed;

e. failing to adequately arrange for a detour around the work site during the time work was being performed; and

f. failing to arrange for traffic to be stopped as the utility line was being pulled up from the roadway.

V. NATURE OF THE MOTION BEFORE THE TRIAL COURT

There is no dispute that the Motion before the trial court was a Motion to Dismiss for failure to state a claim upon which relief can be granted. This is confirmed not only by the title of defendant's Motion and the trial court's Order, but also by the relief sought in defendant's Motion to Reconsider.[1] Exhibits B, C, and D. Further, Ameren UE's Brief before this Court makes no suggestion to contrary.

Before the trial court and before this Court, additional materials beyond the Petition were presented. In plaintiff's Brief in Opposition to the Motion to Dismiss, as well as in Ameren UE's Motion to Reconsider, references were made to the contract between Ameren UE and Asplundh. Exhibits H and D. Ameren UE's Brief discusses not only that contract, but also the issue of workers' compensation benefits, an issue that was not even addressed before the trial court.

If matters outside the pleadings are presented on a Motion to Dismiss for failure to state a claim, the motion can be treated as one for summary judgment and disposed of as provided in Rule 74.04. Rule 55.27(a). For such conversion to occur, however, all parties shall be given a reasonable opportunity to present all pertinent materials. *Id*.

[1] In the prayer for relief of both its Motion to Dismiss and Motion to Reconsider, Ameren UE asked the trial court to dismiss plaintiff's Petition "with prejudice." Even if the trial court had granted Ameren UE's Motions, it would not have resulted in a dismissal with prejudice. "On sustaining a motion to dismiss a claim…the court shall freely grant leave to amend and shall specify the time within which the amendment shall be made or amended pleading filed." Rule 67.06.

In this case, neither the Court nor any party sought to invoke Rule 55.27(a), and notice was not served to convert the motion to one for summary judgment. As such, the parties were not afforded a reasonable opportunity to present all pertinent materials. Indeed, as Ameren UE has not responded to plaintiff's discovery, nor produced corporate representatives for depositions, it would have been impossible for plaintiff to present all pertinent materials at the hearings. Exhibits L-O.

ARGUMENT

I. RESPONSE TO AMEREN UE'S POINT RELIED ON I. B.

A. Introduction

Contrary to Ameren UE's argument, a Writ of Prohibition will not lie in this case because Ameren UE cannot demonstrate that it lacks an adequate remedy at law and will suffer irreparable harm if a Writ is not issued, in that any purported error may be corrected by summary judgment, at trial, or on appeal.

B. Standard for Issuance of Remedial Writs

Prohibition is not a writ of right - it is issued at the sole discretion of a court, and lies only "when the facts and circumstances of the particular case demonstrate unequivocally that there exists extreme necessity of preventive action." *State ex rel. McCulloch v. Schiff*, 852 S.W.2d 392 (Mo.App. E.D. 1993); *State ex rel. Hannah v. Seier*, 654 S.W.2d 894, 895 (Mo. banc 1983). It is well established that a writ of prohibition is an extraordinary remedy which should rarely be granted, and is to be used with great caution and forbearance. *State ex rel. Ballenger v. Franklin*, 114 S.W.3d 883, 885 (Mo.App. W.D. 2003). Such a writ should be

issued only judiciously and with great restraint. *Derfelt v. Yokum,* 692 S.W.2d 300, 301 (Mo. banc 1985).

The two requirements for issuance of a writ of prohibition are the lack of an otherwise adequate remedy and the lack of jurisdiction. *Scott County Reorganized R-6 School Dist. v. Missouri Com'n on Human Rights*, 872 S.W.2d 892, 893 (Mo.App. S.D. 1994). It must be shown that the "aggrieved party [will] suffer considerable hardship and expense" if the writ is not issued. *State ex rel. Riverside Joint Venture v. Missouri Gaming Commission*, 969 S.W.2d 218, 221 (Mo. banc 1998).

Moreover, "Prohibition is not to be used in lieu of appeal, as a substitute for correction of alleged or anticipated judicial errors, or to adjudicate disputes which will be adequately redressed during the ordinary course of judicial proceedings." *McCarney v. Nearing, Staats, Prelogar and Jones*, 866 S.W.2d 881, 886-887 (Mo.App.W.D. 1993). Prohibition cannot be used to undo erroneous judicial proceedings that have already been accomplished. *State ex rel. Boll v. Weinstein*, 295 S.W.2d 62, 67 (Mo. banc 1956). One court should not substitute its judgment or discretion for that of another court properly vested with jurisdiction and exercising its discretion within the legitimate boundaries of that jurisdiction. *State ex rel. Douglas Toyota III, Inc. v. Keeter*, 804 S.W.2d 750, 751 (Mo. 1991).

C. A Writ of Prohibition does not lie following the denial of a Motion to Dismiss for Failure to State a Claim upon which relief can be granted.

