IN THE

SUPREME COURT OF MISSOURI

APPEAL NO. SC 95995

MICHAEL E. CONNER,

Plaintiff-Appellant,

v.

DALE OGLETREE, *et al*.,

Defendants-Respondents.

APPEAL FROM THE CIRCUIT COURT OF WRIGHT COUNTY
STATE OF MISSOURI

THE HONORABLE R. CRAIG CARTER, CIRCUIT JUDGE

DEFENDANTS-RESPONDENTS' SUBSTITUTE BRIEF

Terry M. Evans #21922
ANDERECK, EVANS, WIDGER, LEWIS & FIGG, LLC
119 East Main Street
P. O. Box 654
Smithville, Missouri 64089
Telephone: 816-532-3895
Facsimile: 816-532-3899
E-Mail: tevans@lawofficemo.com

Attorney for Defendants-Respondents

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STATEMENT OF FACTS

I. Facts that gave rise to this lawsuit.

This case involves a workplace injury where Plaintiff and Defendants were co-employees. (L.F. 23). The accident which gave rise to Plaintiff's lawsuit occurred on December 7, 2007 at the Old Brown Shoe Factory in Mountain Grove, Missouri. *Id.* Plaintiff worked for Intercounty Electric Cooperative Association (hereinafter referred to as "Intercounty") as a journeyman lineman. (L.F. 73). Intercounty had employed Plaintiff since January 2, 2001. (L.F. 283). Defendants Dale Ogletree and Scott Kidwell (hereinafter referred to collectively as "Defendants" and individually as "Defendant Ogletree" and "Defendant Kidwell") also worked for Intercounty as journeyman linemen; Defendant Ogletree was the crew supervisor and Defendant Kidwell was Intercounty's serviceman.[1] (L.F. 23). It is undisputed that Plaintiff and Defendants were all working in the course and scope of their employment that day. (L.F. 72-73).

The job that day was to retire a transformer bank and to remove copper lines at the Old Brown Shoe Factory. (L.F. 184). Due to the size of the job, Defendant Kidwell requested that Defendant Ogletree and his crew assist with the job. Defendant Ogletree's crew consisted of himself, Plaintiff Michael E. Conner, journeyman lineman Eryc Koch, and apprentice lineman Randy Cooper. (L.F. 184).

[1] Part of the job description of a serviceman is to assist power line crews and construction crews as needed. (L.F. 762).

Intercounty relies on its supervisors to ensure the rules and guidelines contained in its safety manual are followed. (L.F. 829). Intercounty delegated to Defendant Ogletree, the crew foreman, the task of providing a safe workplace at the Old Brown Shoe Factory that day. Part of that delegated task included de-energizing the energized power line that was present at the workplace. (L.F. 829).

The sole purpose for de-energizing the power line was to provide Intercounty employees with a safe workplace. (L.F. 829). Defendant Kidwell was not a member of Defendant Ogletree's crew but was a journeyman lineman and had been trained by Intercounty on the proper procedure to de-energize a power line. (L.F. 829). The job description of a journeyman lineman includes assisting power line and construction crews as needed. (L.F. 762).

Prior to beginning the job, Defendant Ogletree's crew, along with Defendant Kidwell, met over lunch at the Intercounty warehouse in Mountain Grove and discussed the job in what is commonly referred to as a tailgate meeting. (L.F. 184, 450-51, & 486-87). After lunch, each member of the crew went to the Old Brown Shoe Factory. (L.F. 185-86). Defendant Ogletree and Randy Cooper arrived first, and Defendant Kidwell arrived shortly thereafter. (L.F. 489). Because it was his job and Defendant Ogletree's crew was just assisting, Defendant Kidwell volunteered to open the disconnect switches. (L.F. 364). He took a yellow extendo "hot stick" and stretched it out to reach the knife-blade switches and opened each switch. (L.F. 412, 458, & 489-90). The hot stick is the

proper tool to use to open the switch. (L.F. 627).[2] Defendant Kidwell could see a visual opening in the switch and believed the power line was de-energized. (L.F. 407). To Mr. Koch, the opening in the switch indicated that the power had been de-energized. (L.F. 453). The entire crew thought opening the switches de-energized the power line. (L.F. 421). When Mr. Koch pulled up to the jobsite he saw Defendant Kidwell returning the hot stick that was used to open the switches back into the service truck. (L.F. 458). At that time, Mr. Koch believed the power line had been de-energized. (L.F. 458). After Defendant Kidwell opened the switch, he came to the power bank and told Defendant Ogletree that the power line was disconnected in that there was a visual opening in the switch. (L.F. 364). Defendant Ogletree and Randy Cooper also believed the power line was disconnected because they saw the opening in the switch. (L.F. 324, 365, & 490).

Defendant Ogletree and Randy Cooper were on the platform where the transformers were located when Plaintiff arrived in his digger derrick truck. (L.F. 324). Upon arriving, Plaintiff backed his digger derrick up to the platform and assumed the power line had been de-energized because he saw Defendants, Randy Cooper, and Eryc Koch all working near the power line. (L.F. 191, 193, 324, & 772). Plaintiff, in speaking with Mr. William Krawczyk, Plaintiff's own expert, stated that "he had taken it for granted that the line was dead" because "[e]veryone else was up there working when he .

[2] Section 2.2.5 of the AMEC safety manual provides "(5) Single pole disconnect switches, cutouts, and hot clams shall not be operated except with an approved switch stick or hot line tool."

. . climbed up the ladder onto the platform. (L.F. 772). Plaintiff admitted that when he saw the crew working he assumed the power line was de-energized and made no inspection regarding whether or not the power line had been de-energized. (L.F. 84, 61:16-62:8). While up on the platform, Plaintiff did not have any conversation with either Defendant. (L.F. 199). Neither Defendant told Plaintiff to get onto the platform. (L.F. 325-25, & 491). Defendant Ogletree was sitting on top of a transformer at the time of the accident with his head approximately two inches from the energized power line. (L.F. 325). Defendant Kidwell was in the bucket of his service truck working on the power line between the transformers and the Old Brown Shoe Factory. (L.F. 413).[3] Defendant Kidwell was not on the platform.

Whatever risk was involved in being on the platform was shared by everyone (L.F. 495). Mr. Cooper was going to cut a stinger wire but was too short. (L.F. 490-94). Plaintiff came up the ladder and said he would get the stinger wire. *Id.* Plaintiff had klies (a tool to cut wire) in his hands. *Id.* Mr. Cooper then went back to work and heard a sound. *Id.*

Plaintiff had reached up and attempted to cut a stinger wire that was not de-energized. (L.F. 490-494). The electric shock knocked Plaintiff off of the platform and caused significant injuries, rendering Plaintiff a quadriplegic. (L.F. 24).

[3] To ground the power line, a bucket truck would be used. (L.F. 413). Mr. Eryc Koch was operating the bucket truck and would have that responsibility. (L.F. 447).

Plaintiff filed a Workers' Compensation claim on December 10, 2007 for injuries sustained in the accident. (L.F. 273). Since this accident, Plaintiff has now received benefits that exceed $2,222,384.28 for medical expenses and $227,540.65 in total disability. (L.F. 832). And the life care plan pertaining to the Worker's Compensation settlement exceeds $5,733,233.75. (L.F. 834).

II. Facts concerning the pleadings in this case.

On December 17, 2012 Plaintiff filed his Amended Petition naming foreman Dale Ogletree and serviceman Scott Kidwell as defendants. (L.F. 22). Plaintiff's Petition included three counts of negligence against Defendant Ogletree and two counts of negligence against Defendant Kidwell. (L.F. 22-34).

The three counts against Defendant Ogletree were captioned as Affirmative Negligence Against Defendant Ogletree ("something more"), Negligence Against Defendant – Assumption of a Duty Pursuant to Restatement (Second) of Torts § 324a (1965), and Negligence Against Defendant Dale Ogletree. (L.F. 25-30).

