[Cite as *French v. New Paris*, 2011-Ohio-1309.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

PREBLE COUNTY

CATHY A. FRENCH, Individually and as Administrator of the Estate of Robert French II,	:	CASE NO. CA2010-05-008
Plaintiff-Appellant	:	O P I N I O N 3/21/2011
- vs -	:	
VILLAGE OF NEW PARIS, OHIO, et al.	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case No. 07-CV-26434

Devoss, Johnson, Zwick, Baker and Ainsworth, Joseph M. Johnson II, 147 South Second Street, P.O. Box 30, Decatur, Indiana 46733, for plaintiff-appellant

Cline, Farrell, Christie, Lee & Caress, P.C., Lee C. Christie, 951 North Delaware Street, Indianapolis, Indiana 46202, for plaintiff-appellant

Rendigs, Fry, Kiely & Dennis LLP, Wilson G. Weisenfelder, Jr., One West Fourth Street, Suite 900, Cincinnati, Ohio 45402, for defendant-appellee Northwest Fire & Ambulance District

Taft Stettinius & Hollister, LLP, Timothy G. Pepper and J. Steven Justice, 40 North Main Street, Suite 1700, Dayton, Ohio 45423, for defendant-appellee, Dayton Power & Light

Douple, Beyoglides, Leve, Hansen, Claypool, Kovich & Lipowicz, Charles A. Claypool, 130 West Second Street, Suite 1900, Dayton, Ohio 45402, for defendant-appellee, Bill's Antenna Service

POWELL, J.

{¶1} Plaintiff-appellant, Cathy A. French, individually and as administrator of the estate of Robert W. French II, appeals a decision of the Preble County Court of Common Pleas entering summary judgment in favor of defendants-appellees, Northwest Fire and Ambulance District, Dayton Power and Light Company and DPL, Inc. (collectively, "DP&L"), and Bill's Antenna Service, in a wrongful death and survivor action. We affirm the judgment of the trial court.

{¶2} This case originates from the accidental death of Robert French on July 30, 2005. While installing an antenna on a radio tower on the premises of Northwest, French came in contact with a high-voltage electrical line owned and operated by DP&L. The radio tower was owned by Northwest and had been installed on the premises by Bill's Antenna in or around 2000. The parties do not dispute that the tower was located approximately five and one-half feet from the electrical line.

{¶3} The record indicates that Northwest provides fire and ambulance services to the residents of the village of New Paris as well as two neighboring townships. French's accident occurred while he was attempting to install an amateur or "ham" radio antenna on the 60-foot tower behind Northwest's building. He was performing the installation as a volunteer member of the Preble Amateur Radio Association ("PARA"). The goal of PARA was to provide an ancillary communications network to existing public safety communications systems. According to the parties, the purpose of the installation of the ham radio equipment was to improve communications throughout Preble County in the event of a large-scale emergency. The installation was also conducted in connection with the Preble

County Emergency Management Agency, the Radio Amateur Civil Emergency Service, and the Department of Homeland Security.

{¶4} Appellant, French's wife, testified that French was an experienced tower climber and had been climbing radio towers since the age of 14. He had also been a ham radio enthusiast for approximately 27 years. French's friend and colleague, Gary Hollenbaugh, testified that he had known French for "thirty plus years," and that French had taught him how to safely install and maintain antennas. According to Hollenbaugh, both he and French were the founding members of PARA, and French was in charge of the installation of the ham radio equipment at Northwest.

{¶5} The first phase of the project involved installing a cross arm located approximately 30 feet up the tower. The radio antenna would then be mounted to the cross arm in a subsequent installation. Alan Stone, a fellow ham radio enthusiast, testified that he and French installed the cross arm approximately two weeks prior to the accident.

{¶6} Subsequently, on July 30, French arrived at Northwest to install the ham radio antenna. Upon his arrival, it was also determined that he would install an additional antenna. French completed the installation of the first antenna without incident. According to witnesses, he climbed the tower and after positioning himself at the installation point, he pulled the antenna up the tower using a nylon guide rope.

