IN THE MISSOURI SUPREME COURT

MICHAEL E. CONNER,	)	
	)	
Appellant,	)	
	)	
vs.	)	**Case No. SC95995**
	)	
DALE OGLETREE, *et al.*,	)	
	)	
Respondents.	)	

APPELLANT'S SUBSTITUTE BRIEF

Appeal from the Civil Division of the
Circuit Court of Wright County, Missouri
44th Judicial Circuit
Honorable R. Craig Carter

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JURISDICTIONAL STATEMENT

This is an appeal from the Interlocutory Order of May 16, 2013, and Summary Judgment entered on May 13, 2014, by the Circuit Court of Wright County, Missouri in favor of Defendants Dale Ogletree and Scott Kidwell (collectively "Defendants") and against Plaintiff Michael Conner ("Plaintiff"). Plaintiff filed a timely Notice of Appeal on May 22, 2014. The issue on appeal originally was whether a genuine issue of material fact exists regarding Defendants' co-employee duties owed to Plaintiff in de-energizing the power line as well as discovery of an incident report.

On September 19, 2016, the Court of Appeals, Southern District, issued its Opinion affirming the Circuit Court's Judgment. Plaintiff timely filed Applications for Re-hearing and Transfer in the Court of Appeals which were denied on October 11, 2016. Plaintiff then timely filed an Application for Transfer in this Court on October 25, 2016. This Court granted Plaintiff's Application for Transfer on December 20, 2016.

STATEMENT OF FACTS

Plaintiff Michael Conner ("Plaintiff") was a journeyman lineman/electrician. (LF 153-54). He was employed by Intercounty Electric Cooperative Association. (LF 333, 800). He began work with Intercounty on January 1, 2001. (LF 334, 801). Defendant Ogletree was employed by Intercounty Electric Cooperative Association. (LF 333). Defendant Kidwell was also employed by Intercounty Electric Cooperative Association. (LF 800). Plaintiff was injured during the course of his employment. (LF 333, 800). Plaintiff suffered electric shock and/or was electrocuted[1] by 7200 volts which caused him to be thrown off of an elevated platform; as a result, he is a quadriplegic. (LF 108, 111, 403-04, 424-25, 494). Plaintiff brought suit against the co-employee, Kidwell, who was supposed to de-energize the equipment but failed to do so and the on-site supervisor, Ogletree, who told the Plaintiff the job-site was de-energized. (LF 22-34).

There were five people on-site in the afternoon hours of December 7, 2007. (LF 813, 861). No one remembered what they were doing that morning. (LF 183, 450-51, 486). Although the Electric Co-op keeps work logs that would show what work was done that morning, it did not produce these logs. (LF 517-18).

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[1] While defense counsel insists electrocute means to kill, the Plaintiff is using the term in the vernacular just as Defendant Ogletree uses it. (LF 371). The word shock, as one might describe an encounter with a kitchen appliance, fails to capture the reality of a 7200 volt power line that causes death or loss of limb. (LF 368, 370).

Defendants Ogletree and Kidwell claim there was a "tailgate meeting" prior to going to the worksite. (LF 813, 861). Eryc Koch, one of the other employees at the scene, says there might have been an informal discussion at the warehouse, but there was not a tailgate meeting at the warehouse or job site. (LF 450-51). The decision on what switches to throw was made at the warehouse, not the job site. (LF 375, 402). The Co-op rules provide that an employee is not to open or close a switch unless absolutely certain it is the right one. (LF 405-06). The Co-op had no paperwork on the service installed at the job site. (LF 535-36). There was no written request to retire the service at the old Brown Shoe factory. (LF 578, 400-01). There was no written job review. (LF 400-01, 519). Since Plaintiff's injury, job briefings are now written. (LF 535). Regardless, the meeting was held without the Plaintiff. (LF 184).

The Plaintiff returned from lunch to work on December 7, 2007. (LF 192-95). Plaintiff did not know much more than that the crew was taking down a transformer bank. (LF 215). The bank of three transformers was elevated on a platform suspended between two telephone poles. (LF 814, 862). Although the platform has been removed, Exhibit 5 shows the two poles, to-wit:

(LF 766, 815, 863; Exhibit 5). The other picture from the scene shows an example of a transformer on a platform and is where Defendant Kidwell thought he was disconnecting the power, to-wit:

(LF 361-63, 408-09, 767; Exhibit 7).

Defendant Ogletree and Randy Cooper were the first to arrive. (LF 816, 863). Randy Cooper was an apprentice lineman. *Id.* Mr. Cooper took the ladder from the truck and leaned it against the platform with the bank of three transformers, e.g. Exhibit 5. (LF 816, 864). Defendant Ogletree had 41 years of experience when he retired in 2013 and at least 35 years of experience on December 7, 2007. (LF 352).

Defendant Kidwell arrived next. (LF 489). He went over to open the switches on the pole at the left in Exhibit 7. (LF 362, 408-09, 489). Defendant Kidwell had volunteered to go over and open the switches and was designated to do so by Ogletree. (LF 360, 364). Defendant Kidwell was a service lineman. (LF 817, 864). He had been since 2006. *Id.* A service lineman has a specific area in the Co-op and is responsible for taking care of the meter and maintenance work in that area. (LF 521). Defendant Kidwell was not part of Defendant Ogletree's line crew. (LF 413, 521).

Defendant Kidwell did not use the bucket on his bucket truck but took his "yellow stick," extendo stick, to open the switch. (LF 364, 412, 458, 489). The switch was at least 25 feet off of the ground. (LF 412). A person needs to be within 10' to 15' to tell the subtle differences between a by-pass and a cut-off switch. (LF 461-62). The rules mandated grounding the system, which required a bucket truck. (LF 370, 412-13). Grounding the lines would have taken about 15 to 20 minutes. (LF 364). Defendant Kidwell's bucket truck was parked by the power bank where Defendant Ogletree was standing. (LF 363-67, 396, 489). Defendant Ogletree knew the system had not been grounded. (LF 359).