In Count I, Plaintiff alleged that Defendant Ogletree breached a personal duty of care and was affirmatively negligent in the following ways:

a. Directed Plaintiff to perform work on an energized power line after Plaintiff was wrongfully made to believe that the system had been properly tested for voltage, grounded and in effect de-energized;

b. After Defendant Ogletree got a "workman's hold" for the line system and thereby took control over it, he negligently failed to make sure that the line

was tested for voltage, grounded and de-energized before he directed Plaintiff to perform work on it;

c. Failed to warn Plaintiff of the dangerous condition of the power line system, and instead Plaintiff was made to believe that the line had been de-energized, and Defendant Ogletree failed to direct the crew to ground the line;

d. Failed to supervise the work of his linemen including among other things, failed to conduct a tailgate briefing at the job site to give directions and supervision to the members of his crew.

(L.F. 25-27).

Plaintiff alleged that these "affirmative" negligent acts of Defendant Ogletree were "something more" than simply failing to provide a safe work place and therefore constitute a breach of a personal duty owed by Defendant Ogletree to Plaintiff. *Id.*

Count II against Defendant Ogletree for Assumption of a Duty pursuant to Restatement (Second) of Torts § 324a alleged that Defendant Ogletree assumed a duty to exercise ordinary care to protect Plaintiff against injury in the performance of his work.[4] (L.F. 27-29).

Finally, Count III is a general negligence count against Defendant Ogletree, stating that Defendant Ogletree owed a personal duty to Plaintiff to exercise such care in

[4] Appellant has not raised any points on appeal regarding this count.

the prosecution of his work as men of ordinary prudence use in like circumstances. (L.F. 30).

The two counts against Defendant Kidwell were captioned as Affirmative Negligence Against Defendant Scott Kidwell – ("something more") and Negligence Against Defendant Scott Kidwell. (L.F. 31-33).

In Count IV, Plaintiff alleged that Defendant Kidwell "did 'something more' than fail to provide Plaintiff Michael E. Conner with a reasonably safe work environment by affirmatively, negligently and knowingly allowing Plaintiff to perform work on the energized power line system causing Plaintiff to encounter a known dangerous condition and/or hazard." (L.F. 31-32). Plaintiff alleged that Defendant Kidwell was affirmatively negligent in the following ways:

a. Defendant Kidwell negligently inspected the subject "high voltage power/primary energy line" and failed to properly identify dangerous and/or hazardous condition of the power line system and failed to de-energize the "high side line/primary line";

b. Defendant Kidwell knowingly allowed Plaintiff Michael Conner to perform work on an energized power line system after Mr. Conner was wrongfully made to believe that such system had been properly tested for voltage, grounded and in effect de-energized;

c. Defendant Kidwell negligently failed to make sure the high line/primary line was tested for voltage, grounded and de-energized before the Plaintiff began to start work on the power line system;

d. Defendant Kidwell negligently failed to warn Plaintiff Michael Conner of the dangerous condition of the power line system and Mr. Conner, was instead made to believe that the "high voltage line/primary line" had been de-energized; and

e. That subparagraphs 42 a through d all show failure to comply with all safety rules and safety standards as set forth in Missouri law, the National Electrical Code, and the National Electrical Safety Code.

Id.

Plaintiff alleged that these "affirmative" negligent acts of Defendant Kidwell were "something more" than simply failing to provide a safe work place and therefore constitute a breach of a personal duty owed by Defendant Kidwell to Plaintiff. *Id.*

Count V is a general negligence count against Defendant Kidwell, stating that Defendant Kidwell owed a personal duty to Plaintiff to exercise such care in the prosecution of his work as men of ordinary prudence use in like circumstances. (L.F. 33).

Allegations that Defendants failed to hold a tailgate meeting, test for voltage, ground the power line, tag the power line, and warn Plaintiff that the power line was not de-energized are mere allegations of violations of Intercounty's safety rules and such failure is the failure of the employer to perform its nondelegable duty to provide a safe workplace, and such failure rests with the employer and not the employees. (L.F. 569, 618-620).

In their affirmative defenses, Defendants specifically pled that Plaintiff's claims all related to the employer's nondelegable duty to provide a safe workplace (L.F. 48), that

Plaintiff's claims are barred by the exclusivity provision of the workers' compensation law (L.F. 46-47), and that Defendants did not engage in any intentional activity that would constitute something more or an affirmative negligent act. (L.F. 48).

III. Procedural history of this case that led to this appeal.

After the parties engaged in discovery, Defendants filed separate motions for Summary Judgment. (L.F. 66-67, 91-92). On May 16, 2013, The Honorable R. Craig Carter granted Summary Judgment in favor of Defendant Ogletree as to Counts II and III and in favor of Defendant Kidwell as to Count V. (L.F. 275-76). Summary Judgment was granted as to Counts II, III, and V because, "[t]he allegations contained within these counts, as well as the facts proven by the Summary Judgment motions and replies, show that the Plaintiff cannot prevail on these causes of action." (L.F. 276). Summary Judgment was denied as to Counts I and IV because discovery was still ongoing. (L.F. 275-76). On May 13, 2014, after Plaintiff had the opportunity to conduct additional discovery, Summary Judgment was granted in favor of Defendant Ogletree as to Count I and in favor of Defendant Kidwell as to Count IV. (L.F. 885-88). The Circuit Court's reasoning for granting Summary Judgment was stated as follows:

> Counts I and IV of this pleading are described as "something more" causes of action. However, the Court notes only one allegation contained within the entire Petition that would, if proven, be submissible to a jury as a "something more" case. This allegation is contained in paragraph 42.b., wherein plaintiff alleges; "Defendant Kidwell knowingly allowed Plaintiff Michael Conner to perform work

> on an energized power line system after Mr. Conner was wrongfully made to believe that such system had been properly tested for voltage, grounded and in effect de-energized." The court has thoroughly reviewed the exhibits proffered by the parties, and finds that all of the evidence disproves this allegation. Even Plaintiff's expert testified that there was no purposeful or knowing act or omissions by any Defendant.

Id.

On October 4, 2016, Plaintiff filed a Motion for Rehearing and an Application for Transfer to the Supreme Court of Missouri. On October 11, 2016 the Motion for Rehearing was overruled and the Application for Transfer was denied. On December 20, 2016 this Court sent a Mandate sustaining Appellant's Application to Transfer.

POINT RELIED ON

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS, DALE OGLETREE AND SCOTT KIDWELL, BY FINDING THAT DEFENDANTS DID NOT OWE PLAINTIFF A PERSONAL DUTY OF CARE BECAUSE PLAINTIFF FAILED TO PLEAD AND PRODUCE SUFFICIENT FACTS TO SUPPORT A FINDING THAT DEFENDANTS OWED AND BREACHED A PERSONAL DUTY OF CARE TO PLAINTIFF IN THAT AT ALL TIMES OF THE ACCIDENT DEFENDANTS WERE CARRYING OUT THE NONDELEGABLE DUTIES OF THEIR EMPLOYER TO PROVIDE A SAFE WORKPLACE AND ANY FAILURE ON THE PART OF DEFENDANTS TO CARRY OUT INTERCOUNTY ELECTRIC COOPERATIVE'S NONDELEGABLE DUTIES LIES WITH THE EMPLOYER AND NOT DEFENDANTS.

Carman v. Wieland, 406 S.W.3d 70 (Mo. App. E.D. 2013)

Marshall v. Kansas City, 291 S.W.2d 1 (Mo. 1956)

Parr v. Breeden, 489 S.W.3d 774 (Mo. banc 2016)

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

ARGUMENT

I. OVERVIEW

This appeal arises from a lawsuit involving a workplace injury that occurred while Plaintiff, Michael E. Conner (hereinafter referred to as "Plaintiff"), and Defendants, Dale Ogletree and Scott Kidwell (hereinafter referred to collectively as "Defendants" and individually as "Defendant Ogletree" and "Defendant Kidwell"), were journeyman linemen working as part of a crew for Intercounty Electric Cooperative (hereinafter referred to as "Intercounty"). Defendant Ogletree was the supervisor of the crew, and Defendant Kidwell was a serviceman for Intercounty.

The crew was working to retire a transformer bank at the Old Brown Shoe Factory. It is undisputed that Defendant Ogletree, acting in his supervisory position as foreman, and Defendant Kidwell, a serviceman and member of the crew that day, were working in the course and scope of their employment at the time of the accident. It is undisputed that the jobsite was inherently dangerous and that all members of the crew knew they would be working in the immediate vicinity of the power line and any risk that was involved in being on or adjacent to the platform and performing the job was known and shared by everyone.

