[Cite as *Platt v. Cleveland Elec. Illuminating Co.*, 2009-Ohio-7003.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

RAY PLATT, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2009-A-0018**
- vs -	:	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2007 CV 912.

Judgment: Affirmed in part, reversed in part, and remanded.

Patrick T. Murphy, Dworken & Bernstein Co., L.P.A., 60 South Park Place, Painesville, OH 44077 (For Plaintiffs-Appellants).

John T. Dellick, Harrington, Hoppe & Mitchell, Ltd., 1200 Sky Bank Building, 26 Market Street, Youngstown, OH 44503 (For Defendant-Appellee, The Cleveland Electric Illuminating Company).

Jeffrey A. Ford and *Jason Fairchild*, Andrews & Pontius, L.L.C., 4817 State Road, #100, P.O. Box 10, Ashtabula, OH 44005-0010 (For Defendant-Appellee, Picken's Plastics, Inc.)

Jan L. Roller, Davis & Young, 1200 Fifth Third Center, 600 Superior Avenue, East, Cleveland, OH 44114-2654 (For Defendant-Appellee, Ashtabula Construction Company, Inc.)

COLLEEN MARY O'TOOLE, J.

{¶1} November 8, 2004, Ray Platt was working as foreman for Ashtabula Construction Company, Inc., supervising the construction of a penthouse on top of a

factory owned by Picken's Plastics, Inc., in the city of Ashtabula, Ohio, when he approached too closely to, or touched, electrical lines owned and operated by The Cleveland Electric Illuminating Company. He suffered horrible injuries as a result. Mr. Platt and his wife, Deborah, presently appeal from the summary judgments granted by the Ashtabula County Court of Common Pleas to Ashtabula Construction, Picken's, and C.E.I. in the Platts' action for personal damages and loss of consortium. We affirm in part, reverse in part, and remand this matter.

{¶2} In the spring of 2004, Picken's acquired a new hydraulic press for its factory in the city of Ashtabula. The machine was too large to be accommodated within the existing structure, so Picken's maintenance manager, Mike Carolin, solicited bids to extend the height of the factory by building a penthouse on top of it. At the same time, Picken's was in the process of purchasing a new transformer for its factory from C.E.I. Mr. Carolin testified by way of deposition that he took his contact from C.E.I., Craig Raymond, around the factory. Mr. Carolin testified that he asked Mr. Raymond about the feasibility of using a crane stationed on or about Anne Avenue, on the west side of the factory, to lift materials for construction of the penthouse. Mr. Richard Burns, the semi-retired founder of Ashtabula Construction, winner of the bid to build the penthouse, testified he was present when Mike Carolin showed C.E.I. representatives around the factory, and asked whether certain powerful power lines located close to the factory on Anne Avenue could be "blanketed" if he used a crane to lift materials.[1] Mr. Raymond testified he never met with Mr. Burns until after Mr. Platt's accident. However, all men agreed that the C.E.I representative (whether Mr. Raymond or another) stated that a

1. "Blanketing" a power line involves placing a non-conducive rubber blanket over it.

crane could not be used to lift materials over the Anne Avenue power lines, as it would be too dangerous. Mr. Burns further testified the C.E.I. representative stated the lines in question were too old to blanket. Mr. Raymond denied this, noting that blanketing or sleeving power lines is not a true safety measure, but simply serves to alert workers that power lines are present.

{¶3} Ashtabula Construction commenced construction of the penthouse in the autumn of 2004. The penthouse was a prefabricated steel structure. The structural steel was lifted into place from the interior of the factory; however, the siding and roofing could only be applied from the outside. The power lines along Anne Avenue, on the west side of the factory, were approximately ten feet four inches from the factory. OSHA regulations forbid any person who is not a qualified linesman from working within ten feet of an energized power conductor. However, to place the siding and roofing on the west side of the penthouse, Ashtabula Construction needed to use a scissors lift. When working on the scissors lift, at the height of the penthouse roof, any Ashtabula Construction crew was within ten feet of certain of the Anne Avenue power lines – including certain 33,000 volt lines serving Picken's.