The switches on the pole to the south were not knife blade switches but by-pass switches. (LF 459-60). While a knife blade switch cuts all the power down the line, a by-pass switch cuts the power at the switch's location but lets the power keep flowing down the line. (LF 460). By-pass switches are old fashioned and outdated. (LF 459-60). The difference between the two is subtle, but it can be seen from 15 feet away. (LF 461-62). Defendant Ogletree was about 100 feet away. (LF 365). He only saw the switches from a distance. (LF 363). Defendant Ogletree was the supervisor who was about to retire. (LF 352). He had the apprentice, Mr. Cooper, put up the ladder. (LF 819, 867). He allowed a service lineman, who was not a member of his line crew, walk the 100 feet to pull the switches on the pole at the left of Exhibit 7. (LF 364, 365, 391, 413, 521).

The Plaintiff was the last to arrive. (LF 817, 865). The Plaintiff was driving the digger truck that would be used to lift the transformers from the platform. *Id.* The Plaintiff backed his truck in. *Id.* The Plaintiff exited his truck. *Id.* Kidwell was in his bucket going up to work on the line running to the building. (LF 419). Ogletree was already on the platform. (LF 191).

All of the trucks have rubber gloves that allow linemen to work on the equipment while it is energized. (LF 403-04, 449, 455-56, 488). The Co-op's safety rules call for wearing rubber gloves when working with energized lines. (LF 372-73). The Plaintiff and the other workers were trained to test for line voltage. (LF 335, 802). However, the Co-op's prescribed safety standard is to obtain clearance from the on-site supervisor before beginning work. (LF 354, 366-67).

After parking his digger truck, the Plaintiff asked the site supervisor if the power had been cut. (LF 192). Defendant Ogletree said that the power had been killed. (LF 205-209). The Plaintiff climbed the ladder to the platform without his rubber gloves. (LF 195, 455).

The Plaintiff understood the task and proceeded to the next step in tearing down the transformer bank.[2] (LF 819, 867). The Plaintiff was promptly shocked and/or electrocuted which caused him to be blown from the platform stand, resulting in the injuries to his spine and subsequent quadriplegia. (LF 108).

The witnesses agreed that being on the platform with the transformers still energized was a dangerous condition. (LF 464-65, 495). Defendant Ogletree agreed the circumstances were a tragedy and a mistake. (LF 374).

The Plaintiff does not remember the first 20 days after the "mistake." (LF 213). He spent another six months in the hospital and rehabilitation facility. (LF 222).

Suit was filed August 13, 2012, and Answers and Motions to Strike were filed September 21, 2012. (LF 3). The Plaintiff's deposition was taken November 30, 2012. (LF 132). Defendants' first Motion for Summary Judgment was filed January 28, 2013. (LF 7). In between were a flurry of deposition notices, motions to quash, and motions to compel. (LF 4-7 and SLF *generally*).

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[2] At different parts in the deposition the elevated platform with three transformers is also called a power bank. (LF 396-97).

Plaintiff deposed the witnesses. (LF 346-560). The Defendants and witnesses did not remember key facts. *Id.* The Defendants did not remember if they had a primary voltage detector with them. (LF 371, 404-05). They did not remember if the Plaintiff came into contact with an energized line. (LF 357, 419, 490, 541, 544). They did not remember who de-energized the system precluding the Plaintiff from deposing those people. (LF 425, 464). Defendant Kidwell left open the claim the Plaintiff was injured by backfeeding electricity. (LF 424-25).

Plaintiff obtained expert testimony from William Krawczyk, an expert with over 40 years of experience in the electric utility business with ample experience with safety manuals, rules, and practices. (LF 775). Mr. Krawczyk testified that Kidwell and Ogletree failed to follow safety procedures upon which they had been trained by failing to test the line to make sure it was dead after opening the disconnects and failing to short and ground the line. (LF 787)

Eryc Koch testified that everyone knew what happened. (LF 459). He said by-pass switches are decades old and out-of-date. (LF 461). Defendant Kidwell testified that by-pass switches are common. (LF 416). The Plaintiff submitted Eryc Koch's version of events in response to Defendants' Motions for Summary Judgment. (LF 820, 868-69). Defendants Kidwell and Ogletree denied those material facts. *Id.* They denied that a knife blade switch cuts the power while a by-pass switch does not. *Id.* They denied that one has to be within 15 feet to tell the subtle differences between the switches. *Id.* They denied that by-pass switches are old-fashioned and out-of-date. (LF 821, 869).

The Plaintiff filed a Motion to Compel after the depositions. (LF 872-74). The Motion stated the deposed witness did not remember key facts. *Id.* The final judgment denied the Motion to Compel and granted summary judgment to Defendants. (LF 875-78). Plaintiff appealed to the Court of Appeals, Southern District, which affirmed the Trial Court by signed majority Opinion on September 19, 2016. Plaintiff timely filed Applications for Rehearing and Transfer which were denied on October 11, 2016. Plaintiff then timely filed an Application for Transfer in this Court which was granted on December 20, 2016. Plaintiff originally had three (3) points on appeal in the Southern District. This Court's decisions in *Peters v. Wady Industries, Inc.*, 489 S.W.3d 784 (Mo. banc 2016), and *Parr v. Breeden*, 489 S.W.3d 774 (Mo. banc 2016), obviated the need for Plaintiff's third point. Further, in order to focus the issues in this Court, Plaintiff will only proceed on his First Point on Appeal.

POINT RELIED ON

The trial court erred in entering summary judgment on Plaintiff's First Amended Petition because Defendants Kidwell and Ogletree owed duties to Plaintiff, independent of the employer's non-delegable duties, and breached those duties by negligently carrying out the details of the work in that Plaintiff was injured after Defendant Kidwell failed to follow workplace rules, failed to see, know or be familiar with the switch, failed to test the system, failed to ground the system and then told the on-site supervisor the system was de-energized, and Defendant Ogletree, the supervisor, failed to follow work place rules, allowed Kidwell to "clear" the system, knew Kidwell had not used the correct equipment to open the switch, knew Kidwell did not have a way to see the elevated switch, knew Kidwell did not have a testing device or a way to ground the elevated lines, knew that the system was not grounded or tested for voltage, accepted Kidwell's word that the system was de-energized, and then, when asked by Plaintiff for clearance, told Plaintiff the system was dead.