While the crew was working, Plaintiff came in contact with an energized power line when he attempted to cut the power line that all members of the crew, including Plaintiff, believed was de-energized. The electric contact caused Plaintiff to lose his balance and fall off of the platform and caused significant injuries to Plaintiff, which included rendering him a quadriplegic.

Pursuant to basic safety procedure and the rules and policies of Intercounty, each and every journeyman lineman and each and every member of the crew is responsible for his own safety, cannot rely on anyone else for his own safety, must assume the power line is energized until proven otherwise, and has the responsibility to make the job site safe by opening the circuit, testing for voltage, and grounding the power line, which, in effect, ensures the power line is de-energized. (L.F. 86, 786, 789, 830). Since the job site was not made safe by anyone and all are responsible, each and every member of the crew, including Plaintiff, failed to carry out the nondelegable duties of Intercounty and such failure lies on Intercounty and not on Defendants or any other individual members of the crew. (L.F. 786). In essence, each and every member of the crew failed to confirm that the switch had been opened and that the power line had been tested and grounded, all of which would have made the inherently dangerous and unsafe workplace safe, and thus, constitutes a failure to carry out Intercounty's nondelegable duty owed to its employees to provide a safe workplace. (L.F. 836).

The workplace was never made safe. All allegations and evidence adduced against Defendant Ogletree merely pertain to him in his supervisory role acting in place of Intercounty to perform Intercounty's nondelegable duty to provide a safe workplace. Defendant Ogletree did not commit an act that resulted in the creation of a transitory risk in carrying out the details of his work as directed by his employer. Defendant Kidwell's actions to pull and open the switch to de-energize the power line were done for the sole purpose of making an unsafe workplace safe. Defendant Kidwell did not commit an act that resulted in the creation of a transitory risk due to his alleged negligence in carrying

out the details of his work because the risk was permanent in nature. Neither Defendant altered, changed, or modified the inherent and permanent risks involved in working on power lines that was present at the jobsite. At no time did either Defendant engage in an act that was independent of the master-servant relationship. For a transitory risk to be created the work place must first be made safe, which in this instance necessitated a de-energized power line.

Ultimately, Defendants did not commit any acts that made the workplace unsafe, as the workplace was never safe. Every action that Defendants took, or that Plaintiff has alleged they took, was taken for the purpose of carrying out the nondelegable duties of their employer, Intercounty. The risks present at the time of the accident were permanent in nature, and thus, were not transitory. Simply put, Plaintiff failed to plead or prove that Defendants breached a duty separate and distinct from their employer's nondelegable duty to provide a safe workplace. Simply put, Plaintiff failed to plead or prove that Defendant Ogletree was doing anything other than carrying out Intercounty's nondelegable duty to provide a safe workplace in his supervisory role. Under the law as outlined in *Peters* and *Parr*, the Missouri Court of Appeals, Southern District, properly affirmed the Circuit Court's properly granted Summary Judgment in favor of Defendants, Dale Ogletree and Scott Kidwell, because Plaintiff's allegations against Defendants amount to nothing more than Defendants' failure to carry out the nondelegable duty of their employer, Intercounty Electric Cooperative, to provide a safe place to work.

II. THE MISSOURI COURT OF APPEALS FOR THE SOUTHERN DISTRICT PROPERLY AFFIRMED THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS BECAUSE DEFENDANTS, DALE OGLETREE AND SCOTT KIDWELL, CANNOT BE LIABLE TO THE PLAINTIFF IN THAT THEY WERE CARRYING OUT THEIR EMPLOYER'S, INTERCOUNTY ELECTRIC COOPERATIVE'S, NONDELEGABLE DUTY TO PROVIDE A SAFE WORKPLACE (RESPONDING TO APPELLANT'S SOLE POINT ON APPEAL).

A. STANDARD OF REVIEW

The grant of summary judgment is reviewed de novo. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). A grant of summary judgment will be upheld if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Id.* The dispute, however, must be "real, not merely argumentative, imaginary, or frivolous." *De Rousse v. State Farm Mut. Ins. Co.*, 298 S.W.3d 891, 894 (Mo. banc 2009). Summary judgment allows the court to enter judgment, without delay, where the moving party demonstrates a right to judgment as a matter of law based on the facts as to which there is no genuine dispute. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 376.

"Summary judgment as a matter of law in favor of the defending party is appropriate when: (1) there are facts that negate any one of the elements of claimant's cause of action; (2) the movant shows that the non-movant, after an adequate discovery

period, has not and will not be able to produce evidence sufficient to allow a trier of fact to prove the elements of its claims; or (3) there is no genuine dispute as to the existence of each of the facts necessary to support the movant's affirmative defense." *Fowler v. Phillips*, 504 S.W. 3d 107, at 109 (Mo. App. E.D. 2016); citing *Parr*, 489 S.W.3d at 778.

When the trial court does not specify its reasons for granting summary judgment, the reviewing court will presume the trial court acted for one of the reasons stated in the motion for summary judgment. *Turner Engineering, Inc. v. 149/155 Weldon Parkway, LLC*, 40 S.W.3d 406, 409 (Mo. App. E.D. 2009). The reviewing Court must affirm a grant of summary judgment if it is sustainable under any theory, even if "on an entirely different basis than that used by the trial court." *Lumbermens Mut. Cas. Co. v. Thornton*, 92 S.W.3d 259, 269 (Mo. App. W.D. 2002).

B. DEFENDANTS, DALE OGLETREE AND SCOTT KIDWELL, CANNOT BE LIABLE FOR NEGLIGENCE FOR FAILING TO CARRY OUT THEIR EMPLOYER'S, INTERCOUNTY ELECTRIC COOPERATIVE'S, NONDELEGABLE DUTIES.

Under the law established by this Court in *Peters* and *Parr*, Defendants cannot be liable because Plaintiff's injury resulted from a failure of their employer to carry out its nondelegable duties of providing a safe workplace. Defendants were standing in place of their employer at the jobsite with the purpose of making the jobsite safe. Defendants, as well as the other members of the crew, did not accomplish that task. The workplace was never made safe. "To maintain a negligence action against a co-employee, a plaintiff must show that the co-employee breached a duty separate and distinct from the

employer's nondelegable duty to provide a safe workspace for all employees." *Parr*, 489 S.W.3d at 782; *Peters*, 489 S.W.3d at 794. In other words, when an employee fails to perform the employer's nondelegable duty, the failure rests on the employer and not the employee. *Carman v. Wieland,* 406 S.W.3d 70, 76 (Mo. App. E.D. 2013).

"In any action for negligence, the plaintiff must establish that (1) the defendant had a duty to the plaintiff; (2) the defendant failed to perform that duty; and (3) the defendant's breach was the proximate cause of the plaintiff's injury." *Peters*, 489 S.W.3d at 793. Additionally, whether a duty exists is purely a question of law. *Id.* at 793-94.

This Court explicitly reaffirmed the following employer nondelegable 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 the work safe.

Peters, 489 S.W.3d at 795.

"If co-employees are assigned to perform the employer's nondelegable duties, it is solely by virtue of the master-servant relationship. Absent the master-servant relationship, a co-employee would have no duty to perform an employer's nondelegable duties." *Peters*, 489 S.W.3d at 795. Borrowing language from the *Peters* appellate opinion, "[s]imply put, if the employer is 'on the hook' at all, then the employee is off."

Peters v. Wady Industries, Inc., ED 100699, 2014 WL 4412193 (Mo. App. E.D. Sept. 9, 2014).

Although "[e]mployers are not insurers of the safety of employees[,]" an employee is only liable when an injury is caused by transitory risks created by the negligence of that employee while carrying out the details of their work. *Peters*, 489 S.W.3d 759. The definition of transitory risk is not found in Missouri case law. In his dissenting opinion in *N. Pac. Ry. Co. v. Dixon,* 194 U.S. 338 (1904), Justice Edward White outlined the doctrine of transitory risk as follows:

> where the work is of such a character that dangers which cannot be foreseen or guarded against by the master may, in the nature of things, suddenly and unexpectedly arise, there is no neglect of a positive duty owing by the master in failing, by himself or the agencies he employs, to anticipate and protect against that which the utmost care on his part could not have prevented.