{¶7} According to Stone, after the first antenna was installed, French mentioned that he believed his blood sugar was low. He drank a soda and rested for approximately one hour. Witnesses present testified that it was a hot day, and as the morning wore on, it appeared that French was "in a hurry" to complete the installation

of the second antenna.

{¶8} During his attempt to install the additional antenna, French attached a metal, coaxial cable to the antenna prior to climbing the tower. He positioned the cable over his shoulder and pulled the antenna beneath him as he ascended to the cross arm. As French neared the installation point, the antenna became lodged in a tower rung below him. According to witnesses, French "yanked" on the cable and the antenna dislodged, springing away from the tower and striking the 7,200-volt electrical line. He was electrocuted and fell 30 feet to the ground. French's cause of death was determined to be electrocution followed by blunt force trauma as a result of his fall from the tower.

{¶9} In July of 2007, appellant, individually and on behalf of her husband's estate, initiated a wrongful death and survivor action against Northwest, DP&L, and Bill's Antenna. Appellant argued that as a public utility company, DP&L owed French the highest duty of care in the installation, maintenance, and operation of the high-voltage electrical line. Appellant claimed that DP&L breached that duty in the following respects: 1) by neglecting to maintain an assured, clear distance between the electrical line and the building and radio tower; 2) by failing to inspect and maintain the line in conformance with applicable National Electrical Safety Code ("NESC") standards; and 3) by failing to insulate the line, inspect the location, and warn the general public of the dangerous condition presented by the line. Appellant also claimed that Bill's Antenna and Northwest negligently and/or willfully installed and maintained the radio tower in close proximity to the electrical line, and failed to warn French of the dangers posed by its location. According to appellant, as a direct and proximate result of the conduct of Northwest, DP&L, and Bill's Antenna, French

endured physical pain and mental suffering prior to his death.

{¶10} In separate decisions dated April 14, 2010, the trial court granted summary judgment in favor of the defendants. The court concluded that Northwest was entitled to summary judgment as a result of its immunity as a political subdivision, the open and obvious nature of the hazard posed by the electrical line, and that French had assumed the risks associated with the installation of the antenna. The court also found that DP&L and Bill's Antenna were entitled to judgment under a comparative negligence analysis, determining that reasonable minds could only conclude that French's negligence outweighed any negligence of Bill's Antenna and DP&L.

{¶11} Appellant has appealed the trial court's decisions, raising three assignments of error for our review. However, prior to addressing the merits of the assignments, we must make note of a procedural error in this case. Upon review of the trial court docket, it is apparent that both Bill's Antenna and appellant attached uncertified deposition excerpts to the briefs in support of, and in opposition to, summary judgment. Appellant also attached the excerpts to her appellate brief. Although the record indicates that the full depositions of appellant, Robert Dungan, Gary Hollenbaugh, Clarence Jobe, Brian Simpson, and Alan Stone were filed with the trial court, some depositions referenced by the parties were not filed. These include the depositions of Mack Martin, Bill Nelson, Charlie Biggs and Jay Young. The unfiled and uncertified depositions did not conform to the requirements of Civ.R. 56(C).[1] However, "[a]ppellate courts have stated that it is within the trial court's

1. Civ.R. 56(C) provides, in part, that in determining whether summary judgment is appropriate, a court may consider only "the pleadings, depositions, answers to interrogatories, written admissions,

discretion to consider nonconforming evidence when there is no objection." *Chamberlin v. Buick Youngstown Co*., Mahoning App. No. 02-CA-115, 2003-Ohio-3486, ¶7, quoting *Bell v. Holden Surveying, Inc*., Carroll App. No. 01 AP 766, 2002-Ohio-5018, ¶22. See, also, *Ohio City Orthopedics, Inc. v. Medical Billing and Receivables, Inc*., Cuyahoga App. No. 81930, 2003-Ohio-1881, fn. 1 (noting that it is also well-within the court's discretion to ignore documents that do not comply with Civ.R. 56).