{¶4} As foreman for the Picken's project, Mr. Platt and Mr. Burns both deposed Mr. Platt was responsible for safety at the job site. They agreed he had power to stop work if he thought unsafe conditions existed. Mr. Platt testified that he asked both Mr. Burns, and Mr. Carolin, several times about whether something could be done about the Anne Avenue power lines. Mr. Carolin testified that Mr. Platt did not ask about rendering the power lines safe. Mr. Platt admitted being aware of OSHA's ten foot rule, as well as the fact that power lines could be de-energized. Mr. Burns testified he told

Mr. Platt to stop work if it was raining, or misty, or too windy, because of the power lines. He admitted that Mr. Platt did not have authority to contact C.E.I. to de-energize the Anne Avenue lines. Indeed, deposition testimony indicated that Picken's, as the C.E.I. customer involved, would have to make such a request: after Mr. Platt's accident, Mr. Carolin did arrange for this to be done, in order to complete construction of the penthouse.

{¶5} Mr. Platt deposed he did not feel the Picken's site unsafe the day of his accident, and did not believe that Mr. Burns or his daughter, Terri Toukonen, president of Ashtabula Construction, had such a belief. Mr. Burns had previous experience of the dangers of electric lines: one of his workers had been killed in the mid-1970s, when he touched the cable of a crane Mr. Burns was operating himself, that cable having just contacted a high-power line.

{¶6} The Ashtabula Construction crew arrived at Picken's about 7:00 a.m., the morning of November 8, 2004. They were going to start roofing the penthouse, which required them to place twelve-foot pieces of steel trim along the top of the siding. Christopher Queale and Jason Blood were working on the east side of the penthouse, on a ladder and scaffolding. Mr. Blood specifically testified he did not wish to work in the scissors lift on the west side of the penthouse, due to the proximity of the power lines. Mr. Platt took the west side, along with Tony Bremwald and John Callahan. There was some wind that day, though all present appear to agree it was not too strong.

{¶7} Before going up in the scissors lift, someone placed a sheet of old rubber roofing from the factory over the edge of the scissors lift which would be closest to the

Anne Avenue wires, evidently under the impression this would provide some protection. Unfortunately, this material was conductive.

{¶8} Mr. Blood, working on the east side of the penthouse, had a question for Mr. Platt. Mr. Platt could not hear him, and Mr. Blood's co-worker, Chris Queale stuck his head over the peak of the uncompleted roof to relay the question. Mr. Platt and Mr. Bremwald were holding one of the long pieces of steel trim. Mr. Platt placed a hand on the side of the penthouse, to steady himself as he listened for the question. Everyone present agreed there was a loud popping noise, like a shotgun being fired. Those who could see Mr. Platt recall a fireball the size of a basketball exploding from his chest, before he collapsed on the floor of the scissors lift. He recalls agony, and blacking out. There was at least one more loud popping noise. Mr. Blood, who leapt from the roof on the east side, and ran through the factory, recalls a third popping sound when he came out on the west side. At the same time, he claimed seeing the piece of rubber laid across the lift's railing being blown by the wind into a 33,000 volt power line.

{¶9} After some difficulty, Mr. Bremwald managed to lower the scissors lift, and Mr. Platt was rushed to the hospital. At the time of his deposition in autumn 2005, his condition was deteriorating.

{¶10} Mr. and Mrs. Platt filed claims against C.E.I., Ashtabula Construction, and Picken's in 2005. After defendants filed for summary judgment, the Platts voluntarily dismissed their claims. They re-filed a complaint sounding in negligence against C.E.I. and Picken's July 25, 2007. C.E.I. and Picken's answered. September 14, 2007, the Platts filed an intentional tort action against Ashtabula Construction, which answered September 27, 2007. Upon motion of C.E.I., the trial court consolidated the cases

October 5, 2007. In October 2008, all defendants filed for summary judgment, with the Platts responding the following month. By three separate judgment entries filed February 24, 2009, the trial court granted the motions for summary judgment.

{¶11} The Platts timely noticed appeal, assigning three errors:

{¶12} "[1.] THE TRIAL COURT ERRED IN GRANTING THE CLEVELAND ELECTRICAL ILLUMINATING COMPANY'S MOTION FOR SUMMARY JUDGMENT [.]

{¶13} "[2.] THE TRIAL COURT ERRED IN GRANTING ASHTABULA COUNTY CONSTRUCTION COMPANY'S MOTION FOR SUMMARY JUDGMENT [.]