Id. at 355. The Merriam-Webster Online Dictionary defines transitory as being of brief duration, temporary, momentary, or fleeting.[5] In other words, only where the danger created by negligent acts of a co-employee in carrying out the details of his work is

[5] Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/transitory (8 Feb. 2017).

impermanent, quickly passing, or fleeting, then a personal duty of care is owed.[6] If however, the danger is permanent, static, or foreseeable in nature, then no personal duty of care can be found. *Id.*

These definitions align with the facts outlined in *Marshall v. Kansas City,* the case cited by this Court in *Peters* as an example of the distinction between an employer's nondelegable duty to provide a safe workplace and a co-employee's duty arising from a transitory risk. *Marshall*, 291 S.W.2d 1 (Mo. 1956). In *Marshall,* two co-employees were tasked with different jobs. One was assigned the task of carrying a 92-pound jackhammer from the truck to the worksite and the other was tasked with hooking a hose up to an air compressor. The employee tasked with hooking the hose to the air compressor stretched the hose across the path of the other employee, and while the other employee was carrying the 92-pound jackhammer, the first employee suddenly and unexpectedly jerked the hose upward causing the second employee to trip and ultimately causing injury to him. *Id.* at 2. The injured employee sued his employer and won a jury verdict. However, the trial court set aside the jury verdict on the basis that the "fellow servant doctrine" barred recovery. *Id.* This Court affirmed, holding "the place of work was not unsafe and the hazard was not brought about by the manner in which the work was being done; the danger came about by reason of the manner in which [the co-employee] handled the hose." *Id.* at 3.

[6] Transient or transitory is defined as impermanent or quickly passing. A Dictionary of Modern Legal Usage, (2d ed. 1987).

Marshall is illustrative because it shows that for a co-employee's duty to arise from a transitory risk (1) the place of work must be safe, and (2) the risk must be one that is not permanent to the workplace, rather it was a temporary risk created by the co-employee. *Marshall* demonstrates circumstances where an injury results from an act of a co-employee where a safe workplace is made unsafe. In the present case, the workplace was always unsafe. The workplace was never made safe. Additionally, the co-employee that created the transitory risk in *Marshall* did so while undertaking a task that was completely separate and distinct from the nondelegable duty of providing a safe place to work. In *Marshall*, not only was the action that was taken by the defendant not undertaken to provide a safe place to work, the action was affirmatively negligent and represented a misuse of the tools that ultimately caused the plaintiff's injuries. In other words, the act of untangling the hose was not necessary to make the workplace safe—the workplace was already safe—and thus could not fall under the employer's nondelegable duty to provide a safe place to work. Moreover, there is a key difference between the workplace in *Marshall* and the workplace in the present action. The workplace in *Marshall* was completely safe until the defendant negligently shook a compressor hose, whereas in the present case the workplace was unsafe just as it was prior, during, and after the accident. Further, each and every member of the crew, including Plaintiff, knew the workplace in the present case to be unsafe. Plaintiff himself described the workplace as inherently dangerous. The risks present were inherent to the workplace and are in no way transitory in nature.

Another maxim from *Marshall* is that for a co-employee to be liable the employee must not have been exercising the degree of care that an ordinarily careful person would have used in the same or similar circumstances. *Id.* at 3. Furthermore, for a co-employee to be liable, the employer cannot be liable to even the slightest degree in failing to carry out any of its nondelegable duties. "[W]hen an employee fails to perform the employer's nondelegable duty, the failure rests with the employer, not the employee." *Carman v. Wieland,* 406 S.W.3d 70, 76-77 (Mo. App. E.D. 2013).

Additionally, the facts of this case are not like the facts of *Logsdon v. Duncan* where a co-employee caused injury 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," which caused a brick to fall and injure a co-employee that was standing below. *Logsdon*, 293 S.W.2d 944, 948 (Mo. 1956). In *Logsdon*, the defendant's actions in carrying out the details of his work were beyond that which is normal and reasonable to that job and workplace. Dissimilar are the facts of the present case where the risks present were inherent to the workplace, permanent in nature, shared by each and every member of the crew; and all members of the crew, as journeyman linemen and one experienced apprentice lineman, were responsible for ensuring their own safety.

Neither Defendant breached a personal duty of care owed to Plaintiff because no personal duty of care was ever created, as there was no transitory risk created by Defendants' in carrying out the details of their work. Pursuant to *Peters*, a co-employee is only liable if he creates a transitory risk while carrying out the details of his work. *Peters*, 489 S.W.3d 796. No transitory risk was created by the actions of Defendants, as no

transitory risk ever existed. The workplace was never safe as the danger was permanent and the entire crew knew this.

The danger that was present in this workplace was always present – the energized power line remained energized. Jack Rinne, Manager of Operations and Maintenance of Intercounty, stated in an Affidavit "there was no danger to Michael Conner at the job site other than the danger that normally goes with working on power lines." (L.F. 284). Working on electrical power lines is inherently dangerous and is a recognized hazard that journeyman and apprentice linemen face in the workplace. Prior to when the crew arrived at the job site at the Old Brown Shoe Factory, there were energized power lines; at the time the work was commenced, there were energized power lines; and at the time of the accident, there were still energized power lines. No acts by Defendants, nor acts by anyone else, made the workplace unsafe. The alleged failure on the part of Defendants was a failure equally shared by each and every other member of the crew, including Plaintiff. As a journeyman lineman and a member of the crew, Plaintiff shared an equal duty to make the job site safe by opening the circuit, testing the power line for voltage, grounding the power line, and in effect de-energize the power line. (L.F. 789). Contrary to what Plaintiff asserts in his Substitute Brief, Plaintiff and Plaintiff's own expert have testified that it was everyone's duty, including that of the Plaintiff, to assume that the power line was energized until proven otherwise. (L.F. 86). It is the responsibility of each and every journeyman lineman, irrespective of their title, to make the job site safe and everyone is responsible for their own safety and cannot rely upon others for their own safety. (L.F. 86, 789).

Pursuant to Intercounty policy, each and every journeyman and apprentice lineman is responsible for his own safety. Intercounty policy states "The care or safety exercised by others shall not be relied upon for protection by any individual. Each employee doing hazardous work shall check conditions for and all adequate safeguards will be adhered to." (L.F. 830). In turn, each and every journeyman lineman cannot rely on anyone else for his own safety. (L.F. 786). Everyone, including the onsite foreman whose job it was to "ensure that the rules and guidelines contained in the safety manual are followed[,]" believed the power line was de-energized. (L.F. 829). Plaintiff told his own expert, Mr. William Krawczyk, "he had taken it for granted that the line was dead." (L.F. 772). Plaintiff agreed in his deposition that he had just "assumed the line was de-energized." (L.F. 84).

Simply put, since the job site was not made safe by anyone and all are responsible, and the entire crew failed to carry out the nondelegable duties of their employer, such failure lies exclusively on the employer and not the crew. Plaintiff's own expert agrees that any mistakes made at the job site were the mistakes of the entire crew. (L.F. 786). No transitory risk was created. There was no sudden or unexpected event. Thus, Defendants did not owe Plaintiff a personal duty of care and cannot be liable.

C. DEFENDANT OGLETREE, AS THE JOB SUPERVISOR FOR INTERCOUNTY, CANNOT BE LIABLE AS HE WAS CARRYING

OUT HIS EMPLOYER'S NONDELEGABLE DUTY TO PROVIDE A SAFE WORKPLACE.

Under the law established by this Court in *Peters* and *Parr*, Defendant Ogletree, as the job supervisor for Intercounty, cannot be held liable as he was carrying out his employer's nondelegable duty to provide a safe workplace. The allegations against Defendant Ogletree in Plaintiff's Amended Petition were that he breached a personal duty of care by (1) directing Plaintiff to work on an energized line; (2) failing to make sure that the line was tested, grounded, and de-energized; (3) failing to warn Plaintiff of the energized line; and (4) failing to supervise the work of his crew members. (*See* L.F. 25-27). However, Plaintiff did not even ask if the power line had been tested or grounded. (L.F. 85). Plaintiff could plainly see that the power line was not grounded as a grounding set would be visible; it is undisputed that all members of the crew could see that the power line was not grounded. (L.F. 85, 309-10). Plaintiff, as a journeyman lineman, has the responsibility to assume that a power line is energized until proven otherwise and cannot rely on anyone else for his own safety. (L.F. 86, 786, 830). At the worksite, Defendant Ogletree was standing in place of Intercounty. Every allegation against Defendant Ogletree pertains to him in his supervisory role acting as the alter ego, or in the place of Intercounty.