Ameren UE's Application for the extraordinary Writ of Prohibition, or alternatively Mandamus, is an unwarranted attempt to forego the Rules of Civil Procedure. A writ of prohibition is an extraordinary remedy that is meant to prevent the usurpation of judicial power, not to serve as a remedy for all legal difficulties nor as a substitute for appeal. Mo.St.Ann. § 530.010; *State ex rel. Div. of Motor Carrier and R.R. Safety v. Russell*, 91 S.W.3d 612, 615 (Mo.2002).

As Ameren UE's Motion to Dismiss has been denied, this case should proceed through discovery and trial. Should Ameren UE choose, a Motion for Summary Judgment is available to it, as is an appeal following trial. Assuming for the sake of argument Respondent committed any error, it can be remedied at one of those subsequent stages. *State ex rel. Cohen v. Riley*, 994 S.W.2d 546 (Mo. 1996). In *Cohen*, this Court held that a Writ does not lie following the denial of a preliminary injunction as the issues will be addressed at the trial and, if necessary on appeal. As this Court has also held:

> "[W]here a court has jurisdiction to render judgments, in ordinary civil causes, it would be manifestly improper to issue a writ of prohibition against it on an application alleging that it was about to pronounce...judgment on a petition which did not state a cause of action, but which the trial court had held sufficient...."

State ex rel. Morasch v. Kimberlin, 654 S.W.2d 889, 890-891 (Mo. 1983).

Indeed, this Court has already decided a case which is squarely on point. In *State ex rel. Dick Proctor Imports, Inc. v. Gaertner*, 671 S.W.2d 273 (Mo. banc 1984), a defendant moved to dismiss for failure to state a claim, which the trial court overruled. Defendant then sought a writ of prohibition from the Missouri Court of Appeals, Eastern District. That court denied the petition, and relators filed another petition for writ of prohibition in this Court. In its opinion, this Court observed that "Relator's position is merely an attempt to achieve interlocutory review of alleged trial court error via the extraordinary writ of prohibition." *Dick Proctor Imports*, 671 S.W.2d at 275. In quashing its preliminary order in prohibition, this Court declared:

> "Whether the particular facts on which the court proceeds...are, or are not, sufficient to justify its exercise of jurisdiction, is a question of law, the solution of which either way cannot impair the court's right to apply its judicial power...according to its view of the law and the facts before it."

Id., at 274.

Although Respondent has previously raised the applicability of *Dick Proctor Imports*, Ameren UE fails to address it. Rather, Ameren UE relies on *State ex rel. Birdsong v. Adolf*, 724 S.W.2d 731 (Mo.App. E.D. 1987). Although a Writ was granted following the denial of a Motion to Dismiss for Improper Venue based on Fraudulent Joinder, the court went to great lengths to distinguish its decision from cases involving the denial of typical Motions to Dismiss for failure to state a claim, such as that involved in *Dick Proctor Imports*.

Likewise, all of the other cases on which Ameren UE relies in its section entitled "Nature of the Remedies of Prohibition and Mandamus" are distinguishable and do not support the issuance of a Writ in this case. See, *State ex rel. Munn v. McKelvey*, 733 S.W.2d 765 (Mo. 1987)(granting Writ to prevent the trial court from enforcing an order directing a witness to answer questions posed to him during a deposition); *State ex rel. McCulloch v. Schiff*, 852 S.W.2d 392 (Mo.App. E.D. 1993)(granting Writ to prevent trial court from granting probation to convict); *State ex rel. Raack v. Cohn*, 720 S.W.2d 941 (Mo.banc 1986)(granting Writ to prevent trial judge from taking action in case following a Motion to Disqualify the judge); *State ex rel. Springfield Underground, Inc. v. Sweeney*, 102 S.W.3d 7 (Mo. 2003)(granting Writ after the denial of Motions to Dismiss and for Summary Judgment); *State ex rel. Director of Revenue v. Gaertner*, 32 S.W.3d 564 (Mo.banc 2000)(granting Writ following denial of Motion to Dismiss for improper venue); *State ex rel. Ballenger v. Franklin*, 114 S.W.3d 883 (Mo.App. W.D. 2003)(quashing Writ where trial court refused to set aside waiver of preliminary hearing in criminal case); *State ex rel. J.E. Dunn Construction Co. v. Fairness In Construction*, 960 S.W.2d 507 (Mo.App. W.D. 1997)(quashing Writ where successful bidder sought to prevent local construction board from hearing appeal of unsuccessful bidder); *State ex rel. Chassing v. Mummert*, 887 S.W.2d 573 (Mo.banc 1994)(granting Writ to permit discovery in a contempt action); *State ex rel. Premiere Marketing v. Kramer*, 2 S.W.3d 118 (Mo.App. W.D. 1999)(granting of Writ following denial of Motion to Dismiss for want of subject matter jurisdiction where contract contained out-of-state forum selection clause); *State ex rel. Ford Motor Co. v. Westbrooke*, 12 S.W.3d 386 (Mo.App. S.D. 2000)(quashing Writ following denial of Motion to Dismiss