{¶12} The parties did not raise any objection to the trial court with respect to the use of the unfiled and uncertified depositions. It appears that the trial court reviewed and considered several of the unfiled deposition passages, as it referred to evidence in its decisions granting summary judgment to Northwest and Bill's Antenna that it could have only ascertained from those excerpts. However, it is not clear whether the court considered all of the depositions. To the extent that this court can discern that the unfiled depositions were reviewed and considered by the trial court, we will likewise consider them despite their noncompliance with Civ.R. 56(C). We will not consider excerpts that the record does not specifically indicate were considered by the court in reaching its decisions on summary judgment. See *Stoll v. Gardner*, Summit App. No. 24336, 2009-Ohio-1865, ¶24. To do otherwise would presume irregularity by the trial court. Id.

{¶13} We now turn to the merits of appellant's assignments of error. For ease of discussion, we have addressed the assignments out of order.

{¶14} Assignment of Error No. 3:

{¶15} "THE TRIAL COURT ERRED IN GRANTING NORTHWEST FIRE &

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affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action * * *."

AMBULANCE DISTRICT'S MOTION FOR SUMMARY JUDGMENT[.]"

{¶16} In her third assignment of error, appellant argues that the trial court improperly entered summary judgment in favor of Northwest. In its motion, Northwest argued that it was entitled to judgment because: 1) it was immune from liability as a political subdivision pursuant to R.C. 2744.01, et seq.; 2) French was an independent contractor, and therefore no duty of care was owed to him; and 3) French assumed the risks associated with installing the antenna on the radio tower.

{¶17} An appellate court's examination of a trial court's decision to grant summary judgment is subject to de novo review. *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105, 1996-Ohio-336. In performing its review, an appellate court is required to evaluate the trial court's judgment independently and without deference to its determinations. *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296. We utilize the same standard in our review that the trial court should have employed. *Lorain Natl. Bank v. Saratoga Apts*. (1989), 61 Ohio App.3d 127, 129.

{¶18} Summary judgment is appropriate under Civ. R. 56 only when "(1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor." *Zivich v. Mentor Soccer Club, Inc*., 82 Ohio St.3d 367, 369-370, 1998-Ohio-389. The party moving for summary judgment has the initial burden of producing some evidence that affirmatively demonstrates the lack of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-93, 1996-Ohio-107. The nonmoving party must then rebut the moving party's evidence with specific facts showing the existence of a genuine triable

issue; they may not rest on the mere allegations or denials in their pleadings. Id.; Civ.R. 56(E).

{¶19} Although appellant's complaint alleged, in part, that the conduct of Northwest, DP&L and Bill's Antenna was "willful," the record indicates that through the course of discovery, appellant's wrongful death claim developed under a negligence theory of recovery. In order to maintain a wrongful death action on a theory of negligence, a plaintiff must establish three elements: "a duty owed to plaintiff['s] decedent, a breach of that duty, and proximate causation between the breach of duty and the death." *Samonas v. St. Elizabeth Health Ctr.*, Mahoning App. No. 05 MA 83, 2006-Ohio-671, ¶17, citing *Littleton v. Good Samaritan Hosp. & Health Ctr*. (1988), 39 Ohio St.3d 86, 92.[2] The threshold question of the existence of a duty is a question of law for the court to decide, and depends upon the foreseeability of the injury. *Midwestern Indemn. Co. v. Wiser* (2001), 144 Ohio App.3d 354, 358. An injury is foreseeable if the defendant "knew or should have known that his act was likely to result in harm to someone." Id.

Premises liability

{¶20} Appellant has presented several issues for our review under this assignment of error. She first contends that a genuine issue of material fact exists as to French's status upon entering Northwest's premises on July 30. Appellant claims that French was an invitee, and as such, Northwest owed him a duty to maintain the premises in a safe condition and to warn French of hidden dangers. According to appellant, Northwest breached that duty by failing to notify French of the close

2. These elements must also be shown to establish a survivor action predicated upon a claim of ordinary negligence. *Samonas* at id.

proximity of the electrical line to the radio tower, and that the location of the line violated NESC standards. Appellant asserts that the NESC required the tower to be a minimum of seven and one-half feet from the electrical line. In granting summary judgment in favor of Northwest, the court determined that regardless of whether French was classified as an invitee or an independent contractor, Northwest owed no duty of care to French because the electrical line was an open and obvious hazard.