Peters v. Wady Industries, Inc., 489 S.W.3d 784 (Mo. banc 2016)

Marshall v. Kansas City, 296 S.W.2d 1 (Mo. 1956)

Burns v. Smith, 214 S.W.3d 335 (Mo. banc 2007)

Tauchert v. Boatmen's National Bank of St. Louis, 849 S.W.2d 573 (Mo. banc 1993)

ARGUMENT

POINT RELIED ON

The Trial Court erred in entering summary judgment on Plaintiff's First Amended Petition because Defendants Kidwell and Ogletree owed duties to Plaintiff, independent of the employer's non-delegable duties, and breached those duties by negligently carrying out the details of the work in that Plaintiff was injured after Defendant Kidwell failed to follow workplace rules, failed to see, know or be familiar with the switch, failed to test the system, failed to ground the system and then told the on-site supervisor the system was de-energized, and Defendant Ogletree, the supervisor, failed to follow work place rules, allowed Kidwell to "clear" the system, knew Kidwell had not used the correct equipment to open the switch, knew Kidwell did not have a way to see the elevated switch, knew Kidwell did not have a testing device or a way to ground the elevated lines, knew that the system was not grounded or tested for voltage, accepted Kidwell's word the system was de-energized, and then, when asked by Plaintiff for clearance, told Plaintiff the system was dead.

Introduction

The Trial Court decided this case under the old "something more" standard as summary judgment was entered prior to this Court's decisions in *Peters v. Wady Industries, Inc.*, 489 S.W.3d 784 (Mo. banc 2016) and *Parr v. Breeden*, 489 S.W.3d 774 (Mo. banc 2016). Thus, the Trial Court applied the incorrect legal standard for co-employee liability cases. The facts and evidence before the Trial Court and the law as established by *Peters* and *Parr* clearly show that Plaintiff has both pleaded a submissible

co-employee negligence claim against Defendants Ogletree and Kidwell and also presented sufficient evidence to prohibit entry of summary judgment.

Standard of Review

Summary judgment is only appropriate where, on the undisputed material facts in the record, the movant is entitled to judgment as a matter of law. *ITT Commercial Finance Corp. v. Mid-AmEryca Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo.banc 1993). A defendant is only entitled to summary judgment where it shows:

> (1) facts that negate any one of the claimant's elements facts; (2) that the non-movant, after an adequate period of discovery, has not been able to produce and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements; or (3) that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly pleaded affirmative defense.

Id. at 381. The facts are viewed in the light most favorable to the non-moving party and the non-moving party receives the benefit of all reasonable inferences from the record. *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 453 (Mo. banc 2011).

Discussion

Plaintiff Michael Conner was injured when his co-employees, Kidwell and Ogletree, negligently failed to perform the details of their work, abide by workplace rules, and negligently used employer-provided instrumentalities, thus breaching personal duties and not the employer's non-delegable duties.

A. The *Peters* Decision.

At the time Plaintiff was injured, December 2007, co-employees were not immune from liability under Section 287.120, RSMo. *Peters*, 489 S.W.3d at 793. In *Peters*, this Court held that a co-employee may be held liable for negligence when he or she breaches:

> a duty owed independently of the master-servant relationship—that is, a duty separate and distinct from the employer's non-delegable duties—including instances in which injury results from transitory risks created by the co-employee's negligence in carrying out the details or his or her work.

*Id.*at 796.

The employer's non-delegable duties include the following specific duties:

1. The duty to provide a safe place to work.
2. The duty to provide safe appliances, tools, and equipment for work.
3. The duty to give warning of dangers of which the employee might reasonably be expected to remain in ignorance.
4. The duty to provide a sufficient number of suitable fellow servants.
5. The duty to promulgate and enforce rules for the conduct of employees which would make this work safe.

Id. at 795. The scope of these duties is dependent on the nature of the employer's work and the risks associated with the work. *Id.* "[W]hen an employee's injuries result from the tools furnished, the place of work, or the manner in which the work was being done, the injuries are attributable to a breach of the employer's non-delegable duty to provide a

safe workplace." *Id.* "When, however, the employee's injuries result from a co-employee's negligence in carrying out the details of the work, the injuries are attributable to the co-employee's breach of a duty separate and distinct from the employer's non-delegable duty to provide a safe workplace." *Id.*

The *Peters* court did not strictly define what constitutes the "co-employee's negligence in carrying out the details of his or her work." It relied on an illustration from *Marshall v. Kansas City*, 296 S.W.2d 1 (Mo. 1956) to describe the "transitory risk" created by the negligence of fellow servants. In *Marshall*, the plaintiff was injured when he tripped over a compressor hose shaken by his co-employee. *Id.* at 2. This Court found that the injury resulted not from the employer's non-delegable duty, but from the manner in which the co-employee handled the hose. *Id.* at 3. The hose was not defective, but was used in a negligent manner by the co-employee. *Id.*

The *Peters* court also cited as an example the holding in *Logsdon v. Duncan*, 293 S.W.2d 944, 938 (Mo. 1956), in which this Court found that an employee violated a personal duty to a co-employee by negligently using a board to remove debris on a roof by "punch[ing] and dislodge[ing] the debris from behind the chimney with a board." This caused a brick to fall and injure an employee below. *Id.*

Another example cited was *Burns v. Smith*, 214 S.W.3d 335 (Mo. banc 2007). While acknowledging that *Burns* was decided under the "something more/affirmatively negligent act" standard, this Court found that the facts as described in *Burns* showed negligence outside of the employer's non-delegable duty. *Peters*, 489 S.W.3d at 800. In *Burns*, the evidence showed that a co-employee welded over a corroded/rusted water

pressure tank in a negligent manner thus creating a dangerous condition. *Burns*, 214 S.W.3d at 339. The co-employee then instructed the plaintiff to "run it till it blows," which resulted in an explosion, injuring the plaintiff. *Id.* at 336, 340.