{¶14} "[3.] THE TRIAL COURT ERRED IN GRANTING PICKEN'S PLASTICS, INC.'S MOTION FOR SUMMARY JUDGMENT [.]"

{¶15} "'Pursuant to Civ.R. 56(C), summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.' *Holik v. Richards*, 11th Dist. No. 2005-A-0006, 2006-Ohio-2644, ¶12, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, ***. 'In addition, it must appear from the evidence and stipulations that reasonable minds can come to only one conclusion, which is adverse to the nonmoving party.' Id. citing Civ.R. 56(C). Further, the standard in which we review the granting of a motion for summary judgment is de novo. Id. citing *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, ***.

{¶16} "Accordingly, '(s)ummary judgment may not be granted until the moving party sufficiently demonstrates the absence of a genuine issue of material fact. The moving party bears the initial burden of informing the trial court of the basis of the motion and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.' *Brunstetter*

v. Keating, 11th Dist. No. 2002-T-0057, 2003-Ohio-3270, ¶12, citing *Dresher* at 292. 'Once the moving party meets the initial burden, the nonmoving party must then set forth specific facts demonstrating that a genuine issue of material fact does exist that must be preserved for trial, and if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.' Id., citing *Dresher* at 293.

{¶17} "***

{¶18} "***

{¶19} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and nonmoving party. In *Dresher v. Burt*, the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the

last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, ***.

{¶20} "The court in *Dresher* went on to say that paragraph three of the syllabus in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, ***, is too broad and fails to account for the burden Civ.R. 56 places upon a *moving* party. The court, therefore, limited paragraph three of the syllabus in *Wing* to bring it into conformity with *Mitseff*. (Emphasis added.)

{¶21} "The Supreme Court in *Dresher* went on to hold that when *neither* the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled to a judgment as a matter of law as the moving party bears the initial responsibility of informing the trial court of the basis for the motion, 'and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.' Id. at 276. (Emphasis added.)" *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, at ¶36-37, 40-42. (Parallel citations omitted.)

{¶22} We address the second assignment of error, challenging the trial court's grant of summary judgment on the Platts' intentional tort claim, first. The Supreme Court of Ohio set forth the elements of the tort at *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, at paragraphs one and two of the syllabus:

{¶23} "1. Within the purview of Section 8(A) of the Restatement of the Law 2d, Torts, and Section 8 of Prosser & Keeton on Torts (5 Ed. 1984), in order to establish 'intent' for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task. (*Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, ***, paragraph five of the syllabus, modified as set forth above and explained.)

{¶24} "2. To establish an intentional tort of an employer, proof beyond that required to prove negligence and beyond that to prove recklessness must be established. Where the employer acts despite his knowledge of some risk, his conduct may be negligence. As the probability increases that particular consequences may follow, then the employer's conduct may be characterized as recklessness. As the probability that the consequences will follow further increases, and the employer knows that injuries to employees are certain or substantially certain to result from the process, procedure or condition and he still proceeds, he is treated by the law as if he had in fact desired to produce the result. However, the mere knowledge and appreciation of a risk – something short of substantial certainty – is not intent. (*Van Fossen v. Babcock &*

*Wilcox Co. (*1988), 36 Ohio St.3d 100, ***, paragraph six of the syllabus, modified as set forth above and explained.)" (Parallel citations omitted.)

{¶25} "A plaintiff must satisfy all three prongs of the *Fyffe* test, and a failure of proof with respect to any one prong will defeat the intentional tort claim." *Moore v. The Ohio Valley Coal Co.*, 7th Dist. No. 05 BE 3, 2007-Ohio-1123, at ¶23; cf. *Young v. Industrial Molded Plastics, Inc.*, 160 Ohio App.3d 495, 2005-Ohio-1795, at ¶19. [2]

{¶26} Construing the facts most strongly in the Platts' favor leads us to the conclusion the trial court erred in granting Ashtabula Construction summary judgment on their intentional tort claim. The Platts can point to appropriate evidence in the record sufficient to support each prong of the *Fyffe* test. Regarding the first prong – whether the employer knew of a dangerous condition – work around high power lines is inherently dangerous. *Taylor v. Ohio Edison Co.* (Aug. 21, 1998), 11th Dist. No. 97-L-036, 1998 Ohio App. LEXIS 3868, at 13. The danger of working closely to the Anne Avenue power lines in this case was fully known to Ashtabula Construction.