{¶21} Whether or not a premises owner is liable to a party who sustains injury on his property depends on the status of the party entering the premises, i.e., trespasser, licensee, or invitee, and whether the owner breached a duty of care arising from that status. *Radford v. National Whitetail Deer Educ. Found.,* Guernsey App. No. 10 CA 24, 2011-Ohio-424, ¶20. An "invitee" is a business visitor who rightfully comes onto the premises of another by invitation, express or implied, for the benefit of the owner. *Gladon v. Greater Cleveland Regional Transit Auth*., 75 Ohio St.3d 312, 315, 1996-Ohio-137. An owner of premises owes a business invitee a duty to exercise ordinary care to maintain the premises in a reasonably safe condition so that the invitee is not unreasonably or unnecessarily exposed to danger. *Barnett v. Beazer Homes Investments, L.L.C*., 180 Ohio App.3d 272, 2008-Ohio-6756, ¶31, citing *Paschal v. Rite Aid Pharmacy, Inc*. (1985), 18 Ohio St.3d 203. However, a premises owner is under no duty to protect a business invitee from dangers "known to the invitee or dangers that are so obvious and apparent to the invitee that he should reasonably be expected to discover them and protect himself from them." *Layer v. Kings Island Co*., Warren App. No. CA2002-10-106, 2003-Ohio-2375, ¶12.

{¶22} Hazards that have been deemed open and obvious are those that are not concealed and are discoverable by ordinary inspection. *Parsons v. Lawson Co*.

(1989), 57 Ohio App.3d 49, 50-51. However, a dangerous condition does not have to be observed by the invitee to be open and obvious. *Barnett* at ¶32. The determinative issue is whether the condition is observable, which "depends upon the particular circumstances surrounding the hazard." Id., quoting *Olivier v. Leaf & Vine*, Miami App. No. 2004 CA 35, 2005-Ohio-1910, ¶31.

{¶23} In this case, French was an invitee because as a member of PARA, he was invited onto the property by Northwest in order to provide it with the benefit of increased emergency communication measures. Brian Simpson, the volunteer fire chief for Northwest, testified that the installation of the emergency radio equipment would have provided a benefit to the district in the form of "additional communication ability." As a result, Northwest had a duty, as the property owner, to maintain the premises in a reasonably safe condition, and to warn French of any latent or concealed defects of which Northwest was aware. *Zuzan v. Shutrump*, 155 Ohio App.3d 589, 2003-Ohio-7285, ¶6. However, Northwest was relieved of any duty to warn French of open and obvious hazards.

{¶24} Upon review, we find that reasonable minds could only conclude that the danger posed by the electrical line was open and obvious. Deposition testimony from several individuals, including appellant, establish that French was well aware of the existence of the line and the threat it posed.

{¶25} Alan Stone testified that when he and French installed the cross arm, they discussed the fact that the electrical line was close to the tower. However, according to Stone, the proximity of the line was not deemed a problem for the installation of the radio equipment. Hollenbaugh testified that he and French had conducted a site survey at Northwest prior to the installation and made note of the

electrical line. They also discussed the voltage of the line and the fact that it was uninsulated. In addition, Simpson testified that within the year preceding the accident, he had met with French at the fire station and spoke with him about the tower and the line. Appellant also testified that she was with French when he climbed the tower within the year preceding the accident. According to appellant, French noted to her that he thought the electrical line was "a little close."

{¶26} In viewing the evidence in a light most favorable to appellant, reasonable minds could only conclude that because French had observed and was aware of the hazard posed by the line, no duty of care was owed to him by Northwest.

Political subdivision immunity

{¶27} Appellant also argues that a fact issue exists as to whether Northwest was a political subdivision subject to immunity under R.C. 2744.02. She claims that "Northwest has failed to offer any evidence that it is a political subdivision other than to simply state that it provides certain rescue services."