Moreover, none of the allegations against Defendant Ogletree demonstrate the existence of a personal duty of care owed to Plaintiff outside the bounds of Intercounty's nondelegable duties. If any failure alleged against Defendant Ogletree exists, it is a failure of the employer and the liability must remain with the employer and not the

employee. In fact, the allegations against Defendant Ogletree are analogous to the allegations against the supervisor in *Peters*.

Similarly to the present case, the plaintiffs in *Peters* alleged that Peters' supervisor breached a personal duty of care in the following ways:

a. [Terrio] allowed the baskets to be transported on a flatbed truck while stacked at a level that exceeded a safe height;

b. [Terrio] failed to insure that the baskets were properly braced or secured for transportation and unloading;

c. [Terrio] failed to provide sufficient help;

d. [Terrio] failed to provide adequately trained help;

e. [Terrio] failed to provide a proper area for the unloading of the baskets;

f. [Terrio] failed to heed the warnings of employees about the stacked baskets;

g. [Terrio] allowed the unsafe course to become standard operating procedure,

h. [Terrio] ordered and directed plaintiff Curt Peters to load, stack, transport, and unload the baskets in the aforementioned unsafe manner; [and]

i. [Terrio] ordered and directed plaintiff Curt Peters to load, stack, transport, and unload the baskets in the aforementioned manner in violation of OSHA Regulations including 29 CFR 1926.205(a)(1).

Peters, 489 S.W.3d at 788. This Court ultimately held that the plaintiffs in *Peters* failed to plead a cause of action because each of the foregoing allegations pertains to the supervisor "in his supervisory role . . ., negligently carrying out [the employer's] nondelegable duty to provide a safe workplace." *Id.* at 799. Every allegation of Plaintiff against Defendant Ogletree pertains to him in his supervisory role and merely alleges negligence in carrying out Intercounty's nondelegable duty to provide a safe workplace.

Plaintiff's allegation that Defendant Ogletree directed Plaintiff to work on an energized power line that was dangerous is similar to the supervisor in *Peters* directing the plaintiff to load, stack, and transport the dowel baskets in an unsupported manner. The allegation that Defendant Ogletree failed to ensure the power line was tested, grounded, and de-energized is similar to the allegation that the supervisor in *Peters* failed to insure that the baskets were properly braced. This Court held in *Peters* that such allegations were only allegations of a failure to carry out the nondelegable duty of the employer to provide a safe workplace. *Id.* Plaintiff's allegation that Defendant Ogletree failed to supervise merely amounts to an allegation of a failure to carry out Intercounty's nondelegable duty to provide sufficient or adequately trained help, both of which were alleged in *Peters*. Finally, the allegation that Defendant Ogletree failed to warn Plaintiff of a dangerous condition does not establish a transitory risk created in carrying out the details of his work.

Even more compelling is that Plaintiff told Mr. Krawczyk, Plaintiff's own expert that he took it for granted that the power line was de-energized. (L.F. 72). It is basic, common knowledge to all journeyman linemen that testing and grounding is essential

when working on energized power lines. This is always true and there is no pecking order as to who is responsible for ensuring safety, as all are responsible. Even though Defendant Ogletree was the foreman, that does not relieve each crew member, including Plaintiff, from considering that all power lines are energized unless proven otherwise. (L.F. 311). Plaintiff's allegations regarding Defendant Ogletree's alleged failure to supervise and warn are further without merit as Plaintiff, as a journeyman linemen, was responsible for his own safety and Plaintiff failed to follow his employer's rules and policies. Plaintiff is responsible for his own safety. (L.F. 311). Plaintiff's own expert criticized Plaintiff, as a member of the crew, for not following the proper safety procedure of testing and grounding the power line. (L.F. 786-88). In the end, and pursuant to Intercounty policy, every crew member is responsible for his or her own safety. (L.F. 311). Thus, Plaintiff violated his own training and employer's policy by commencing work without asking and ensuring whether the power line had been tested and grounded. Plaintiff has even admitted that he bears some fault for the accident, as do the other members of the crew. (L.F. 88, 155:16-21). However, any fault for the accident is the failure of all members of the crew to perform Intercounty's nondelegable duties to make the workplace safe, the failure of which rests on Intercounty and not Plaintiff, Defendants, or the other members of the crew.

Plaintiff has not pled a cause of action against Defendant Ogletree, much less set forth evidence to support any of his allegations. Plaintiff Conner, similarly to the plaintiff in *Peters*, has failed to establish either that a separate duty existed or that Defendant

Ogletree breached a duty that was separate and distinct from his employer's nondelegable duty to provide a safe workplace.

D. DEFENDANT KIDWELL CANNOT BE LIABLE AS HE WAS CARRYING OUT HIS EMPLOYER'S NONDELEGABLE DUTY TO PROVIDE A SAFE WORKPLACE.

Under the law established by this Court in *Peters* and *Parr*, Defendant Kidwell cannot be held liable as he was carrying out his employer's nondelegable duty to provide a safe workplace. A co-employee charged with carrying out the nondelegable duties of his employer is only liable if he creates a transitory risk while carrying out the details of his work. *Peters,* 489 S.W.3d at 796. No transitory risk was created by the actions of Defendant Kidwell because the risk at the jobsite was permanent in nature and Intercounty assigned those actions he undertook for the sole purpose of making the workplace safe, and thus, any failure to make the workplace safe lies on the employer and not the employee. There was no risk at the jobsite that was not already present or known with respect to the power lines. Therefore, Defendant Kidwell was carrying out the nondelegable duty of his employer. Even if Defendant Kidwell, as a member of the crew, failed to carry out the employer's nondelegable duty then such failure does not create an individual or personal duty of care to Plaintiff.

Plaintiff was a journeyman lineman. (L.F. 73). As a journeyman lineman, being around energized power lines is a recognized hazard of the job. Prior to when the crew arrived to the job site at the Old Brown Shoe Factory there were energized power lines, at the time work was commenced there were energized power lines, and at the time of the

accident there were still energized power lines. Jack Rinne, Manager of Operations and Maintenance of Intercounty, stated in an Affidavit "there was no danger to Michael Conner at the job site other than the danger that normally goes with working on power lines." (L.F. 284). No acts of Defendant Kidwell created an impermanent, quickly passing, or fleeting danger that did not already exist at the job site. The danger at the Old Brown Shoe Factory was permanent in nature, and thus, falls under the duty of Intercounty to provide a safe workplace for which liability cannot be charged to Defendant Kidwell.

Additionally, it is significant that the crew foreman discussed with the entire crew, including Defendant Kidwell, the opening of the switches at a tailgate meeting at the warehouse prior to beginning the job. (L.F. 486-87). The task of pulling open the switch in attempt to de-energize the power line was done with "[t]he sole purpose . . . to provide Intercounty Electric Cooperative Association's employees with a safe workplace." (L.F. 829). When a co-employee is assigned the performance of an employer's nondelegable duties to provide a safe workplace, it is solely by virtue of the master-servant relationship. *Peters*, 489 S.W. 3d at 795. "*Absent the master-servant relationship*, a co-employee would have no duty to perform an employer's nondelegable duties." *Id.* (emphasis added).

It is clear that Defendant Kidwell was tasked with pulling open the switches to make the workplace safe. Defendant Kidwell's performance of this task was Intercounty assigning the performance of its nondelegable duty. Defendant Kidwell, like Defendant Ogletree, was standing in place of his employer. Defendant Kidwell, like Defendant

Ogletree, became the alter ego of his employer. Defendant Kidwell, like Defendant Ogletree, was acting as the functional equivalent of his employer. Intercounty thus remains liable for any breach of such duties. The task of pulling open switches to de-energize a power line is not like the task of untangling an air hose in *Marshall*. Pulling open switches to de-energize the power line was done in the performance of the nondelegable duty to provide a safe place to work, while the act of untangling and connecting an air hose is wholly distinct from an employer's nondelegable duty to provide a safe place to work. The acts of Defendant Kidwell on behalf of his employer were to make the workplace safe, while the act of untangling the air hose in *Marshall* created a transitory risk and made a safe workplace become unsafe.