{¶27} The second prong of the *Fyffe* test requires that the employer have knowledge that harm is substantially certain to occur if an employee is subjected to the dangerous condition. Again, in this case, Ashtabula Construction was aware that harm was substantially certain to occur if an employee contacted the power lines. Indeed, Mr. Burns knew from personal observation that contact with high power lines could be fatal. Further, Ashtabula Construction was well aware of the OSHA ten foot rule, and that the rule was being violated.

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2. This writer has recognized present R.C. 2745.01 as constitutional. See, e.g., *Smith v. Inland Paperboard and Packaging, Inc.*, 11th Dist. No. 2008-P-0072, 2009-Ohio-3148, at ¶22-34 (O'Toole, J.). However, two members of this panel have found it unconstitutional. *Fleming v. AAS Serv., Inc.*, 177 Ohio App.3d 778, 2008-Ohio-3908, at ¶26-48 (per Rice, J.; Trapp, J., concurring). We need not reach that

{¶28} The third prong of the *Fyffe* test is that the employer requires its employee to continue to work despite knowledge of the substantial certainty of harm. The evidence herein shows that Mr. Platt was responsible for safety at the site. However, it is unclear whether he had any power to insist that work stop until the power lines were de-energized. Certainly Mr. Burns testified that Mr. Platt was not authorized to contact C.E.I. about the situation. Even though only Picken's could actually request de-energizing of the lines, the implication is that Mr. Platt did not have authority to stop work until this was done. Given the inherent danger of working near high power lines, Ashtabula Construction's knowledge of this, Mr. Platt's testimony that he asked several times about the lines, and the indications that Mr. Platt was without authority to rectify the situation, leads inevitably to the conclusion that a genuine issue of material fact remains regarding whether Ashtabula Construction required Mr. Platt to continue working despite the substantial certainty he would be injured. This fulfills the third prong of *Fyffe*.

{¶29} The second assignment of error has merit.

{¶30} By their first assignment of error, the Platts contend that C.E.I. breached a duty it owed to Mr. Platt to assure that the Anne Avenue power lines were safe during the Picken's construction project. They note that C.E.I. was aware, in the spring of 2004, that Picken's would be constructing an addition to the Ashtabula factory, which would necessarily involve workers coming within ten feet of the power lines. They argue that this knowledge, gained through the visits of Mr. Raymond of C.E.I. to Picken's, in the course of discussing the new transformer Picken's was installing, was

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issue in this case, as Mr. Platt's injury occurred before the effective date of the present statute, inducing us to apply the common law as pronounced in *Fyffe*.

sufficient to put C.E.I. on notice that work would occur within a danger zone created by the C.E.I. lines, thus creating a concomitant duty on C.E.I.'s part to mitigate that danger.

{¶31} "'A power company erecting and maintaining equipment, including poles and wires (***) for the purpose of transmitting and distributing electrical current, is bound to exercise the highest degree of care consistent with the practical operation of such business in the construction, maintenance and inspection of such equipment and is responsible for any conduct falling short of that standard.' *Hetrick v. Marion--Reserve Power Co.* (1943), 141 Ohio St. 347, ***, paragraph two of the syllabus ***[.]" *Parke v. Ohio Edison Co.*, 11th Dist. No. 2004-T-0144, 2005-Ohio-6153, at ¶9. (Parallel citation omitted.)

{¶32} Further, a power company "owes a duty to maintain its lines, conductors and other equipment in such a way that those who *rightfully* come into contact with such equipment will not be harmed." *Parke* at ¶11. (Emphasis added.) However, this duty is predicated on proper notice to the power company of the potential for contact. Id. at ¶17.