{¶28} The determination of whether a political subdivision is immune from tort liability involves a three-tiered analysis. *Griffits v. Village of Newburgh Hts.*, Cuyahoga App. No. 91428, 2009-Ohio-493, ¶9; *Carter v. Cleveland*, 83 Ohio St.3d 24, 28, 1998-Ohio-421. First, R.C. 2744.02(A)(1) sets forth the general rule that a political subdivision is "not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." *Griffits* at ¶9. Second, R.C. 2744.02(B) lists five exceptions to the immunity granted to political subdivisions under R.C.

2744.02(A)(1). *Ryll v. Columbus Fireworks Display Co., Inc*., 95 Ohio St.3d 467, 2002-Ohio-2584, ¶25. Third, in the event that a political subdivision is subject to liability under R.C. 2744.02(B), further defenses and immunities are available to it pursuant to R.C. 2744.03(A). See *Griffits* at ¶18.

{¶29} We must first determine whether the evidence established that Northwest was a political subdivision. As Northwest pointed out in its reply brief to summary judgment and in its merit brief on appeal, appellant alleged in her complaint that Northwest was, in fact, a political subdivision. Northwest admitted the truth of the allegation in its answer. As a result, there is no factual issue presented with regard to whether Northwest was a political subdivision, and it had no obligation to offer evidence as to its status for purposes of summary judgment. See, *State Farm Mutual Automobile Ins. Co. v. Dicenzo* (1981), 1 Ohio App.3d 68, 69.

{¶30} In addition, Northwest qualifies for general immunity because R.C. 2744.01(F) declares fire and ambulance districts created under R.C. 505.375 to be political subdivisions, and R.C. 2744.01(C)(2)(a) provides that the provision or non-provision of police, fire, emergency medical, ambulance and rescue services or protection constitutes a governmental function. See, generally, *Hubbard v. Canton City School Bd. of Ed*., 97 Ohio St.3d 451, 2002-Ohio-6718, ¶11. In support of its motion, Northwest submitted evidence to establish that it was created pursuant to the provisions of R.C. 505.375. Appellant failed to raise any issue or present evidence in opposition to summary judgment to negate Northwest's argument that it was entitled to general immunity as a political subdivision. She also failed to assert than any R.C. 2744.02(B) exceptions to immunity were present in this case. Northwest was therefore entitled to summary judgment on its immunity defense.

Assumption of the risk

{¶31} In its motion for summary judgment, Northwest also argued that appellant's claims were barred under the doctrines of primary and implied assumption of the risk. Northwest claimed that there was no factual dispute that French understood the risks associated with installing the antenna near the electrical line, but chose to proceed notwithstanding the hazard. In concluding that Northwest was entitled to judgment on its affirmative defense, the trial court determined that the doctrine of primary assumption of the risk applied to relieve Northwest of any duty owed to French.

{¶32} On appeal, appellant appears to argue that the doctrine of implied assumption of the risk is applicable to the instant case, and contends that a question of fact remains as to whether French assumed the risks associated with installing the antenna on the radio tower. She argues that although French observed the electrical line, this fact does not preclude his recovery because reasonable minds could disagree as to whether he fully appreciated the risks involved with high voltage electricity.

{¶33} Ohio law has recognized multiple variations of the affirmative defense of assumption of the risk, including primary and implied. *Ballinger v. Leaniz Roofing, Ltd*., Franklin App. No. 07AP-696, 2008-Ohio-1421, ¶6. Primary assumption of the risk requires a person to reasonably and voluntarily expose himself to an obvious or known danger. *Gonzalez v. Posner*, Fulton App. No. F-09-017, 2010-Ohio-2117, ¶15. Under primary assumption of the risk, a person assumes the inherent risks of certain activities and cannot recover for injuries in the absence of another's reckless or intentional conduct. *Crace v. Kent State Univ*., 185 Ohio App.3d 534, 2009-Ohio-

6898, ¶13. The rationale for this doctrine is that certain risks are so inherent in some activities that the risk of injury cannot be avoided. Id. "[P]rimary assumption of [the] risk requires an examination of the activity itself and not plaintiff's conduct. If the activity is one that is inherently dangerous and from which the risks cannot be eliminated, then a finding of primary assumption of [the] risk is appropriate." Id. at ¶16. The application of the primary assumption of the risk doctrine presents a question of law and negates the duty element of a negligence claim. Id. at ¶15.

