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July 1, 2008

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06/26/2008

Court rejects 'novel' theory in contractor caseBy Donna Walter
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The Missouri Supreme Court refused a plaintiff's invitation to recognize the host employer theory of liability.

Describing the plaintiff's theory as "novel," the court said it wasn't willing to hold a landowner liable for an accident that occurred on property under the control of an independent contractor. Under the plaintiff's host employer theory, a landowner would be responsible for making sure the independent contractor knows of the hazards associated with a job site and complies with the safety rules.

Plaintiff Angela Friley alleged AmerenUE, the landowner, was responsible for ensuring the safety of workers employed by independent contractor Asplundh Construction Corp. Her husband, William, died in October 2005 while working on a job for AmerenUE in Scott County. He was an Asplundh employee.

AmerenUE filed for a writ prohibiting Scott County Judge David Dolan from taking any action other than dismissing the lawsuit against the company.

On Tuesday, the unanimous Supreme Court agreed to make the writ absolute with one modification. The court gave Friley one more shot at the utility by allowing her to amend her petition to state a proper cause of action. If Friley does not amend her petition, the trial court must dismiss her case, the Supreme Court said.

The defense bar welcomed the court's decision.

"This would have been an extension of a host liability theory into the premises liability law. The court declined to go that far," said Jay Dobbs, chairman of the litigation department at Polsinelli Shalton

Flanigan Suelthaus and a board member of the Missouri Organization of Defense Lawyers.

Bill Thomas, of Rabbitt, Pitzer & Snodgrass and president of the Lawyers Association of St. Louis, said the plaintiff's lawyers were just trying to find a way to make their client whole.

"The problem is, the law just isn't on their side on this thing," he said. "The Workers' Compensation Act was created to provide protection for injured workers."

AmerenUE's lawyer, Lawrence L. Pratt, of Evans & Dixon in St. Louis, told the state Supreme Court at oral arguments in February that Friley's allegations are ambiguous and don't correspond to "any known, viable cause of action recognized in the state of Missouri today."

"The plaintiffs have alleged that Ameren has duties," he continued, "but they have failed to allege why they think we have these duties, and they have failed to allege that we have breached these duties."

Neither Pratt nor his co-counsel, Mary A. Lindsey, also of Evans & Dixon, returned phone calls seeking comment by press time Wednesday.

Friley's lawyer, Thomas K. Neill, of Gray, Ritter & Graham, said in arguments, "At the very least, the defendant, Ameren, knows the contract is going to be an issue in this case. They know what facts the plaintiff ultimately intends to prove at trial."

Neill was in deposition Wednesday and could not be reached for comment. Gray, Ritter & Graham's Maurice B. Graham did not return telephone calls seeking comment.

The court based its decision on its 1993 decision in *Matteuzzi v. Columbus Partnership*. In *Matteuzzi* the court held that control of the premises shifts to an independent contractor during construction, so the independent contractor is the party that owes a duty of care to the workers. The exception to this principle occurs when a landowner actively controls the premises and the way the independent contractor completes the job, the court said.

Friley's allegations, the court said, "are simply claims that Ameren had a duty to do the very things for which *Matteuzzi* holds that there is no duty.

"In effect, to adopt the host employer theory would be to overrule *Matteuzzi* and the several cases on which it relies," the court said.

The court also said Friley failed to allege sufficient facts for her premises liability claim — notably that the utility actually owned the land or had an easement on the land where the accident occurred. In addition, Friley's petition lacks any language asserting AmerenUE controlled the job site and Asplundh's activities, the court said.

The court further rejected Friley's argument that AmerenUE is liable for her husband's death because the work he did was inherently dangerous. This is a recognized exception to the principle that landowners aren't liable for the negligence of independent

contractors, but it only applies to injuries suffered by "innocent third parties," the court said.

Although Friley has the opportunity to amend her petition, Thomas said, "I can only assume that the facts of the case are not going to be that Ameren exerted any control over the activities of this independent contractor."

The case is State ex rel. Union Electric Co., d/b/a Ameren UE v. Dolan, No. SC88573, and may be accessed from the judiciary's Web site, www.courts.mo.gov.

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