Peters also cited *Tauchert v. Boatmen's National Bank of St. Louis*, 849 S.W.2d 573 (Mo. banc 1993), as another example of when a co-employee violated a personal duty of care. In *Tauchert*, a supervisor negligently rigged an elevator hoist system which failed, causing the elevator cab on top of which plaintiff was standing to fall five or six floors resulting in injuries. *Id.*at 574. While *Tauchert* was also decided under the now unnecessary affirmative negligent act requirement, *Peters* found that the facts as alleged in that case "went beyond the employer's duty to provide a safe workplace and could constitute a breach of the co-employee's personal duty of care owed to the plaintiff." *Peters*, 489 S.W.3d at 800.[3]

B. Post *Peters* Decisions.

Following the decisions in *Peters* and *Parr*, the Courts of Appeal have attempted to further define the line between negligent performance of the details of the work by a co-employee and the employer's non-delegable duty. In *Abbott v. Bolton*, 500 S.W.3d 288, 293 (Mo.App. E.D. 2016), the Eastern District Court of Appeals found that the

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[3] *Parr v. Breeden*, 489 S.W.3d 774, 778-779 (Mo. banc 2016), decided on the same day as *Peters*, acknowledged the holding in *Peters* but dealt more substantially with whether duty is entirely a question of law and whether federal motor carrier safety regulations impose a personal duty on co-employees.

plaintiff alleged a violation of a personal duty by a co-employee when that co-employee negligently injured the plaintiff by failing to drive in a careful and prudent manner in failing to reduce his speed, failing to keep a safe stopping distance, and failing to keep a careful lookout. The Eastern District noted "Abbott did not allege that the place of work or the equipment provided was not safe, he did not allege there was an insufficient number of employees, and he did not allege there was a failure to warn of unknown dangers or a failure to promulgate or enforce workplace rules." *Id.* The court found that, "Abbott asserted Bolton was negligent in carrying out the details of his work, for which Bolton could be liable under common law." *Id.*

In *Fowler v. Phillips*, -- S.W.3d – (2016), Case No. ED100801, 2016 WL 4442319,[4] the Eastern District again addressed whether a co-employee's conduct violated a personal duty of care. There, the co-employee was driving a vehicle out of Avis' car wash when she struck the plaintiff. *Id.* at *1. After a discussion of the holdings in *Peters* and *Parr*, the court reasoned that "if the injury arises from a co-employee's action that was not specifically directed by the employer and that was not the result of a malfunction of the employer-provided tool or workplace, the co-employee is open to liability at common law." *Id.* at *3. The court held that the plaintiff's claims arose from a violation of the employer's workplace rules, thus alleged violations of a personal duty of care owed to the plaintiff. *Id.*

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[4] *Fowler*, unlike the cases that will be addressed next, has not been transferred to this Court.

In *Fogerty v. Armstrong*, -- S.W.3d – (2016), Case No. ED100947, 2016 WL 5030379,[5] the Eastern District again determined that the plaintiff had sufficiently alleged a violation of the co-employee's personal duty of care. The co-employee was operating a tractor with a front-end loader while moving stones at work. In the course of this work, the forks of the machine repeatedly dropped onto the plaintiff causing injuries. *Id.* at *1. The court examined the holdings in *Peters* and *Parr*. *Id.* at *2. It found that the plaintiff's allegations that the co-employee had a duty to operate the forklift in a reasonable manner and that the co-employee breached that duty by lowering the forks without taking any steps to warn or protect the plaintiff did not arise from the employer's non-delegable duty. *Id.* at *3. It found that the allegations were a claim that the co-employee "was negligent in the operation of the employer-provided tool and in the carrying out of the details of the work." *Id.*

The Western District Court of Appeals addressed this issue in two recent cases as well. In *Garrett v. Brown*, -- S.W.3d – (2016), Case No. WD78443, 2016 WL 46264726, the court found that a question of fact existed as to whether the co-employee violated a personal duty or whether the employer failed to discharge its non-delegable duty. The plaintiff alleged that he fell from a snapped cross-brace on a billboard and was injured because his co-employee failed to perform required annual inspections, ignored reports that structures were unsafe, and, when he received a report of an unsafe structure, would simply send another employee to the same place without informing him of the danger.

[5] *Fogerty* has been transferred to this Court, along with *Garrett*, *McComb*, and *Evans*.

*Id.*at * 1. The plaintiff alleged that his co-employee failed to adhere to the policies of the employer which were implemented to keep employees like the plaintiff safe. *Id.* at *6. The court remanded the case so that a determination could be made whether the employer had a "policy and took reasonable steps to ensure that the policy was communicated to [co-employee], the [co-employee] was properly trained on the policy and that policy was enforced by [co-employee], then [co-employee's] violation of the policy . . . may have constituted a violation of his personal duty owed to [the plaintiff.]" *Id.* If, however, the employer was aware that co-employee had repeatedly violated the policy and took no reasonable action to enforce the policy, then it would be a violation of the employer's non-delegable duty. *Id.*

In *McComb v. Norfus,* -- S.W.3d – (2016), Case No. WD77761, 2016 WL 4626520, the decedent, a hospital courier, was killed when his vehicle slid off the road in inclement weather. The plaintiff, decedent's wife, alleged that the decedent's co-employees were negligent in sending the decedent out in the inclement weather. *Id.*at * 1. The court remanded the case so that the trial court could determine whether the hospital had a policy regarding whether couriers should be sent on their route during inclement weather. *Id.*at * 5. If no policy existed, then the employer failed to discharge its non-delegable duty to provide a safe workplace. *Id.* If, however, a policy did exist, and the co-employees followed that policy in sending decedent out, then the death would be attributable to the employer's non-delegable duty. *Id.* Finally, if the employer had a policy that required termination of courier services in inclement weather, and the co-

employees violated that policy, thus rendering the workplace unsafe, then decedent's death was likely attributable to a breach of a personal duty by the co-employees. *Id.*at *6.