{¶34} In contrast, implied assumption of risk occurs when a person consented to, or acquiesced in an appreciated or known risk. *Ballinger* at ¶8. Courts have concluded that implied assumption of the risk "acts more like contributory negligence than primary assumption of risk" and does not operate as a complete bar to recovery. Id. at ¶11; *Crace* at ¶17. Under an implied assumption of the risk analysis, some duty is found to exist on the part of the defendant and a court is permitted to utilize comparative fault principles to determine what, if any, recovery to which the plaintiff may be entitled. See, generally, *Galinari v. Koop*, Clermont App. No. CA2006-10-086, 2007-Ohio-4540, ¶19. With the enactment of R.C. 2315.19, Ohio's comparative negligence statute, the defenses of implied assumption of the risk and contributory negligence merged. *Anderson v. Ceccardi* (1983), 6 Ohio St.3d 110, 113.

{¶35} Despite appellant's argument to the contrary, we conclude that a primary assumption of the risk analysis is the appropriate variation to apply in this case. We recognize that an implied assumption of the risk analysis has been applied in cases involving a public utility company's higher standard of care to individuals injured while working in the vicinity of power lines. See, e.g., *Brady Fray v. Toledo Edison Co.*, Lucas App. No. L-02-1260, 2003-Ohio-3422. However, we do not find

the analysis applicable to a landowner who owes no duty of care to warn guests of open and obvious hazards.

{¶36} Appellant argues that French did not "fully appreciate" the risks associated with high voltage electricity. She cites to the deposition excerpts of Mack Martin, her purported expert on high voltage electricity and NESC standards. Martin opined that based on his understanding of the dangers posed by a 7,200-volt electrical line, it was not safe for French to climb the tower. According to Martin, the only safe way to install the antenna would have been to have the line de-energized.

{¶37} Contrary to appellant's argument, the evidence establishes that French was aware of the obvious danger posed by working close to the line, and appellant has failed to present any evidence that Northwest engaged in reckless or intentional conduct which contributed to French's death. See *Crace*, 2009-Ohio-6898 at ¶13. The record indicates that Northwest had little involvement with the actual installation of the ham radio equipment. Simpson testified that he was only involved with coordinating the date and time of the installation. On the morning of the accident, he opened the building for French but was not present during the installation. In addition, Northwest did not supply any tools used in connection with the installation and there was no discussion regarding whether DP&L should have been contacted to have the lines de-energized. As a result, we conclude that French primarily assumed the risk of injury in this case, thereby relieving Northwest of any duty of care.

{¶38} Based on the foregoing, we find that the trial court did not err in granting summary judgment in favor of Northwest. Appellant's third assignment of error is overruled.

{¶39} Assignment of Error No. 1:

{¶40} "THE TRIAL COURT ERRED IN GRANTING BILL'S ANTENNA SERVICE'S MOTION FOR SUMMARY JUDGMENT."

{¶41} In her first assignment of error, appellant claims that the trial court improperly granted summary judgment in favor of Bill's Antenna. According to appellant, an issue of material fact remains as to whether French was more than 50 percent responsible for his injuries, because the installation of the tower violated NESC standards.

{¶42} In granting summary judgment, the trial court employed a comparative fault analysis in concluding that French's negligence outweighed any negligence on the part of Bill's Antenna. We decline to employ such an analysis in this case. This court's de novo review of summary judgment decisions requires an independent analysis of the record and applicable law. *Ireton v. JTD Realty Investments, LLC*, Butler App. No. CA2010-04-023, 2011-Ohio-670, ¶46. However, we are required to affirm a trial court's judgment that achieves the "right result for the wrong reason," because such an error is not considered prejudicial. *Johnson v. American Family Ins.*, Lucas App. No. L-04-1238, 2005-Ohio-1776, ¶29. Based on our independent review, we conclude that summary judgment in favor of Bill's Antenna was nevertheless proper because appellant failed to establish the existence of a duty owed to French.