Defendant Kidwell volunteered to de-energize the power line and his supervisor, Defendant Ogletree, approved. (L.F. 364, 375, & 829). By being allowed to de-energize the power line, Defendant Kidwell was permitted "to carry-out [Intercounty's] non-delegable duty to provide a safe work place." (L.F. 829). Before they arrived at the site, all of the men knew the switches should be pulled in order to de-energize the power line. (L.F. 375). Defendant Kidwell used an extendo stick, provided by Intercounty (L.F. 412), to pull the switches open; and the crew could see the open switches from the worksite. (L.F. 366). All of the men were experienced linemen and four of the five were journeyman linemen. Intercounty policy states "The care or safety exercised by others shall not be relied upon for protection by any individual. Each employee doing hazardous work shall check conditions for and all adequate safeguards will be adhered to." (L.F. 830). Members of the crew could watch Defendant Kidwell use the extendo stick and

could see the visual opening. (L.F. 324). Every member of the crew could have asked if the power line had been tested and grounded. Every member of the crew as a journeyman linemen knew how to test and ground the power line. Every member of the crew could see that the power line on which Plaintiff was shocked was not grounded.

Everyone, including the onsite foreman whose job it was to "ensure that the rules and guidelines contained in the safety manual are followed[,]" believed the power line was de-energized. (L.F. 829). Plaintiff assumed the power line was de-energized and had "taken it for granted that the line was dead." (L.F. 84, 772). "The sole purpose for de-energizing a power line is to provide Intercounty Electric Cooperative Association's employees with a safe workplace." (L.F. 829). Thus, no transitory risk was created and neither defendant owed Plaintiff a personal duty of care.

E. THE CO-EMPLOYEE LIABILITY CASES SINCE *PETERS* AND *PARR* ARE FACTUALLY UNIQUE AND DISTINGUISHABLE, AND THE LAW ESTABLISHED IN *PETERS* AND *PARR* PERMITS THEIR RESPECTIVE DISSIMILAR RESOLUTIONS AND COMPELS AFFIRMING THE GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS, DALE OGLETREE AND SCOTT KIDWELL.

Under the law established by this Court in *Peters* and *Parr*, the dissimilar facts and circumstances of each of the co-employee liability cases, including the cases to which this Court has granted transfer, warrant differing outcomes. This Court stated in *Parr* "Whether a personal duty exists depends on the particular facts and circumstances

of each case." *Parr*, 489 S.W.3d 782. And further that "[t]he employer's duty to provide a safe workplace is continuing . . . and includes specific duties relating to keeping employees safe." *Id.* at 779.

Plaintiff's assertion that "[t]he controlling factor in each of [the Eastern and Western Districts'] decisions is whether the employer had in place adequate rules and provided instrumentalities to the employees to keep the workplace safe" is lacking as it fails to make consideration for the unlike nature of these cases, it fails to make consideration for the unique and dissimilar sets of facts of these cases, and it fails to make consideration of the fact that the duty to provide a safe workplace includes multiple, varied duties. Pet'r's Br. #23. The facts of the present case simply do not align with the facts in any of the other co-employee liability cases since this Court rendered its decisions in *Peters* and *Parr*. Simply put, none of the other cases deal with an inherently dangerous job site that was never made safe, as exists in the present case.

The present case is unlike the other co-employee liability cases because the workplace possessed permanent risks that made the workplace unsafe: an energized power line, which was always present and known to the entire crew, including Plaintiff. Electricity is one of the most dangerous agencies ever discovered by human science. *Geismann v. Missouri Edison Electric Co.*, 73 S.W. 654, 659 (Mo. 1903).

Accordingly, any breach by Defendants' was a breach of Intercounty's nondelegable duty to provide a safe workplace and does not represent the breach of a personal duty owed to Plaintiff because no independent or personal duty ever came into existence. Intercounty's nondelegable duty never ended. Thus, correspondingly, no

personal or independent duty of Defendants to Plaintiff ever began. The inherent risks at the jobsite were permanent in nature; the risks existed from the time of the crew's arrival to the time of the accident and continued to exist after the crew had left the jobsite. To be transitory the risk must be arise suddenly and unexpectedly and be temporary, quickly passing, or fleeting. Thus, Defendants created no transitory risk in carrying out the details of their work. No transitory risk ever occurred.

In *Abbott v. Bolten*, 500 S.W. 3d 288, 290 (Mo. App. E.D. 2016), the Court of Appeals, Eastern District, held that the Trial Court erred in granting summary judgment because Defendant owed Plaintiff an independent duty separate from the employer's nondelegable duties. In *Abbott*, Plaintiff and Defendant were co-employees, and Plaintiff was standing behind a work vehicle getting a drink of water when Defendant, while driving a separate work truck, drover over Plaintiff's foot and ankle causing injuries. *Id.* Plaintiff alleged that Defendant failed to exercise the highest degree of care by not reducing speed, keeping a careful lookout, etc. Defendant alleged he was carrying out the nondelegable duties of his employer at the time of the accident. *Id.* The Appellate Court held that the employer's obligation to protect his employees does not extend to protecting them from the transitory risks that are created by the negligence of the employees themselves in carrying out the details of the work. *Id.* at 292. The events in *Abbott* clearly exemplify a scenario where a safe workplace was made unsafe due to the negligent acts of Defendant, co-employee, which significantly differs from the facts and circumstances of the present case in that no actions of Defendants had the effect of making a safe workplace unsafe as occurred in *Abbott*.

In *Bierman v. Violette*, ED 100946, 2017 WL 582665 (Mo. App. E.D. Feb. 14, 2017), the Court of Appeals, Eastern District, held that the Trial Court erred in dismissing Plaintiff's negligence action. In *Bierman*, while Plaintiff was in a lofted space accessible only through use of a 12-foot A-frame ladder, Defendant unlocked and moved the ladder before returning the ladder to where it was accessible to Plaintiff. *Id.* at 1. Upon returning the ladder, Defendant failed to make the ladder safe for use by Plaintiff in that he did not fully open, lock, and secure the ladder. *Id.* Plaintiff attempted to use the ladder and fell after the ladder collapsed under Plaintiff causing Plaintiff to become injured. *Id.* The workplace in *Bierman* was safe and Plaintiff's injury took place only after Defendant made the safe workplace unsafe by the manner in which he carried out the details of his work in how he returned the ladder. *Id.* at 5. In the present case, any failure was a failure to make an inherently dangerous workplace safe and such failure lies on Intercounty and not Defendants.

In *Nolen v. Bess*, ED 101591, 2016 WL 6956755 (Mo. App. E.D. Nov. 29, 2016), the Court of Appeals, Eastern District, held that the Trial Court erred in granting summary judgment because Plaintiff alleged Defendant violated a duty that was separate and distinct from the nondelegable duties of their employer. *Id.* at 3. In *Nolen*, the employer "provided safe tools and a safe work place by equipping the bleachers with rails." *Id.* However, the Eastern District determined that Plaintiff's "injuries were attributable to the transitory risks arising from [Defendants'] alleged negligence in carrying out the details of the work in that their decision to withhold the rails made an otherwise safe employer-provided tool or workplace unsafe." *Id.* Ultimately, the grant of

summary judgment was reversed and the case remanded because of the "alleged violation of a separate and distinct duty owed [to Plaintiff] in that [Defendants] withheld safety equipment provided by their employer" after Plaintiff requested it be used. *Id.* This clearly exemplifies a safe workplace with safe tools that was made unsafe by the actions of the co-employee. *Nolen*, unlike the present case, does not deal with an inherently dangerous workplace that was never made safe. In the present case, Plaintiff's injuries resulted from the place of work itself, and thus, can be attributable only to a breach of Intercounty's nondelegable duty to provide a safe workplace.

In *Fowler v. Phillips*, 504 S.W. 3d 107, 109 (Mo. App. E.D. 2016), the Court of Appeals, Eastern District, held that the Trial Court erred in granting summary judgment on the basis that the facts demonstrated Defendant's reckless conduct constituted affirmative acts sufficient to establish co-employee liability. In *Fowler*, Defendant was driving a vehicle out of an Avis car wash into a parking lot when he struck Plaintiff, knocking him down and causing severe and disabling injuries. *Id.* The Eastern District noted that the alleged affirmative acts of Defendant violating workplace rules by "failing to stop at the stop sign, failing to honk when exiting the car wash, and making a prohibited left turn without signaling or looking left" were actions "outside the employer's non-delegable duties, that thus violated [Defendant's] personal duty of care towards [Plaintiff]." *Id.* at 111. The facts of *Fowler* are that of a safe workplace made unsafe by the reckless manner in which Defendant drove a vehicle, which is substantially different from an inherently dangerous workplace that was never made safe as is the facts and circumstances of the present case.