{¶33} In this case, Mr. Platt did not come into contact with the Anne Avenue power lines rightfully: he was acting in contravention of the OSHA ten foot rule, of which he was fully aware. And it appears to us that C.E.I. did not have effective notice of the potential for contact. We do not think C.E.I.'s duty to protect those working close to its facilities may be premised on the notice alleged here: that a C.E.I. sales representative, Mr. Raymond, was made aware in the spring of 2004 that construction of a penthouse near the Anne Avenue power lines was likely to occur at some point in the future. It would be impracticable for C.E.I. to monitor any and all potential, future building projects

near its facilities of which it becomes aware. A power company's duty to maintain its facilities so as to protect those coming in contact with them is limited by practicability and by whether the danger is foreseeable. Cf. *Hetrick*, supra, at paragraph two of the syllabus; see, also, *Parke* at ¶17. In this case, the potential for contact was tenuous, and no duty arose.

{¶34} The first assignment of error lacks merit.

{¶35} By their third assignment of error, the Platts contend the trial court erred in granting Picken's summary judgment. They believe Picken's breached a duty it owed Mr. Platt.

{¶36} "'As a general rule, a property owner does not owe a duty of care to the employee of an independent contractor in relation to an openly dangerous condition.'" *Lexie v. Ohio Edison Co.*, 1996 Ohio App. LEXIS 5642, *10 (Dec. 13, 1996), Trumbull App. No. 96-T-5384, ***. The exception to the rule is that 'a property owner does owe a duty of care when the owner actively participated in the performance of the work.' 1996 Ohio App. LEXIS 5642 at *10." *Taylor*, supra, at 13. "Active participation means more than supervising or coordinating; the property owner must direct the activity which resulted in the injury and/or give or deny permission for the critical acts that led to the employee's injury." *Barnett v. Beazer Homes Invests., LLC*, 180 Ohio App.3d 272, 2008-Ohio-6756, at ¶17.

{¶37} In this case, the Platts argue that Picken's denied permission for a critical act leading to Mr. Platt's injury. They point to the uncontested testimony that only Picken's could arrange for C.E.I. to de-energize its lines – and, that following the accident, it did so, evidently at Ashtabula Construction's behest.

{¶38} We must reject this argument. Mr. Carolin, the maintenance manager for Picken's, testified that Ashtabula Construction was solely responsible for carrying out the construction project, and that Picken's merely did what Ashtabula Construction required. Even though Mr. Platt testified he expressed concerns to Mr. Carolin about the electric lines, there is nothing to indicate Picken's was ever asked by anyone from Ashtabula Construction prior to the accident to arrange de-energizing of the lines with C.E.I. In effect, the evidence does not show that Picken's refused permission for de-energizing the lines – which would be the type of evidence required to show active participation by Picken's in the events leading to Mr. Platt's injuries. As such, Picken's had no duty.

{¶39} The third assignment of error lacks merit.

{¶40} The judgments of the Ashtabula County Court of Common Pleas are affirmed in part, reversed in part, and this matter is remanded for proceedings consistent with this opinion.

{¶41} It is the further order of this court that appellants and appellee Ashtabula Construction Company, Inc., are assessed equally costs herein taxed.

{¶42} The court finds there were reasonable grounds for this appeal.

CYNTHIA WESTCOTT RICE, J., concurs in judgment only,

MARY JANE TRAPP, P.J., concurs in judgment only with Concurring Opinion.

MARY JANE TRAPP, P.J., concurs in judgment only with Concurring Opinion.

{¶43} Applying the three-pronged test of *Fyffe* to the facts presented in this case, I concur with the majority's holding that summary judgment should not have been granted on the intentional tort claim.

{¶44} As the Supreme Court of Ohio held in *Fyffe*, "in order to establish 'intent' for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task. ***." Id. at paragraph one of the syllabus.

{¶45} The court further held that in order to establish an intentional tort by an employer, an employee must demonstrate proof beyond that required to prove negligence or recklessness. Id. at paragraph two of the syllabus. "If a plaintiff can show that harm or consequences will follow the risk, that the employer knows that injuries to employees are certain or substantially certain to result from the risk, and yet the employer still requires the employee to proceed, the employer is treated by law as if he had in fact desired the end result." *Wallick v. Willoughby Supply Co.,* 168 Ohio App.3d 640, 2006- Ohio-4728, ¶12, citing *Fyffe* at paragraph two of the syllabus.