{¶43} Although appellant argues that a NESC violation was present, her expert, Mack Martin, testified that Bill's Antenna had not violated the NESC because those standards applied only to utility providers, and were not applicable to the construction and installation of radio towers. Martin testified:

{¶44} "Q. So there was not a violation by Bill's Antenna Service of the

National Electric Safety Code?

{¶45} "A. Well, not that he was a party to. That's what I'm saying. If he was knowledgeable of that standard and knew it was being violated I would expect him to say something to somebody, primarily the utility company or the people who employed him, but absent that he would have no knowledge, and when the - - violation occurred he wouldn't have any knowledge of that either so you can't expect him to do anything."

{¶46} Deposition excerpts of Bill Nelson, owner of Bill's Antenna, indicate that when he installed the tower in 2000, Nelson did not reference any manuals to determine where to install the tower. He testified that he was not aware of any rules or regulations regarding the distance between towers and electrical lines, and was not familiar with the NESC. According to Nelson, he generally let the customer determine where the tower should be installed on the property. He also testified that there were "warning tickets" on each section of the tower advising individuals to be aware of high voltage electricity.

{¶47} As this court has noted, the NESC is a recognized standard in the electric utility industry and governs the lines, equipment, and practices of public and private utility companies. *Sandlin v. Dayton Power and Light Co*. (Aug. 30, 1985), Preble App. No. CA84-06-020, at 6. NESC standards are utilized by courts to determine the standard of care applicable to a public utility company. *Grabill v. Worthington Indus., Inc*. (1994), 98 Ohio App.3d 739, 743. However, in light of the foregoing evidence, appellant has not demonstrated that these standards are equally applicable to Bill's Antenna. In the absence of affirmatively establishing the existence of a duty owed by Bill's to French, requiring it to conform its conduct to a certain

standard, appellant has failed to demonstrate the first element of her wrongful death action. Her claim against Bill's Antenna therefore fails as a matter of law. Appellant's first assignment of error is overruled accordingly.

{¶48} Assignment of Error No. 2:

{¶49} "THE TRIAL COURT ERRED IN GRANTING DAYTON POWER & LIGHT AND DPL'S MOTION FOR SUMMARY JUDGMENT."

{¶50} In her second assignment of error, appellant claims that the trial court improperly granted summary judgment in favor of DP&L because a genuine issue of material fact remains as to whether DP&L breached its elevated standard of care to French. According to appellant, there was evidence presented to demonstrate that DP&L failed to comply with NESC standards in inspecting and maintaining the electrical line at issue.

{¶51} Although the trial court used a comparative negligence analysis in concluding that French's negligence exceeded that of DP&L, as we discussed in our resolution of appellant's first assignment of error, we do not believe such an analysis is appropriate in this case. However, based on our independent review of the record, we nevertheless find that the trial court's judgment was proper, as appellant failed to establish that DP&L breached its duty of care to French.

{¶52} Under Ohio law, a public utility company has a duty to exercise the highest degree of care to avoid injuries to those who have a right to be in proximity to electrical wires. See *Phillips v. Dayton Power & Light Co*. (1994), 93 Ohio App.3d 111, 116. This duty extends to the general public and has been held to apply to injuries that the utility company could have anticipated with a reasonable degree of probability. Id.

{¶53} In support of her claim that DP&L was negligent, appellant argues that representatives of DP&L noted upon inspection of the accident scene that the electrical line was too close to the tower. She cites to what appears to be the affidavit of David Lindloff, an investigator with the Preble County Prosecutor and Coroner's offices. In his affidavit, Lindloff purports to attach a true and accurate copy of the coroner's file, which included voluntary statements obtained from witnesses following French's death.