for improper venue or forum non conveniens); *State ex rel. Svejda v. Roldan,* 88 S.W.3d 531 (Mo.App. W.D. 2002)(granting Writ to require expert witness to divulge test data); *State ex rel. Keystone Laundry v. McDonnell*, 426 S.W.2d 11 (Mo. 1968)(granting Writ to prevent city commission from entering into contract with commercial laundry); and *State ex rel. Planned Parenthood v. Kinder*, 79 S.W.3d 905 (Mo.banc 1998)(granting Writ to require trial court to allow attorney general to voluntarily dismiss action it had brought).

Missouri courts have issued remedial writs in cases involving the erroneous denial of discovery requests, improper certification of a class, denial of the right to trial by jury, failure to remove on the ground of forum non conveniens, discovery of material that a party claims is privileged, and the grant of a motion to dismiss. The common denominator among those actions is the lack of review available at trial or in appellate court. Actions such as those listed above cannot be "undone," and the issues they dispose of will not arise again in a trial on the merits. The action complained of in this case - the denial of a motion to dismiss - is an action which by its very definition preserves the factual and legal issues for trial.

D. Ameren UE does not lack an adequate remedy at law and will not suffer irreparable harm if a Writ is not issued.

Ameren UE's bald assertion that it lacks an adequate remedy at law is without merit. As discussed above, there will be several points in the underlying litigation at which the alleged error of the Respondent may be remedied.

While Ameren UE cites several cases confirming that the underlying case is not ripe for appeal, none of those cases involve the issuance of a Writ following the denial of Motion

to Dismiss for failure to state a claim upon which relief can be granted. Furthermore, Ameren UE pointed to no case supporting its contention that the inconvenience and expense of litigation causes a Writ to lie at this stage in the underlying case.

E. Issuance of a Writ in this case would open the door for Writs following every denial of a Motion to Dismiss.

If a Writ were to lie in this case, Missouri's appellate courts would be inundated with Applications for Writs. In any case in which a Motion to Dismiss is denied, an appellate court could immediately be asked to review the trial court's ruling. Given the number of Motions to Dismiss, and the ease of converting a Motion to Dismiss into an Application for Writ, the burden on the courts could be immense.

Further, were Writs to lie following any denial of a Motion to Dismiss, the appellate courts would regularly being substituting their judgment or discretion for that of another court exercising its discretion. That was precisely the type of action which this Court proscribed in *Douglas Toyota III, Inc.*, 804 S.W.2d at 751. Additionally, such a rule would cause Prohibition to be used in lieu of appeal. That function, too, has been proscribed. *McCarney*, 866 S.W.2d at 886.

F. Conclusion

Ameren UE has not demonstrated that it lacks an adequate remedy at law and that it will suffer irreparable harm if a Writ is not issued. Further, Missouri law is clear that Writs do not lie following the denial of a Motion to Dismiss for failure to state a claim

upon which relief can be granted. For the reasons stated, this Court should deny Relator's request, just as it did in *Dick Proctor Imports*.

II. RESPONSE TO AMEREN UE'S POINT RELIED ON I. A.

A. Introduction

A Writ of Prohibition will not lie in this case because Ameren UE cannot demonstrate that Respondent acted without jurisdiction in denying Ameren UE's Motion to Dismiss or Motion to Reconsider in that Respondent did not abuse his discretion in finding that the underlying Petition stated a claim upon which relief can be granted.

B. Standard for Motion to Dismiss

A Motion to Dismiss for failure to state a cause of action is solely a test of the adequacy of plaintiff's Petition. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. 1993). A court considering such a Motion must assume as true all allegations in Plaintiff's Petition. *Arnold v. Erkmann*, 934 S.W.2d 621, 625-26 (Mo.App.1996). Further, those facts must be viewed in the light most favorable to plaintiff. *Id*. No attempt is made to weigh any facts alleged. *Nazeri*, 860 S.W.2d at 306.

In ruling on a Motion to Dismiss, a trial court must use its discretion to determine the truthfulness of the allegations, as well as their applicability to possible causes of action. *Dick Proctor Imports*, 671 S.W.2d at 275. Dismissal for failure to state a claim is not warranted "unless it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Goe v. City of Mexico*, 64 S.W.3d 836, 839-40 (Mo.App. E.D.2001).

A Petition is sufficient if it "invokes substantive principals of law entitling plaintiff to relief and alleges ultimate facts informing defendant of that which plaintiff will attempt to establish at trial." *Grewell v. State Farm Mut. Auto. Ins. Co., Inc.*, 102 S.W.3d 33, 36 (Mo. 2003). A Petition should not be dismissed for mere lack of definiteness or certainty or because of informality in the statement of an essential fact. *Id*. *See also*, *Eilers v. Kodner Development Corp.*, 513 S.W.2d 663, 666 (Mo.App. 1974)(rejecting the argument that "magic words" are necessary to state a cause of action); *National Sur. Corp. v. Hochman*, 313 S.W.2d 776, 780 (Mo.App. 1958)(holding that there is no "magic verbal formula" by which facts must be alleged).