{¶46} Ashtabula Construction concedes that a question of fact existed whether Mr. Platt's work was a dangerous condition, but even absent such a concession, the

majority correctly notes that we have found work around power lines to be inherently dangerous work. But, it is still critical to the *Fyffe* analysis that the dangerous condition be articulated. As we noted in *Fleming*, "'dangerous work must be distinguished from an otherwise dangerous condition within that work. It is the latter of which that must be within the knowledge of the employer before liability could attach.' *Naragon v. Dayton Power & Light Co.* (Mar. 30, 1998), 3d Dist. No. 17-97-21, 1998 Ohio App. LEXIS 1531, 19. 'Were it otherwise, any injury associated with inherently dangerous work *** could subject an employer to intentional tort liability, whatever the cause.'" *Fleming* at ¶62.

{¶47} The dangerous condition for Mr. Platt was that his employer required him to work in proximity to a 33,000 volt line on a scissors lift in violation of the OSHA ten-foot rule. The record establishes Mr. Burns knew the ten-foot rule, and that he knew Mr. Platt would be working on the west side of the building on a scissors lift within the zone of danger. Such knowledge takes Mr. Platt past the first prong of *Fyffe*.

{¶48} The second prong of *Fyffe* is found in paragraph two of the syllabus: "To establish an intentional tort of an employer, proof beyond that required to prove negligence and beyond that to prove recklessness must be established. Where the employer acts despite his knowledge of some risk, his conduct may be negligence. As the probability increases that particular consequences may follow, then the employer's conduct may be characterized as recklessness. As the probability that the consequences will follow further increases and the employer knows that injuries to employees are certain or substantially certain to result from the process, procedure or condition, and he still proceeds, he is treated by the law as if he had in fact desired to

produce the result. However, the mere knowledge and appreciation of a risk -- something short of substantial certainty -- is not intent."

{¶49} As we observed in *Fleming*, "[u]nder *Fyffe,* an employee is not required to show that an employer subjectively intended the injury at issue to prove intent. See *Hubert v. Al Hissom Roofing and Constr., Inc.,* 7th Dist. No. 05 CO 21, 2006-Ohio-751, ¶P35; see, also, *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 117. Rather, evidence indicating an employer knew that subjecting an employee to a dangerous condition would, with substantial certainty, cause an injury is sufficient to show intent." Id. at ¶67.

{¶50} The record also establishes Mr. Burns knew from his own first-hand experience that electrocution and death could occur when a crane cable touched a high tension line. He also knew that injury was substantially certain to occur if Mr. Platt or any of the workers on the Picken's job worked in that area if the weather condition were "misty or raining *** [or] windy" because he had been told that electricity would "jump, if things are wet or damp" and he knew that the wind would blow the power lines sideways. In fact, he testified that he asked CEI to cover the wires because "he didn't like the looks of them." This evidence in the record creates a genuine issue of material fact as to whether Mr. Platt's employer knew that harm was substantially certain to result from the dangerous condition, and, thus, the Platts have met their burden as to *Fyffe's* second prong.

{¶51} The third prong of *Fyffe* requires proof that "the employer, with knowledge of a dangerous condition and of a substantial certainty of harm, must have required the employee to perform a dangerous task." *Hannah v. Dayton Power & Light Co.* (1998),

82 Ohio St.3d 482, 486. As is cogent to a case decided upon summary judgment, the court explained that in order "to overcome a motion for summary judgment, an opposing party can satisfy this requirement by presenting evidence that raises an inference that the employer, through its actions and policies, required the [plaintiff] to engage in that dangerous task." Id. at 487.

{¶52} It is clear from the record that all agree that the siding and trim work could not have been performed by workers stationed inside the building. Mr. Burns admits that he was one of the persons who decided to bring the scissors lift onto the site. He testified that even though he included the use of scaffolding for the installation of the siding in his bid, it was up to Mr. Platt what instrumentality -- scaffolding or the scissor lift -- to use to install the siding on the west wall. When asked what he would have used, he admits that he would have used the lift. Mr. Platt expressed concern about the proximity of the wires regardless of the instrumentality used along the west wall.