In addition to the instant case, the Southern District Court of Appeals issued its opinion in *Evans v. Barrett*, -- S.W.3d – (2016), Case No. SD33209, 2016 WL 4990251, affirming the entry of summary judgment in favor of a co-employee. The plaintiff was injured when a co-employee allegedly negligently drove a forklift carrying a load of trusses where plaintiff was walking along side and holding a tag-line to stabilize the trusses. *Id.* at *1. The plaintiff alleged that the co-employee negligently drove the forklift over a rock which caused the load to shift and pull the plaintiff towards the forklift, which struck him and ran over his foot. *Id.* The plaintiff alleged that the co-employee had not been adequately trained to drive a forklift and that the supervisor knew this and still ordered him to operate the forklift. *Id.* After examining the holdings in *Peters* and *Parr*, the court determined that the allegations described a violation of the employer's non-delegable duty to provide a safe workplace, that so-called "bad driving" is no more than an allegation of a failure to provide a safe working environment, and the risks attendant in performing the employer's work are subsumed in the non-delegable duty and cannot support an independent personal duty and plaintiff was injured from a known risk that a load may shift. *Id.* at *2.

Likewise, in the instant case, the Southern District Court of Appeals determined that, "absent the employment relationship with Intercounty, Kidwell would owe no duty to Conner." *Conner v. Ogletree*, Case No. SD33342, Opinion p. 9. It found that every allegation against him was simply the failure to provide a safe workplace. *Id.* It also

found that Kidwell's actions failed to create a "transitory risk" as described in *Marshall* because the risk of electricity was "already present and known." *Id.* at 10. In regard to Ogletree, the Court of Appeals found that all of the allegations against him were due to his "supervisory role" in failing to carry out the employer's non-delegable duty to maintain a safe workplace. *Id.* at 12. Unlike the Eastern and Western Districts, the Southern District made no attempt to distinguish between what constitutes negligent performance of the details of the work and failing to perform the employer's non-delegable duties as required by *Peters*.

Clearly a conflict exists between the Courts of Appeal. The Eastern District and the Western District have adopted similar approaches. The controlling factor in each of those districts' decisions is whether the employer had in place adequate rules and provided instrumentalities to the employees to keep the workplace safe. If so, and the injury resulted from a co-employee's failure to follow those rules or use the provided instrumentalities as directed, "the employee's injuries result[ed] from a co-employee's negligence in carrying out the details of the work" and the injuries are attributable to the co-employee's breach of a duty distinct from the employer's non-delegable duties. *Peters*, 489 S.W.3d at 796. The Southern District's approach does not delve into workplace rules, and focuses primarily on whether the injury occurred while the employees were working together and could be foreseen as a potentially hazardous portion of the work.

However, whether this Court chooses to adopt the reasoning of the Eastern and Western districts, or hews more closely to the reasoning in *Marshall*, *Burns*¸ and

Tauchert, Plaintiff Michael Conner has both alleged and put forth evidence to establish a breach of an independent duty owed to him by both Kidwell and Ogletree.

C. Plaintiff Pled and Submitted Evidence that Kidwell and Ogletree Negligently Failed to perform the details of their work, thus injuring Plaintiff.

In his First Amended Petition, Plaintiff alleges that Ogletree was the lead man who owed a personal duty for the safety of Plaintiff beyond the employer's non-delegable duty to provide a safe workplace. (LF 25). Ogletree breached that duty by: (1) ordering Plaintiff to perform work on an energized system after Plaintiff was told that the system had been tested for voltage, grounded, and de-energized; (2) failing to make sure that the "high voltage/primary line" was tested for voltage, grounded and de-energized before directing Plaintiff to work on the system; (3) failing to warn Plaintiff that the system had not been de-energized; (4) failing to conduct a tailgate meeting or briefing with the crew; (5) failing to isolate the working zone from all voltage; (6) failing to tag the "high voltage/primary line;" (7) failing to apply protection on the de-energized side of all possible sources to the "working zone;" (8) failing to test the "high voltage/primary line" to assure it was de-energized; (9) failing to supervise the work of his linemen; and (10) failing to comply with the electric cooperative safety rules. (LF 25-30).

Plaintiff also alleged that Kidwell owed a personal duty to Plaintiff beyond the employer's non-delegable duties to maintain a safe workplace. (LF 31). Plaintiff alleged that Kidwell breached his duty by: (1) failing to inspect the "high voltage power/primary energy line;" (2) failing to identify the energized condition of the line; (3) knowingly allowing Plaintiff to perform work on an energized system after Plaintiff was informed

the system had been properly tested for voltage, grounded and de-energized; (4) failing to test the high line/primary line for voltage, grounding it, and de-energizing it before Plaintiff began to work on the system; (5) failing to warn Plaintiff that the system was energized; and (6) failing to comply with workplace safety rules and safety standards as set forth in Missouri law, the National Electric Code, and the National Safety Electrical Code. (LF 31-33).

While the Trial Court decided this case on the basis of the "something more" standard, this Court must look to whether Plaintiff's allegations and evidence fall under the standard elucidated in *Peters* to determine whether Plaintiff's injuries resulted from a breach of the employer's non-delegable duty to maintain a safe workplace or from a breach of an independent duty owed to Plaintiff by defendants. Under the facts and circumstances as described in the pleadings, summary judgment pleadings, and taking into account the nature of the employer's work and risks associated with that work, Plaintiff has adequately pleaded and elucidated facts showing that his injuries resulted from Ogletree and Kidwell's breaches of personal duties.