C. Standard of Review

"The general rule is that, if a court is entitled to exercise discretion in the matter before it, a writ of prohibition cannot prevent or control the manner of its exercise, so long as the exercise is within the jurisdiction of the court." *State ex rel. K-Mart Corporation v. Holliger*, 986 S.W.2d 165, 169 (Mo. banc 1999)(quashing writ where trial court did not abuse its discretion in denying Motion to Dismiss for Forum non Convenies).

This Court must presume that Respondent's discretionary ruling is correct and the contesting party bears the burden of showing an abuse of discretion. *Anglim v. Missouri Pacific R. Co.*, 832 S.W.2d 298, 303 (Mo. 1992). "Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of

careful consideration; if reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." *Id*.

D. Respondent Did Not Abuse His Discretion.

Ameren UE completely ignores that a trial court is entitled to exercise its discretion in ruling on a Motion to Dismiss. At no point does Ameren UE even suggest that Respondent abused his discretion.

That Ameren UE does not address the discretionary nature of Respondent's ruling is perhaps understandable. Because Respondent's ruling was not "clearly against the logic of the circumstances," nor was it "so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration," Ameren UE cannot demonstrate that the trial court abused its discretion.

On the contrary, Respondent heard arguments and reviewed memoranda and cases submitted by the parties. Exhibit C. Subsequently, Respondent reviewed the cases cited by Ameren UE in its Motion to Reconsider and held a second hearing at which the parties appeared. Exhibit E. These actions belie any suggestion that Respondent did not give the Motion careful consideration. At the very least, Respondent's consideration demonstrates that reasonable people can differ about the propriety of his ruling.

Rather than address Respondent's use of his discretion, Ameren UE argues that the trial court did not have subject matter jurisdiction. But Ameren UE's argument is no more than an attempt to have this Court substitute its judgment for that of the Respondent,

who was exercising his discretion. This Court rejected this very argument in *Dick Proctor Imports*, 671 S.W.2d 273.

Moreover, where a trial court is entitled to exercise its discretion, prohibition is only appropriate if the trial court's abuse of that discretion is so great as to be an excess of jurisdiction and is such as to create an injury which cannot be remedied on appeal. *State ex rel. K-Mart Corp.*, 986 S.W.2d at 169. Neither of those requirements is present in this case.

Because Ameren UE cannot carry its burden of proving that the Respondent abused his discretion in denying Ameren UE's Motion, this Court should quash the Writ.

E. Plaintiff's Petition Alleges Facts Sufficient to State a Claim upon Which Relief May Be Granted.

Not only was Respondent's ruling not an abuse of discretion, it was also the correct ruling. In the underlying case, plaintiff's Petition does state a claim upon which relief can be granted.

In determining whether the alleged facts support a cause of action, a trial court must "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." *Anderson v. Village of Jacksonville*, 103 S.W.3d 190, (Mo.App. W.D. 2003). The trial court may determine whether the petition asserts relief under the theories claimed by plaintiff or under some other theory. *Dick Proctor Imports*, 671 S.W.2d at 275. In the underlying case, there are multiple theories of liability which support Respondent's ruling.

1. Ameren UE may be held liable on a theory of premises liability.

Ameren UE claims that, because it was not the "landowner of the premises" on which Mr. Friley's fatal injuries occurred, it has "no legal duty as the owner of the property." This argument ignores, however, that liability can flow not only from the ownership of land, but also from being having an easement over property. *See, Kibbons v. Union Elec. Co.*, 823 S.W.2d 485, 488 (Mo. 1992).

The underlying Petition raises such allegations, specifically alleging that Mr. Friley was working on the power distribution network owned by Ameren UE. Exhibit A, paragraph 17. Ameren UE's ownership of the network and its attendant easements carry duties which are clearly raised in the Petition. Exhibit A, paragraphs 17 and 18.

2. Ameren UE may be held liable on a theory that it controlled the job site and activities.

Ameren UE acknowledges the general rule that a possessor of land owes a duty of care to invitees, including employees of contractors. Relator's Brief, pages 25-26. Ameren UE argues that where possession and control of the premises is relinquished to an independent contractor, the duty owed shifts from the possessor of the land to contractor.

Total control by the owner or possessor, however, in unnecessary. Only "substantial control" is required. *Noble v. Bartin*, 908 S.W.2d 390, 391 (Mo.App. E.D. 1995). Liability may be established when the possessor substantially controls "either the physical activities of the employees of the independent contractor or the details of the manner in which the work is done." *Id.*, at 391. Moreover, liability may be established

where a possessor of land and an independent contractor jointly possess the premises. *Donovan v. General Motors*, 762 F.2d 701, 705 (8th Cir. 1985).