This Court has transferred *Fogerty v. Armstrong*, ED 100947, 2016 WL 5030379 (Mo. App. E.D. Sept. 20, 2016), from the Eastern District. In *Fogerty*, the Court of Appeals, Eastern District, reversed the Trial Court's granted summary judgment, determining the plaintiff had sufficiently alleged a violation of the co-employee's personal duty of care because the plaintiff sufficiently asserted violations of a personal duty of care relating to the allegation of the respondent negligently operating "the employer-provided tool and in the carrying out of the details of the work." *Id.* at 3. In *Fogerty*, Defendant, co-employee operated a forklift in a manner causing the machine to repeatedly drop onto the plaintiff producing injuries. The workplace in *Fogerty* was safe until Defendant, co-employee made the workplace unsafe by not operating the forklift "in a reasonably safe manner and . . . without taking any steps to warn or protect Appellant from being impacted by the forks," which ultimately represents affirmatively negligent conduct. *Id.* Again, a crucial difference exists between the circumstances of the present case and *Fogerty* in that the place of work was inherently dangerous and was never made safe. In the present case, any mistake made was made in attempt to make an unsafe workplace safe, precisely the opposite of what took place in *Fogerty* where Defendant's affirmatively negligent conduct rendered a safe workplace unsafe. Alternatively, no actions by either Defendant in the present case had the effect of making a safe workplace unsafe.

This Court has also transferred *Garrett v. Brown*, WD 78443, 2015 WL 8780528 (Mo. App. W.D. Dec. 15, 2016), from the Western District. In *Garrett*, the Court of Appeals, Western District, reversed the Trial Court's granted summary judgment finding

genuine issues of material fact exist because the facts suggest that the defendant, co-employee violated his employer's policy and that the outcome of that case may be determined based on the communication, training, and enforcement, or lack thereof, of the employer's policy. *Id.* at 1. The facts of *Garrett* are wholly dissimilar from that of the present case. In *Garrett*, Plaintiff, a billposter, was injured when he fell after his supervisor, and co-employee, failed to perform required annual inspections, ignored reports that structures were unsafe, and, upon receiving reports of unsafe structures, the co-employee would simply send another employee to the same place without informing his co-employee of the danger. *Id.*

Garrett is similar to *Burns v. Smith*, 214 S.W. 3d 335 (MO. Banc 2007), in that Plaintiff was knowingly told to proceed with work in violation of company rules and policies of the employer, which were implemented to keep employees safe. No similar facts or circumstances exist in the present case, and the existence and enforcement of employer policies and rules are not at issue. In the present case, all members of the crew knew that the job sit was inherently dangerous. All members of the crew knew that to make the work place safe the energized power line had to be opened, tested, and grounded. All members of the crew knew that an energized power line is to be assumed energized until proven otherwise and that each and every member of the crew was responsible for his own safety and could not rely upon others for their safety. The facts and circumstances of the present case indicate that any mistakes made were made in failing to provide a safe place to work and were mistakes of each and every member of the crew. Additionally, there was no conduct, or even alleged conduct, that Defendants

knowingly kept information from the other crew members, as was the case in *Garrett*. All members of the crew were working with the mistaken belief that the power line was de-energized. The consequence for which being the failure to make an unsafe workplace safe.

This Court additionally transferred *McComb v. Norfus*, WD 77761, 2015 WL 1813573 (Mo. App. W.D. Apr. 21, 2015), from the Western District. In *McComb*, the Court of Appeals, Western District, ultimately made the determination that the co-employee would have acted negligently in sending the decedent out in inclement weather if the hospital, the employer of the decedent, had no policy regarding whether couriers should be sent on their route during inclement weather. *Id.* at 5. As in *Garrett*, what was ultimately at issue in *McComb* was the existence and enforcement of an employer policy, where the facts suggest that the defendant, co-employees violated such policy causing the workplace to become unsafe. The violation of a workplace policy is what the Western District relied upon as the means of a safe workplace becoming unsafe in *McComb*, which, as in *Garrett*, is dissimilar and not at issue in the same manner as that of the present case. In the present case, there was never a safe workplace. Any mistakes made were mistakes in failing to make the work place safe. The entire crew was tasked with this responsibility.

Another important difference between the present case and *McComb* is that in *McComb* the decedent apparently did not have the authority to pull over and stop and wait for the storm to clear but to the contrary needed permission. In the present case, Plaintiff had both the authority and the responsibility to ensure the workplace had been

made safe by testing and grounding the power line. Moreover, Plaintiff, in addition to each and every member of the crew had both the authority and the duty to verify that the power line was open, tested, and grounded, the purpose of which being to make the workplace safe. Any such failure is the failure of Intercounty to carry out its nondelegable duty provide a safe workplace and not the failure of the members of the crew, including Defendants, as no individual or personal duty existed.

Finally, this court has also transferred *Evans v. Wilson*, SD 33209, 2016 WL 4990251 (Mo. App. S.D. Sept. 19, 2016), from the Southern District. In *Evans*, the Court of Appeals, Southern District, affirmed the entry of summary judgment in favor of the defendant, co-employee. The plaintiff in *Evans* alleged that he was injured when a co-employee allegedly drove a forklift negligently while it was carrying a load of trusses where plaintiff was walking along side and holding a tag-line to stabilize the trusses. *Id.* at 1. The defendant, co-employee in *Evans* was operating a forklift that ran over a rock, which caused the load to shift pulling the plaintiff toward the forklift and striking the plaintiff causing his injuries. Additionally, plaintiff in *Evans* alleged there were known risks including that the driver of the forklift was not licensed, certified, or trained to operate a forklift but was still ordered to operate the forklift. *Id.* This allegation is similar to allegations in *Garrett* and *McComb* but differs from the allegations in the present case.

The Southern District held in *Evans*, "risks attendant to performing the employer's work as directed are 'necessarily subsumed within the employer's nondelegable duties, and cannot support an independent personal duty owed by a co-employee.'" *Evans*, at *3

(Mo. App. S.D. Sept. 19, 2016); citing *Leeper v. Asmus*, 440 S.W.3d 478, 485 (Mo. App. W.D. 2014).

Even though the facts and circumstances of *Evans* and the present case differ and may warrant differing outcomes, the consideration and analysis made by the Southern District was correct. Something more cases are correct to the extent they require for co-employee liability something more than the alleged failure to fulfill the employer's nondelegable duty to provide a safe workplace. *Peters*, 489 S.W. 3d 797. Plaintiff, Defendants, and the remaining members of the crew knew that there existed inherent risks and dangers in the workplace and all had the responsibility to make the workplace safe. Any failure of that responsibility by Plaintiff, Defendants, or the remaining members of the crew was the failure of Intercounty and not a failure of the employees to fulfill the employer's nondelegable duty to provide a safe workplace. The inherent danger of the job site and the risks involved therein cannot support an independent duty owed by Defendants to Plaintiff.

There are all-important differences between the preceding cases and the present case. First, unlike the other co-employee liability cases, the workplace in the present case was a workplace that was inherently dangerous and unsafe. It was a workplace that simply was never made safe by any member of the crew that day. The inherent risks to this workplace were known and typical to the jobsites that journeyman linemen, and this crew specifically, are trained and experienced at working in. Second, no transitory risk was ever created. The permanent risk of the energized power line was inherent to the jobsite and the risk existed prior to the arrival of the crew, it existed while the crew was

working, and it existed after the accident. Third, despite Defendant Ogletree acting as the crew foreman and even though Defendant Kidwell pulled the disconnect switch, the workplace rules and policies of Intercounty provided that each and every journeyman lineman, and each and every member of the crew, had a personal responsibility to make sure the workplace was made safe. Despite it becoming apparent after the accident that the switch that had been opened failed to de-energize the power line that was immediately overhead of the worksite and crew, any mistake or failure on the part of the crew relating to the de-energizing of the line was a failure to make the workplace safe, and therefore, was the mistake and failure of Intercounty to carry out its nondelegable duty to provide a safe place to work. Fourth, Defendant Ogletree, acting in his capacity as supervisor, was tasked and responsible for carrying out the nondelegable duties of Intercounty to provide a safe place to work. In effect, Defendant Ogletree was standing in the place of Intercounty, acting as Intercounty's alter ego, and any failure to carry out that responsibility is the failure of Intercounty and not the failure of Defendant Ogletree. Fifth, Defendant Kidwell did not create a transitory risk at the jobsite, as all risks were permanent. Sixth, Defendant Kidwell did not fail to do any act that any other member of the crew also failed to do. Seventh, Defendant Kidwell did not commit any act that increased the risk of injury to Plaintiff. Eighth, Intercounty's nondelegable duty never ended, and thus, no independent or personal duty of Defendants to Plaintiff ever began. Therefore, Defendants created no transitory risk in carrying out the details of their work, as no transitory risk ever occurred.