In his First Amended Petition, Plaintiff clearly alleges that both Ogletree and Kidwell failed to comply with the rules for workplace safety promulgated by their employer, Intercounty Electric Cooperative Association. (LF 26-33). Specifically, Plaintiff alleged that Ogletree negligently failed to comply with the Intercounty Electrical Cooperative Safety Rules and Procedures and violated the safety rules and standards set forth in Missouri law, the National Electric Code, and the National Electrical Safety Code. (LF 27, 29). Plaintiff's factual allegations regarding Ogletree's specific breaches

all constitute violations of the employer's Safety Manual. (LF 25-29, 618-68). Additionally, in response to each Defendant's two Motions for Summary Judgment, Plaintiff clearly refuted their facts with references to the employer's Safety Manual and his own testimony regarding the employer's rules. (LF 104-06, 334-338). Plaintiff affirmatively states that, due to the multiple safety rule violations by Ogletree and Kidwell, the job site became more dangerous than normal. (LF 337). The Safety Manual states that "No employee shall begin work on any lines or equipment unless authorized or instructed to do so by the person in charge." (LF 618). Ogletree was the supervisor at the worksite. (LF 343). The job consisted of taking down a transformer bank at an old shoe factory. (LF 339). "When lines or equipment are taken out of service, they shall first be de-energized by an appropriate switching device, such as disconnect, interrupter, circuit breaker, fuse or recloser." (LF 619). Thus, the job involved work on de-energized lines and equipment. The Safety Manual requires that before working on de-energized lines, all switches which connect the lines or equipment to a possible source of energy must be opened and rendered inoperable, all means used to provide isolation must be tagged, all phases tested for voltage shall be grounded, all uninsulated lines must be isolated, lines must be grounded pursuant to the rules, switches accessible to persons outside the employer's control must be rendered inoperable, and remotely operated or automatic switches must be tagged at the point of control and rendered inoperable. (LF 619-20).

The facts as described in the summary judgment pleadings show that Ogletree ordered or designated Kidwell to de-energize the system by opening the switches on a pole about 100 feet away from the work area. (LF 341-42, 360). Knife blade switches cut

power down the line. (LF 343). By-pass switches cut the power at the switch's location but let power continue to flow down the line. (LF 343). The difference between the two switches is subtle, but can be seen from 15 feet away. (LF 343). The switches on the pole that Kidwell opened were by-pass switches, not knife blade switches. (LF 343). Ogletree was about 100 feet away from the pole. (LF 343). Defendant Kidwell did not use his bucket truck but took his "yellow stick," extendo stick, to open the switch. (LF 364, 412, 458, 489). The switch was at least 25 feet off of the ground. (LF 412). Workplace rules prohibited an employee from opening or closing a switch "unless absolutely certain that it is the right one." (LF 627). The switches Kidwell opened did not de-energize the power to the work site.

Eryc Koch, who was working with Plaintiff and Defendants on the scene at the time of the incident testified:

> Q: Okay. Were you ever told by Scott or Dale what had gone wrong?
>
> A: Um, I don't ever remember them saying what had went wrong, but I – it – we all knew what went wrong, you know. Nobody had to tell us.
>
> Q: So tell me what – what everybody knew.
>
> A: It's just the fact that the switches that was thought to have opened the line feeding the power bank did not actually open the line.
>
> Q: Okay. Was it –
>
> A: And that was realized right after the accident.

Q: And do you remember who found that out or who realized it?

A: Um, Dale was the first one I remember saying anything.

Q: Okay. What do you remember him saying?

A: Just that they weren't actually knife blades, they was what's known as a bypass switch.

. . .

Q: How do you tell the difference in a bypass and a knife blade switch that kills electricity? Do you have to get up close to it and look at it?

A: The older ones, like was used in this instance, look a lot more similar to a knife blade than what's presently used. To my knowledge, we never install that type of switch anymore.

…

Q: Okay. But you understand my question? I mean, how do you – if you're going to deenergize lines, how do you tell whether it's a knife blade switch that's going to, you know, separate the line, make it safe for the workers, or whether it's a bypass?

A: That – there's subtle differences.

Q: Did you say "subtle"?

A: Subtle.

Q: Okay. Is this something you have to like, get within a few feet to look at it and eyeball it?

A: I don't know. You – you could tell from a – from a reasonable distance, let's say.

Q: What is a –

A: Ten, 15 foot, farther.

(LF 459-62). Based on Koch's testimony alone, there is a question of fact as to whether Kidwell was able to visualize and open the correct switch from the ground with an extendo stick.

In addition to not de-energizing the power to the work site via switches, Ogletree and Kidwell failed to follow the employer's rules requiring that the system be grounded and tested for voltage. Eryc Koch described the process. (LF 462). He stated that you ground the system to be sure it is de-energized. (LF 462). Before you ground the system, you first test to make sure there is no voltage, "because you do not want to put that ground onto an energized line." (LF 462). If there is voltage, you have to figure out why. (LF 463). Grounding the system would have required a bucket truck. (LF 370, 412-13). Grounding the lines would have taken about 15 or 20 minutes. (LF 364). Section 2.3 of the Safety Manual governs how to ground lines and provides detailed instructions for protective grounding, including inspection before use. (LF 633-36). Defendant Kidwell's bucket truck was parked by the power bank where Defendant Ogletree was standing. (LF 363-67, 396, 489). Defendant Ogletree knew the system had not been grounded or tested for voltage. (LF 359). Accordingly, Defendant Ogletree was fully aware that he had not complied with his employer's rules for de-energizing the system, grounding the system, and testing the system for voltage.

Plaintiff's expert testimony from William Krawczyk confirms that both Ogletree and Kidwell failed to follow safety requirements when they did not test the line to make sure it was dead and then ground the line. (LF 787).

Despite this, both Ogletree and Kidwell began the work of removing the transformers with Ogletree working on the platform itself. (LF 342, 808). Plaintiff asked whether the power had been cut, and Ogletree confirmed that it had been killed. (LF 342, 808). The employer provided rubber gloves for use when working on energized equipment; however, since Plaintiff was informed that the equipment had been de-energized, he did not use his gloves. (LF 343, 809). Plaintiff climbed to the platform to begin working, and grabbed a line, which shocked him and threw him from the platform severing his spinal cord and burning his hand. (LF 108, 179).