The Petition in the underlying case alleges that Ameren UE retained substantial control over Asplundh's activities, the manner of the work, and/or the premises. The Petition alleges that Ameren UE was a host employer responsible for the safety of the project. Exhibit A, paragraph 9. It alleges that Ameren UE has a duty to insure the safety of the workplace where power lines were being installed, including the duties to: assess hazards related to the work being performed; inform Asplundh of hazards that Asplundh or its employees might fail to recognize; monitor and observe employees of Asplundh to prevent unsafe working conditions; take appropriate measures to enforce the terms of its contract with Asplundh with respect to safe work practices; and compel Asplundh to enforce compliance with safety rules imposed by the contract. Exhibit A, paragraph 17.

The cases on which Ameren UE relies regarding retained control by possessors of land are not only distinguishable from the underlying case, they also support Respondent's finding that the underlying Petition states a cause of action. Simply looking at the procedural posture of the cases cited by Ameren UE's shows not that the Petitions failed to state causes of action, but that the plaintiff's failed to produce sufficient evidence to support jury verdicts or survive Motions for Summary Judgment.

In *Logan v. Sho-Me Power Elec. Co-op.*, the appellate court affirmed summary judgment where plaintiff could not produce sufficient evidence from which a jury could find that the defendant retained substantial control over the construction project. *Logan v. Sho-Me Power Elec. Co-op.*, 122 S.W.3d 670, 676-7 (Mo.App. S.D. 2003).

In *Wilson v. River Market Venture*, plaintiff appealed a jury verdict in defendant's favor, alleging instructional error. The appellate court agreed, holding that the issue of possession and control of the area in which the injury occurred should have been presented to the jury. *Wilson v. River Market Venture*, 996 S.W.2d 687, 695-6 (Mo.App. W.D. 1999).

In *State ex rel. Anheuser-Busch, Inc. v. Mummert*, the appellate court issued a Writ of Prohibition following the denial of a Motion for Summary Judgment. The court found that the Relator had presented sufficient evidence regarding its lack of control to shift the burden onto the plaintiff, who presented no evidence to the contrary and, therefore, there was no genuine issue for the jury. *State ex rel. Anheuser-Busch, Inc. v. Mummert*, 887 S.W.2d 736 (Mo.App. E.D. 1994).

In *Schumacher v. Barker*, plaintiff appealed a directed verdict entered in favor of defendants. *Schumacher v. Barker*, 948 S.W.2d 166 (Mo.App. E.D. 1997). Ameren UE relies on this case for the proposition that "plaintiff bears the burden of establishing control of the landowner." While that assertion may be correct, it is irrelevant at this point in the present case. Here, on a Motion to Dismiss, Respondent was only asked to determine whether the petition asserted relief under a theory claimed by plaintiff or under some other theory. *Dick Proctor Imports*, 671 S.W.2d at 275. The trial court did not attempt to weigh any of the facts alleged. *Nazeri*, 860 S.W.2d at 306.

None of the above cases relied on by Ameren UE stand for the proposition that the underlying Petition fails to state a cause of action. Rather, they stand for the proposition that such causes of actions exist and that they should be decided on their merits.

Only two of the cases cited by Ameren UE involve Motions to Dismiss. *Matteuzzi v. Columbus Partnership, L.P.*, 866 S.W.2d 128 (Mo.1993). *Halmick v. SBC Corporate Services, Inc.*, 832 S.W.2d 925 (Mo.App. E.D. 1992). Unlike the present case, *Matteuzzi* and *Halmick* were appeals following grants of a Motions to Dismiss, not denials. Moreover, the allegations of the plaintiffs in those cases bear little resemblance to the allegations in this underlying case.

In *Matteuzzi*, the sole allegation of control was that "[t]he subject property was owned and/or controlled by" the company that hired the plaintiff's employer. *Id.*, at 132. In *Halmick*, the appellate court found that plaintiff failed to allege substantial control where his petition alleged only that defendant was negligent for failing to insure that adequate precautions were taken to avoid injury by reason of inherently dangerous activity and that defendant's agents oversaw construction. *Id.*, at 927.

The underlying Petition contains greater allegations of control and sufficiently states a cause of action. Indeed, *Matteuzzi* and *Halmick* were among the cases cited by Ameren UE in its Motion to Dismiss. Exhibit B. Having considered those cases, Respondent exercised his discretion and determined that the underlying Petition was distinguishable and sufficient.