{¶53} Given the employer's knowledge of the violation of the ten-foot rule and case law which provides that the "[f]ailure to comply with safety regulations is relevant to show that an employer required an employee to perform a dangerous task, knowing of the substantial certainty of the injury," *Slack v. Henry* (Dec. 1, 2000), 4th Dist. No. 00CA2704, 2000 Ohio App. LEXIS 6336, 14, I believe genuine issues of material fact remain as to whether this employer required Mr. Platt to perform an inherently dangerous task with knowledge of a dangerous condition and of a substantial certainty of harm. I also agree with the majority's observations that it is "unclear from the evidence whether [Mr. Platt] had any power to insist that work stop until the power lines were de-energized." Construing the evidence in Mr. Platt's favor, it cannot be said that

there are no genuine issues of material fact remaining for a jury determination and that Ashtabula Construction is entitled to judgment as a matter of law.

{¶54} I also concur that summary judgment was appropriate on the Platt's claim for relief against CEI; however, my analysis differs from that of the majority. The question of whether or not Mr. Platt came into contact with the power lines "rightfully" is not dispositive in this particular summary judgment exercise. CEI met its initial burden of identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. CEI asserted that as a matter of law it was not negligent because it did not know when the construction would occur, it was not present during the construction project, it did not actively participate in the construction project, it had no control or right to control the details of the project, and it was unaware that Mr. Platt would be using a scissors lift in the danger zone in violation of the ten-foot rule. Thus, CEI argued it owed no duty to Mr. Platt as it was without notice or apprehension of the specific danger. I agree. Once it has been determined that based upon the specific facts of this case no duty was owed there is no need go further and analyze the defense of primary assumption of the risk.

{¶55} The record contains no contrary evidence or inferences that would create a genuine issue of material fact as to CEI's duty. The record contains evidentiary quality material and testimony supporting CEI's assertion that its involvement and its assumed duties were limited both in time and scope to the installation of a transformer for its customer, a determination before the work began that a crane could not be used to carry steel over the electrical lines, and a determination before the work began that the lines could not be blanketed in order to permit the use of a crane. When Mr. Burns

was asked whether there was any discussion with CEI of concern about men working near the wires, he replied, "[n]o. I was more concerned about the crane." Without any evidence in the record that CEI was on notice that the project called for workers to be within the danger zone, the Platts have not met their burden of setting forth specific facts or reasonable inferences from facts that Mr. Platt's injury was foreseeable by CEI.

{¶56} The often-quoted 1 Shearman and Redfield on Negligence (Rev. Ed.), 50, Section 24, discussion of the doctrine of reasonable anticipation, is cogent to this question:

{¶57} "Foresight, not retrospect, is the standard of diligence. It is nearly always easy, after an accident has happened, to see how it could have been avoided. But negligence is not a matter to be judged after the occurrence. It is always a question of what reasonably prudent men under the same circumstances would or should, in the exercise of reasonable care, have anticipated. Reasonable anticipation is that expectation created in the mind of the ordinarily prudent and competent person as the consequence of his reaction to any given set of circumstances. If such expectation carries recognition that the given set of circumstances is suggestive of danger, then failure to take appropriate safety measures constitutes negligence. On the contrary, there is no duty to guard when there is no danger reasonably to be apprehended. Negligence is gauged by the ability to anticipate. Precaution is a duty only so far as there is reason for apprehension. Reasonable apprehension does not include anticipation of every conceivable injury. There is no duty to guard against remote and doubtful dangers." See *Hetrick v. Marion--Reserve Power Co.* (1943), 141 Ohio St. 347, 358-359; *Parke v. Ohio Edison Co.*, 11th Dist. 2004-T-0144, 2005-Ohio-6153, fn 2.

{¶58} Although CEI as a utility company has a heightened duty of care, it cannot be said in this case that a duty existed to anticipate that Mr. Platt's employer would have him work on a lift within the danger zone in violation of OSHA regulations.

{¶59} Finally, I concur with the majority's determination that summary judgment was appropriately granted in Picken's favor; however, I disagree with the majority's conclusion that "the evidence does not show that Picken's refused permission for de-energizing the lines -- *which would be the type of evidence required to show active participation by Picken's in the event leading to Mr. Platt's injuries*." (Emphasis added.) Had there been evidence in the record that Picken's was asked to de-energize the lines and failed to respond to such a specific request, the failure to respond may have constituted a denial. See *Bond v. Howard Corp.* (1995), 72 Ohio St.3d 332.