As this case was decided on a motion for summary judgment, most. if not all, of these facts are disputed by the Defendants. However, when facts are disputed, summary judgment is inappropriate. *See ITT Commercial Finance Corp.*, 854 S.W.2d at 376. There is a dispute as to the type of switches that were on the pole which Kidwell operated, whether he could properly see those switches, whether a tailgate meeting occurred, who was working where, and exactly how Plaintiff came into contact with the wire. (LF 812-22, 860-71). There is no dispute, however, that both Ogletree and Kidwell believed that the lines had been de-energized, but that neither had followed the requirements of the Safety Manual to verify this by checking the voltage, grounding the lines, tagging the switches, or isolating the system. (LF 359, 407, 417-18, 619-20, 627,

633-36). They did not verify that the lines were de-energized, they just told everyone that the switches were open. (LF 453).

The facts and evidence in this case as presented at this stage easily show that Plaintiff's injuries were caused by the breach of independent duties owed by Kidwell and Ogletree as they negligently failed to carry out the details of their work. Unlike the pleadings in *Peters*, the facts here show that it was the employees' individual actions which caused Plaintiff's injuries, not the policies of their employer. Plaintiff has not alleged nor has he presented evidence that his injuries resulted from a failure of the employer to provide adequate equipment, a sufficient number of employees, or a safe place to work. Unlike the supervisor in *Peters* who simply stacked the baskets the same way they arrived from Wady Industries, Plaintiff's employer had policies for how power lines were to be de-energized before work was begun. It was Ogletree and Kidwell who deviated from the employer's policies and practices in failing to both de-energize the line and then confirm that de-energization with testing, grounding, isolation, and tagging. Further, the facts, when interpreted in the light most favorable to Plaintiff, show that Kidwell was not able to actually visualize the switch and mistakenly opened the wrong one. He was the one tasked with de-energizing the line and all of the other workers relied upon his actions. (LF 341-42, 360, 458). Ogletree, as the supervisor, was the one required to sign off on everyone starting the work, and he was not allowed to rely on only Kidwell's statement.

This negligence included failing to follow workplace rules which required that they make absolutely certain that the correct switch is thrown, then test the line, then

ground the line, then isolate the line, and tag out the switch before work is done. The simple failure to follow the workplace safety rules, put in place by the employer, is sufficient under the Eastern District's reasoning in *Abbott* and *Fowler* and the Western District's reasoning in *Garrett* and *McComb* to meet the requirement that the injury result from a co-employee's negligence in carrying out the details of the work.

Additionally, the facts are analogous to the facts in *Marshall*. Here, as in *Marshall*, the employer provided tools to the co-employee (extendo stick, bucket trucks, grounding equipment, voltage test equipment and, in *Marshall*, a jackhammer and hose). Here, as in *Marshall*, there is no contention that the tools were defective. In *Marshall*, it was the employee's negligent use of the employer-provided tool which caused the injury. Here, there is a question of fact as to whether Kidwell should have used the extendo stick or his bucket truck and other tools to throw the switch. There is no question that Kidwell and Ogletree had the equipment to test the line, ground it, and tag it out, but simply failed to use them. This failure to use properly working and employer-provided instrumentalities in the manner in which they were intended led directly to Ogletree, Kidwell, and Plaintiff being unaware that the line was still energized.

The facts in this case also bear significant similarities to the dangerous situations in *Burns* and *Tauchert* which this Court recognized as falling outside of the employer's non-delegable duties. In both of those cases, the co-employee's actions made a reasonably safe workplace unreasonably dangerous. In *Burns*, this Court found that the co-employee knew, or at minimum should have known, that his welded fix for the pressure tank was unsafe, but ordered the plaintiff to use it anyway despite such risk. 214

S.W.3d at 340. The co-employee, through his own negligence, made a safe situation unreasonably dangerous by improperly repairing the tank but still ordering his co-employee to work with it. Here, Defendants contend that the workplace was reasonably safe "other than the danger that normally goes with working on power lines." (LF 273). The voltage in the line, 7200 volts, can kill and maim a person, but, when the safety rules are followed, it can be safe to work around. (LF 370-71, 621-27). Plaintiff contends that it was the actions of Ogletree and Kidwell which transformed the workplace from reasonably safe to unreasonably dangerous. Ogletree and Kidwell behaved similarly to the co-employee in *Burns*. Kidwell negligently used an extendo stick to turn the switches when he should have visualized them to know they were the "absolutely" correct switches. He assumed, without testing, that this de-energized the system. Ogletree instructed Plaintiff to begin working, assuming that Kidwell had de-energized the system and without testing, grounding, or tagging out. Both Ogletree and Kidwell were well aware that 7200 volts of electricity can cause severe injury or death, yet neither bothered to simply make sure the line was de-energized, as required by their rules and general common sense, before permitting Plaintiff to work on the system. Even if the line was de-energized, as Kidwell makes some reference in his deposition (LF 424-27), had Kidwell and Ogletree isolated the system, grounded it, and tagged it out, this would have prevented back feed or lightning from causing the current that may have harmed

Plaintiff.[6]

Similarly, in *Tauchert*, there was obvious danger when working on a five to six story elevator shaft. 849 S.W.2d at 573. This danger could have been minimized or eliminated almost altogether by simply using proper safety precautions. There was a question of fact relating to the actions of the supervisor/co-employee in "arrang[ing] a make-shift hoist system to raise the elevator." *Id.* at 574. "[P]ersonally arranging the faulty hoist system for the elevator may constitute an affirmative negligent act outside of the scope of the responsibility to provide a safe workplace for plaintiff." *Id.* The *Tauchert* Court found that using an unsafe hoist could have placed the plaintiff in unreasonable danger. Similarly, Kidwell and Ogletree were well aware that they were working around dangerous electricity. They were well aware that if they simply followed workplace rules that this danger was minimized. Yet, Kidwell and Ogletree both ignored their personal duties under the workplace rules and common sense to de-energize the lines, check them, ground them, isolate them, and tag the switches out before Plaintiff began work. Just like the co-employee in *Tauchert*, they should have known that faulty use of the extendo stick and complete disregard for the workplace rules could lead to severe injury or death.