3. Ameren UE may be held liable under the theory that the work to be performed was inherently dangerous.

One who employs an independent contractor to do work which the employer should recognize as likely to create a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by

the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise. Rest. 2d Torts §416. The Restatements also note that:

> "One who carries on an activity which threatens a grave risk of serious bodily harm or death, unless the instrumentalities used are carefully constructed and maintained, and who employs an independent contractor to construct or maintain such instrumentalities, is subject to the same liability for physical harm caused by the negligence of the contractor in constructing or maintaining such instrumentalities as though the employer had himself done the work of construction or maintenance."

Rest. 2d Torts §423.

The Restatement also provides that a general contractor who knows or has reason to know that the work contracted for involves an abnormally dangerous activity is subject to liability to the same extent as the independent contractor for physical harm to others caused by the activity. Rest. 2d Torts § 427. Working with or around electricity transmission is an inherently dangerous activity, and "those who generate and transmit electricity [must] use the highest degree of care to prevent injury which can be reasonably anticipated, and this duty of the utility is nondelegable." *Gnau v. Union Elec. Co.*, 672 S.W.2d 142 (Mo.App. E.D. 1984). Likewise, it has been recognized that the "risks to human life when engaging in the inherently dangerous activity of transmitting electrical power are readily discernable." *Hoffman v. Union Elec. Co.*, 176 S.W.3d 706, 709 (Mo.2005). This Court has held that "because the work contracted for was an inherently

dangerous activity, the utility was vicariously liable for the construction company's negligence because it contracted for the work." *Ballinger v. Gascosage Elec. Co-op.*, 788 S.W.2d 506, 510-11 (Mo. 1990).

The underlying Petition includes various allegations that the instrumentalities used to carry out the job were not carefully constructed and maintained. The Petition also alleges that the work contracted for was on electric transmission lines, an inherently dangerous activity, and that Ameren UE failed to use the highest degree of care. As such, this theory supports Respondent's use of his discretion in denying Ameren UE's Motions.

4. Ameren UE may be held liable on the theory that it failed to provide regulated safeguards.

An employer who is by statute or administrative regulation under a duty to provide specified safeguards or precautions for the safety of others is subject to liability for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions. Rest. 2d Torts §424; see also *Brannock v. Elmore*, 21 S.W. 451 (Mo. 1893). Here, Asplundh was cited in the OSHA accident report for violating section 5(a)(2) of the OSHA Act of 1970, 29 U.S.C. §§651-679. Ameren UE had the duty to provide for the precautions which would have prevented the violation. As such, imposition of liability on Ameren UE may be proper under this theory as well.

5. Ameren UE may be held liable on the theory that it negligently hired an independent contractor.

The underlying Petition is also sufficient to state a cause of action against Ameren UE for the negligent hiring of Asplundh. *Sullivan v. St. Louis Station Associates*, 770 S.W.2d 352 (Mo.App. E.D. 1989). The Petition alleges that "Ameren thus has certain non-delegable duties to hire contractors who have employees with the skills, knowledge, training, tools and protective equipment necessary to perform Ameren's work safely." As such, Respondent could rightfully have denied Ameren UE's Motions on this basis as well.

F. Issues beyond the pleadings.

While a trial court does not look beyond the pleadings when considering a Motion to Dismiss, the contract between Ameren UE and Asplundh has been raised, and Ameren UE now also raises the issue of workers' compensation, as well as the issue of open and obvious dangers. Although these matters are unnecessary to support Respondent's ruling, they are addressed for the sake of thoroughness.

1. The contract between Ameren UE and Asplundh is sufficient to impose a duty on Ameren UE.

The contract between Ameren UE and Asplundh shows that Ameren UE retained substantial control of the workers' physical activities, the manner in which their work was to be done, and the right to possess the job site. The contract required Asplundh to:

- Perform all work "in accordance with instruction and procedures described herein and/or as directed by the authorized Company personnel." (¶ 1.1)
- Obtain Relator's approval to work other than between "7:00 A.M. and 5:30 P.M., five days per week, Monday through Friday." (¶ 1.12)

- Provide Relator with an invoice that "show in detail a complete breakdown of all applicable charges," including "daily time sheets which have been approved by Company's authorized representative." (¶ 3.1)
- "[M]aintain a complete and up-to-date set of drawings and technical specifications on the Premises." (¶ 3(d))
- Notify Relator in writing if Asplundh believes any "plans, drawings or specifications are faulty, conflicting, or do not comply with applicable rules, regulations or ordinances," and Asplundh "may not proceed with the part of the Work so criticized until Company provides further directions." (¶ 3(e))
- "[D]eliver to Company all certificates of approvals" resulting from any governmental inspections. (¶ 6 (b))
- Provide Relator "sufficient notice of and afford Company the opportunity to observe any inspection or tests of any part of the Work which Contractor or any Subcontractor conducts. . . ." (¶ 8(a))
- "[F]urnish all samples, at no cost to Company, necessary for testing." (¶ 8(a))
- "[C]ooperate at all times with other contractors and Company work forces who may be on the Premises." (¶ 9(c))
- "[C]ooperate so as not to interfere with Company's business operations and to ensure the safety of all persons". (¶ 9(c))
- "[T]emporarily defer the execution of any portion of the Work when such action may be necessary in the opinion of the Company for the proper advancement of

the work of other contractors or for the installation of machinery, equipment or other work by the Company." (¶ 18(b))