{¶54} We are troubled by the affidavit. It appears to be a photocopy, and no original is present in the record. Moreover, the affidavit is unsworn, as it is not notarized as required by the Ohio civil rules. "[A] document which is not sworn in the presence of a notary or other person authorized to administer oaths is not an affidavit for the purposes of Civ.R. 56(C)." *Aegis v. Sedlacko*, Mahoning App. No. 07 MA 128, 2008-Ohio-3190, ¶23. Although the trial court was permitted to consider Lindloff's affidavit because the other parties failed to raise any objection, the court was not required to do so. *Cementech, Inc. v. City of Fairlawn*, Summit App. No. 21282, 2003-Ohio-2632, ¶13.

{¶55} The trial court's decision on DP&L's motion incorporated by reference the statement of facts in its decisions concerning Northwest and Bill's Antenna. Upon a close review of those decisions, we note that the court alludes to the coroner's report, which was incorporated by reference into the affidavit. Accordingly, it appears that the court considered Lindloff's affidavit, despite its noncompliance with Civ.R. 56. A portion of the coroner's supplemental report contains Lindloff's investigation notes, which provide that two line workers from DP&L stated that the tower was too close to the electrical line and should be moved.

{¶56} Appellant also argues that the depositions of Jay Young and Richard Johnson, employees of DP&L, provide support for her argument that DP&L was aware that the line was too close to the tower. Although excerpts from Johnson's deposition were attached to appellant's brief on appeal, they were not attached to her brief in opposition to summary judgment and were not before the trial court. As a result, they are outside of the record on appeal and cannot be considered by this court. See App.R. 9(A); *Chivukula v. Williams*, Butler App. No. CA2009-07-187, 2010-Ohio-1634, fn.3. Young's deposition excerpts were before the trial court on summary judgment, but the court made no reference to their content in its decision. We similarly cannot consider these excerpts as appropriate summary judgment evidence. See *Stoll*, 2009-Ohio-1865 at ¶24.

{¶57} The only other evidence properly before us on this issue is the deposition excerpts of Mack Martin. He testified that the NESC required DP&L to inspect the lines and equipment at such intervals as "experience has shown to be necessary." Martin further testified that he had reviewed a document in connection with his testimony which indicated that DP&L performed line inspections every six years. According to appellant, DP&L should have inspected the line "prior to or during 2006" in order to apprise itself of the alleged violation.

{¶58} Even if we were to conclude that a NESC violation occurred as a result of the tower being installed within seven and one-half feet of the electrical line, there is no evidence in the record to establish that French's death could have been anticipated by DP&L. The tower was installed in 2000 and French's accident occurred in July of 2005. Although she claims generally that the line should have been inspected at some point prior to or during 2006, appellant has not established

that DP&L was required to inspect the line prior to the date of French's accident. In addition, this court has determined that a violation of the NESC or other safety regulation does not constitute negligence as a matter of law. See *Sandlin*, Preble App. No. CA84-06-020 at 6. "Generally, only a violation of a safety statute or ordinance that sets forth specific duties constitutes negligence per se." Id.

{¶59} There is also no evidence to demonstrate that DP&L was consulted by Northwest after the tower was installed in 2000. In addition, DP&L was not contacted prior to the attempted installation of the ham radio equipment on July 30. Hollenbaugh testified that he believed the installation could have been done safely without any involvement from DP&L. Stone testified similarly that the electrical line was discussed but that he and French determined that the equipment could still be installed in a safe manner. According to Stone, they never discussed calling DP&L.

{¶60} Further, on the day of the accident, there was no discussion amongst the other PARA members regarding whether DP&L should be contacted to have the lines de-energized or insulated. Simpson testified that although representatives from DP&L inspected the line after the accident, he was not aware of anyone complaining to the district prior to the accident regarding the distance between the line and the radio tower.

{¶61} Based on the limited record before this court, we conclude that there is no evidence to demonstrate that DP&L could have reasonably anticipated French's accident such that it breached its elevated duty of care to French. Appellant's second assignment of error is accordingly overruled.

{¶62} Judgment affirmed.

BRESSLER, P.J., and RINGLAND, J., concur.