The danger in this situation is obvious even to the most casual observer. It is common knowledge that the electricity in powerlines is more than sufficient to kill or

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[6] While it seems undisputed that Plaintiff's fall was caused by coming into contact with a line that was energized (LF 424-25), there is at minimum a question of fact on this issue.

maim a person. A reasonable person, whether an employee of an electric company, a lineman, or anyone else, would know that extra care must be given to insure that power is killed before anyone starts working on a system that is supposed to be de-energized. This general knowledge, known to anyone whether employed or not, should be sufficient, aside from all of the factors discussed above, to impose a personal duty of care on all electrical workers that they de-energize a system before allowing a co-worker or anyone else to come in contact with it.

Defendants will likely argue, as the defendants did in all of the cases cited above, that they were simply assigned the duty to perform the employer's non-delegable duties. However, the employer satisfied its duty to provide a safe workplace here by promulgating voluminous workplace rules for working on its electric systems, both energized and de-energized, familiarizing its employees with the rules, and training its employees to work on these systems utilizing the rules. (LF 167-71, 353-55, 366-69, 372-73, 401-03, 410-12, 420-21, 561-758). The employer provided five workers for the job. (LF 339). The employer provided all necessary tools and equipment to safely perform the work. (LF 77-8, 370-72, 403-07, 412-13). It was the actions of Ogletree and Kidwell in negligently failing to follow these rules ("the details of the work") which created the danger and caused Plaintiff's injuries. Ogletree and Kidwell, each, had personal duties to ensure that the line was de-energized, yet clearly and admittedly failed to follow the straightforward rules set forth by their employer to actually make sure the line was de-energized.

Defendants will also argue that the risks created were not "transitory" under the *Marshall* decision as cited by the *Peters* court. However, the employer in *Marshall* clearly had a duty to provide a safe workplace. While it is not elucidated in the opinion, it can safely be assumed that the employer had a policy (either written or unwritten) that jackhammer hoses should be handled in a safe manner and not in a way that might cause a worker to trip. It is also certainly reasonable for an employer to foresee that a long hose may constitute a trip hazard and guard against this. However, the *Marshall* court and the *Peters* court both recognized that the injury caused by the hose was attributable to the co-employee's personal duty, not to the employer's non-delegable duty.

Defendants will also likely argue that the employer failed to train Ogletree and Kidwell properly to prepare them for all of the different scenarios they may encounter, such as "antiquated" switches or proper opening of switches, testing, and grounding techniques. However, the evidence in the record shows that the employer promulgated extensive rules and trained its employees on how to implement those rules. (LF 167-71, 353-55, 366-69, 372-73, 401-03, 410-12, 420-21, 561-758). Neither Ogletree nor Kidwell contend that they actually complied with the rules by tagging out the switches, testing, and grounding the lines though both were fully aware of those rules. (LF 368-70, 410-12, 417-18). The employer did its duty to promulgate rules, advise its employees of those rules, and train its employees to follow those rules. It was Ogletree and Kidwell who chose not to follow the rules, thus causing Plaintiff's injury. Beyond even following the rules, the facts show that Kidwell had no way to actually see whether he opened the correct switches before telling everyone that the power was killed.

Defendants may contend that the same workplace rules required Plaintiff to be responsible for his own safety. The rules make mention of this, and Plaintiff admitted in his deposition that he was trained to de-energize and ground lines along with the other aspects of the work. What Defendants are actually referring to is contributory negligence. Missouri has adopted comparative fault for negligence claims. *Gustafson v. Benda*, 661 S.W.2d 11, 16 (Mo. banc 1983). Accordingly, it is up to a jury to determine how much, if any, fault should be attributed to Plaintiff for allegedly failing to follow the workplace rules.

Plaintiff is a quadriplegic because Ogletree and Kidwell chose not to follow the workplace rules and their training to make certain that the 7200 volt line was de-energized, tested, grounded, and the switches tagged out. Intercounty Electric Cooperative did everything it could possibly do to prevent Plaintiff's injury. It promulgated voluminous safety rules, provided safety equipment and all necessary tools to perform the job, provided training in how to perform the work safely and in compliance with its rules, and provided a sufficient number of workers at the job site. Ogletree and Kidwell failed to comply with the details of their work, primarily their duties to de-energize, test, and ground the system. Had Ogletree and/or Kidwell even completed one more of the details (either testing or grounding), Plaintiff would not have suffered his injuries. Under any of the cases and facts analyzed in *Peters*, Plaintiff has shown that Ogletree and Kidwell's breach of personal, independent duties, caused his injuries. The Trial Court's entry of summary judgment should be reversed and this case should be remanded for trial.

CONCLUSION

Defendants Ogletree and Kidwell breached personal duties of care owed to Plaintiff when they failed to properly de-energize the system, test the voltage, ground the system, and tag out the switches prior to Plaintiff beginning work. These actions, and Plaintiff's injuries, resulted from Ogletree and Kidwell's negligence in carrying out the details of the work. Thus, Plaintiff's injuries were not the result of a breach of the employer's non-delegable duties and are actionable. The Trial Court's entry of summary judgment should be reversed and remanded for trial.

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RULE 84.06(c) CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellants, pursuant to Rule 84.06(c), hereby certifies to this Court that:

1. The brief filed herein on behalf of Appellants contains the information required by Rule 55.03.

2. The brief complies with the format requirements of Rule 30.06 and 84.06(a) and (b).

3. The number of words in this brief, according to the word processing system used to prepare this brief, is 9,093, exclusive of the cover, certificate of service, this certificate and the signature block.

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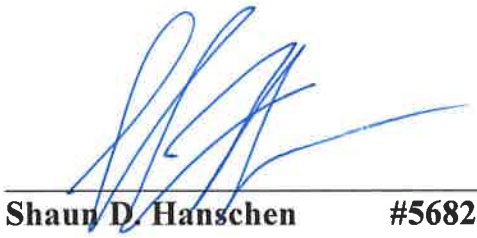
CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document has been sent via the Court's electronic filing system to the attorneys for Defendants, Mr. Terry M. Evans, Andereck, Evans, Widger, Johnson & Lewis, LLC, 119 E. Main St., Smithville, MO 64089 on the 30th day of January, 2017.



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