- "[A]bide by any and all rules Company may have in effect at the Premises where the Work is to be performed including, but not limited to . . . the Ameren Corporation Workplace Violence Policy Statement, the Workplace Conduct Guidelines and the construction job work rules..." (¶ 20)
- "[P]erform 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...and with all safety procedures of Company." (¶ 22(a))

The contract also prohibits Asplundh from:

- Permitting "visitors on the Premises without the prior consent of [Relator]." (¶ 24(a))
- Assigning any of its rights or obligations under the contract "without the prior written consent of Company." (¶ 26(a))

In the contract, Ameren UE retains control to:

- "[R]eject any part of the Work found to be defective or not in accordance with the Contract, regardless of the state of its completion or the time or place of discovery of such errors and regardless of whether Company has previously passed it without objection through oversight." (*Id.* ¶ 8(b))
- "[O]btain substitute service as a remedy for service delays by [Asplundh]." (¶ 2.2)

- "[S]uspend Work which interferes or threatens to interfere with the operation of the Company's equipment until the interference is eliminated." (¶ 22(e))
- "[O]rder changes to be made in the Work."(¶ 12(a))
- Reject, at any time, any Subcontractor that Company considers incompetent or unable to perform the portion of the Work involved. (¶ 19(b))
- "[I]nterrupt, suspend or delay any part or all of the Work covered under this Contract for any reason upon written Notice to Contractor which specifies the nature and expected duration of the interruption, suspension or delay. (¶ 30(a))
- "[I]mmediately 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. (¶ 22(f))

Looking at the contract, it is clear that Ameren UE reserved substantial control over the physical activities of Asplundh's employees, the details of the manner in which the work was performed, and the right to possess the job site.

While the Contract did not grant Ameren UE total, complete, or absolute control over Asplundh's work, and while certain Contract language purported to grant control to Asplundh, the entire Contract must be considered, and the language cited above cannot be ignored. The control reserved by Ameren UE went beyond mere authority to stop work or to ensure compliance with Contract specifications. Furthermore, it is particularly appropriate to hold Ameren UE liable where, as here, it has expertise in the type of work that its contractor was performing. *See*, *Mullins v. Tyson Foods, Inc.*, 143 F.3d 1153, 1159 (8th Cir. 1998)(noting that the general rule limiting recovery by contractor's employees to workers' compensation benefits is premised in part on the fact that some landowners have little expertise in the construction or repair work undertaken by independent contractors).

Tellingly, Ameren UE's discussion of its contract is limited to paragraph 22 thereof. Ameren UE ignores the numerous other paragraphs in the contract, referenced above, which add to its level of control.

Ameren UE relies on two cases for the proposition that its contract is insufficient to subject it to liability. Not only are these cases procedurally distinct from the present case, the contracts in those cases are distinguishable.

In *Smith*, this Court reversed a judgment entered in favor of an employee of a contractor against the telephone company which hired that contractor. *Smith v. Inter-*

County Telephone Co., 559 S.W.2d 518 (Mo.banc 1977). Further, the contract in that case only allowed the telephone company to inspect the work of the contractor to secure compliance.

In *Werdenhausen*, plaintiff's theory was only that, in the contract between Union Electric and the contractor, Union Electric had retained "authority to stop any work operation of [contractor] which failed to comply with OSHA." *Werdenhausen v. Union Elect. Co.*, 801 S.W.2d 358, 365 (Mo.App. E.D. 1990). As described above, Ameren UE retained far more control in its contract with Asplundh.

The appellate court in *Werdenhausen* reversed a judgment entered on a verdict in favor of the plaintiff, finding that he had failed to produce sufficient evidence of control. The court noted that plaintiff failed to produce evidence at trial of Union Electric exercising its power to stop work. *Id*., at 366. In its Brief, Ameren UE uses this case when criticizing the underlying Petition for not alleging that it exercised its power to stop work. Relator's Brief, page 38. It is worth repeating that on a Motion to Dismiss, the trial court does not weigh the evidence, while an appellate court reviewing a judgment must confirm that there was sufficient evidence to support the verdict. Moreover, as Ameren UE has not responded to plaintiff's discovery or produced corporate representatives for depositions, plaintiff has not yet had the opportunity to determine whether Ameren UE did in fact exercise exercising its power to stop work. Exhibits L-O.

If anything, *Smith* and *Werdenhausen* these cases demonstrate that Ameren UE's contract can subject it to liability. Further, they support Respondent's discretionary ruling to not dismiss the case.