In the present case, it is undisputed that the entire crew, including Defendants, was working in an inherently dangerous workplace. According to Jack Rinne, Manager of Operations and Maintenance at Intercounty, Defendant Ogletree, the supervisor of the crew, was delegated the task of providing a safe workplace at the Old Brown Shoe Factory on behalf of Intercounty, which was in accordance with Intercounty Policy. (L.F. 284). One aspect of Defendant Ogletree's task to make the workplace safe included de-energizing the power line, which was done with the sole purpose of providing Intercounty employees with a safe place to work. Any mistakes of Defendants, or mistakes of the crew, were mistakes that were made in carrying out Intercounty's nondelegable duty to provide a safe workplace. The responsibility for any such mistakes or failures lies with the employer and not the employees.

From the point that the crew arrived at the jobsite until the time of the accident, the entire crew, including Plaintiff and Defendants, failed to perform their employer's nondelegable duty to provide a safe workplace. Any breach or failure in carrying out the nondelegable duties of the employer, which includes providing a safe place to work, lies only with the employer and not the employees. No transitory risk was created by Defendants while carrying out the details of the their work. The risks at this workplace—an energized electrical power line—were already present and known to all members of the crew, including Plaintiff. Liability of a co-employee is limited only to instances where injuries result from transitory risks that are created by a co-employee's negligence in carrying out the details of the work. Here, no transitory risk was ever created, as the workplace was never made safe. The risks were permanent. Any resulting injury,

therefore, falls within the employer's nondelegable duty to provide a safe workplace, for which liability rests only with the employer and not with the employees.

Plaintiff's expert, Mr. William Krawczyk, was retained to testify as to the mistakes made by the crew. (L.F. 774). Mr. Krawczyk opined that the mistakes made applied to the entire crew, and they were essentially two-fold. Mr. Krawczyk determined that (1) the mistakes made by the crew were the failure to test and the failure to ground the power line and (2) that these mistakes were a failure to provide a safe place to work. (L.F. 786, 787, 789). These opinions are echoed by Defendants' retained expert, Mr. Robert E. Witter, whose undisputed testimony was that "de-energizing, testing and grounding a power line is part of [Intercounty's] non-delegable duty owed to its employees to provide a safe workplace." (L.F. 836). Further, Mr. Krawczyk testified that each and every member of the crew was individually responsible for their own safety, each and every member of the crew had the duty to consider and treat power lines as if they are energized unless such lines have been tested and grounded, and each and every member of the crew must not rely upon another employee for his own safety. (L.F. 86, 786, 789). Here, the power line was not tested and the power line was not grounded. Defendants, just as each and every member of the crew, including Plaintiff, failed to follow the proper safety procedures and, as a matter of law, that responsibility is subsumed within Intercounty's nondelegable duty to provide a safe workplace. Simply put, Plaintiff was not injured from either Defendant creating a transitory risk in carrying out the details of their work, as the inherently dangerous risk at the job site was already present and known to the entire crew. The risk was permanent throughout.

Ultimately, the present action allows for a dissimilar outcome from that of the other co-employee liability cases currently in front of this Court because the facts of this case do not align with the facts of any of those cases for a number of reasons. In the present case, the workplace was inherently unsafe and no actions taken by anyone had the effect of making a safe workplace unsafe. All risks at the jobsite were permanent and simply do not align with any definition of transitory risk. Exposure to these permanent risks was shared equally between all members of the crew. All members of the crew had received the appropriate training and experience to work on energized electrical power lines. As journeyman linemen and one apprentice lineman, all members of the crew were alone responsible for their own safety and each individually had the duty to ensure the workplace was safe before they commenced work. Because of the aforementioned responsibilities of each and ever member of the crew, all crew members were equally responsible for any mistake or failure to make the workplace safe.

As no transitory risk was created, neither defendant owed Plaintiff a personal duty of care. This action is unique and distinguishable from all other co-employee liability cases currently in front of this Court. The law established by this Court in *Peters* and *Parr* allows for dissimilar outcomes as to whether a personal duty exists based upon the particular facts and circumstances of each case and, in the present case, compels affirming the granted Summary Judgment in favor of Defendants.

CONCLUSION

For all of the reasons set forth herein, the Missouri Court of Appeals, Southern District, properly affirmed the Circuit Court's properly granted Summary Judgment in favor of Defendants, Dale Ogletree and Scott Kidwell, because Plaintiff's allegations against Defendants amount to nothing more than Defendants' failure to carry out the nondelegable duty of their employer, Intercounty Electric Cooperative, to provide a safe place to work for which liability rests with Intercounty and not Defendants. Every action that Defendants took, or that Plaintiff alleges they took, was taken in order to carry out the nondelegable duties of Intercounty. Liability of a co-employee is limited only to instances where injuries result from transitory risks that are created by the co-employee's negligence in carrying out the details of his work. The risks present at the jobsite at the time of the accident were permanent in nature, and thus, were not transitory. Under the law as outlined by this Court in *Peters* and *Parr*, Summary Judgment was properly granted in this case. Intercounty's nondelegable duties did not end prior to the accident causing Plaintiff's injuries. Since those nondelegable duties did not end an individual duty to Plaintiff by Defendants never began. Thus, Defendants respectfully request that this Court affirm the opinion of the Court of Appeals, Southern District, affirming the Circuit Court's Summary Judgment.

ANDERECK, EVANS, WIDGER, LEWIS & FIGG, LLC

By: /s/ Terry M. Evans

Terry M. Evans #21922
119 East Main Street
P. O. Box 654
Smithville, Missouri 64089
Telephone: 816-532-3895
Facsimile: 816-532-3899
E-Mail: tevans@lawofficemo.com

Attorney for Defendants-Respondents

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MICHAEL E. CONNER,

Plaintiff-Appellant,

v.

DALE OGLETREE, *et al*.,

Defendants-Respondents.

CERTIFICATE OF COMPLIANCE

Come Now counsel for Defendant-Respondents Dale Ogletree and Scott Kidwell and for their Certificate of Compliance state as follows:

1. The undersigned do hereby certify that Respondent's Substitute Brief includes the information required by Missouri Rule 55.03.

2. The undersigned do hereby certify that Respondent's Substitute Brief complies with the limitations contained in Missouri Rule 84.06(b), and contains 11,898 words.

3. Microsoft Office Word 2007 was used to prepare Respondent's Brief.

ANDERECK, EVANS, WIDGER, LEWIS & FIGG, LLC

By: /s/ Terry M. Evans

Terry M. Evans #21922
119 East Main Street
P. O. Box 654
Smithville, Missouri 64089
Telephone: 816-532-3895
Facsimile: 816-532-3899
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Defendants-Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March, 2017 one copy of the foregoing Defendant-Respondents' Substitute Brief was served via the Court's electronic filing system to the attorneys for Plaintiff-Appellant, Mr. Stephen E. Walsh, Walsh & Walsh, LLC, 635 N. Main Street, Poplar Bluff, MO 63901 and Mr. Shaun D. Hanschen, Blanton, Rice, Nickell, Cozean & Collins, LLC, 219 S. Kingshighway, P.O. Box 805, Sikeston, MO 63801.

ANDERECK, EVANS, WIDGER, LEWIS & FIGG, LLC

By: /s/ Terry M. Evans

Terry M. Evans #21922
119 East Main Street
P. O. Box 654
Smithville, Missouri 64089
Telephone: 816-532-3895
Facsimile: 816-532-3899
E-Mail: tevans@lawofficemo.com

Attorney for Defendants-Respondents