2. There is no evidence in the record of workers' compensation benefits.

In its Brief to this Court, Ameren UE raises for the first time the issue of workers' compensation. The record is devoid of any evidence regarding workers' compensation benefits. Even if there is ultimately evidence of workers' compensation benefits before the trial court, that would not be a basis to support a Motion to Dismiss for failure to state a cause of action. Moreover, workers' compensation benefits do not preclude an employee of an independent contractor from pursuing a claim against the possessor of land if that possessor controlled the jobsite and activities of the contractor. *Callahan v. Alumax Foils, Inc.*, 973 S.W.2d 488, 490 (Mo. App. E.D. 1998).

3. Whether there was an open and obvious danger is not an issue addressed in a Motion to Dismiss.

Ameren UE also raises for the first time the issue of open and obvious dangers. Interestingly, Ameren UE appears to assume that Mr. Friley died as a result of electrocution. Not only is there no evidence of this in the record, but the underlying Petition alleges that he was "jerked to the top of the utility pole, striking the top portion of the pole and then falling to the ground fatally injured." Exhibit A.

In any event, whether Mr. Friley's death was precipitated by an open and obvious danger is matter to be addressed not on a Motion to Dismiss, but on a Motion for Summary Judgment. *Crow v. Kansas City Power & Light Co.*, 174 S.W.3d 523 (Mo.App. W.D. 2005).

G. Conclusion

Because Ameren UE cannot demonstrate that Respondent abused his discretion in finding that the underlying Petition stated a claim upon which relief can be granted, this Court should quash its Preliminary Writ.

CONCLUSION

Where a trial court denies a Motion to Dismiss, a Writ does not lie. Ameren UE cannot demonstrate that it lacks an adequate remedy at law and that it will suffer irreparable harm if a writ is not issued. To hold otherwise would be a departure from existing law, and would open the door for countless Writ Application in the appellate courts.

Moreover, Respondent's denial of Ameren UE's Motion was the correct decision and is supported by the law. Ameren UE has failed to show that Respondent abused his discretion and, therefore, failed to prove that he acted in excess of his jurisdiction.

For these reasons, this Court should quash its Preliminary Writ.

Respectfully submitted,

Maurice B. Graham # 18029
Thomas K. Neill #51959
GRAY, RITTER & GRAHAM, PC
701 Market Street, Suite 800
St. Louis, MO 63101
(314) 421-5620
(314) 241-4140 (Fax)

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

Undersigned counsel hereby certifies that this brief complies with the requirements of Rule 84.06(b) in that it contains 7,693 words. Disks were prepared using Norton Anti-Virus and were scanned and certified as virus free.

Respectfully submitted,

_____

Maurice B. Graham # 18029
Thomas K. Neill #51959
GRAY, RITTER & GRAHAM, PC
701 Market Street, Suite 800
St. Louis, MO 63101
(314) 421-5620
(314) 241-4140 (Fax)

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was sent via United States Mail, first-class postage prepaid on this 4th day of February, 2008, to:

Mr. Richard G. Steele
Bradshaw, Steele, Cochrane & Berens, L.C.
3113 Independence
P.O. Box 1300
Cape Girardeau, MO 63702-1300
Attorney for Linda M. Hampton
Fax No. 573-334-2947

Mr. Lawrence Pratt
Evans & Dixon, L.L.C.
515 Olive St., Suite 1100
St. Louis, MO 63101-1836
Attorney for Relator Corporation
Fax No. 314-621-3136

The Honorable Judge David A. Dolan
P.O. Box 256
Benton, Missouri 63736
Respondent
Fax No. 573-545-3000

_____
Attorney for Respondent

IN THE SUPREME COURT OF MISSOURI

SC 88573

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

v.

THE HONORABLE DAVID A. DOLAN,
PRESIDING CIRCUIT JUDGE,
33rd JUDICIAL CIRCUIT in SCOTT COUNTY, MISSOURI,
Respondent.

ON PETITION FOR WRIT OF PROHIBITION OR IN THE ALTERNATIVE, FOR WRIT OF MANDAMUS

SEPARATE APPENDIX OF THE RESPONDENT

Maurice B. Graham # 18029
Thomas K. Neill # 51959
GRAY, RITTER & GRAHAM, PC
701 Market Street, Suite 800
St. Louis, MO 63101
(314) 421-5620
(314) 421-4140 (Fax)

APPENDIX

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was sent via United States Mail, first-class postage prepaid on this 4th day of February, 2008, to:

Mr. Richard G. Steele
Bradshaw, Steele, Cochrane & Berens, L.C.
3113 Independence
P.O. Box 1300
Cape Girardeau, MO 63702-1300
Attorney for Linda M. Hampton

Mr. Lawrence Pratt
Evans & Dixon, L.L.C.
515 Olive St., Suite 1100
St. Louis, MO 63101-1836
Attorney for Relator Corporation

The Honorable Judge David A. Dolan
P.O. Box 256
Benton, Missouri 63736
Respondent

_____
Attorney for Respondent