ORIGINAL

IN THE SUPREME COURT OF OHIO

LISA G. HUFF, et al.	)	**SUPREME CT. CASE NO.** 10-0857
	)	
Plaintiffs-Appellees	)	**On Appeal from the**
	)	**Trumbull County Court**
v.	)	**of Appeals, Eleventh**
	)	**Judicial District**
FIRSTENERGY CORP., et al.	)	
	)	**Court of Appeals**
Defendants-Appellants	)	**Case No. 2009 T 00080**

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT, OHIO EDISON COMPANY

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FILED
MAY 13 2010
CLERK OF COURT
SUPREME COURT OF OHIO

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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

In 2001, Ohio Edison Company ("Ohio Edison") entered an agreement with Asplundh Tree Expert Company ("Asplundh"), wherein Asplundh, as an independent contractor, was to maintain trees and vegetation which posed a threat to Ohio Edison's electrical facilities. A provision in that agreement, the Contract for Overhead Line Clearance (the "Contract"), which required Asplundh to work safely, is the basis upon which the Eleventh District Court of Appeals reversed the summary judgment granted to Ohio Edison in this personal injury action.

During a 2004 thunderstorm, a rural tree located on private property outside of Ohio Edison's easement broke and fell upon Appellee Lisa Huff while she was walking in the roadway. The Trial Court found a "complete lack of any evidence that . . . Ohio Edison had any notice whatsoever that the interior of one tree on a rural township road was decaying" (App. A). The Court of Appeals confirmed that Appellees "were unable to demonstrate that [Ohio Edison] had notice of a patent defect in the tree" (App. B, ¶28). In the Contract, Asplundh agreed to "plan and conduct the work to adequately safeguard all persons and property from injury." This on-the-job accident prevention provision involved no promise by Ohio Edison. Nevertheless, the Court of Appeals purportedly applied Restatement of the Law 2d, Contracts, §302, to find a potential duty on behalf of Ohio Edison (App. B, ¶¶59-62).

The Court of Appeals relied upon *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St.3d 36. *Hill* adopted the "intent-to-benefit" test of *Norfolk & Western Co. v. United States* (C.A. 6, 1980), 641 F.2d 1201, 1208, to determine if a stranger to a contract was an intended third party beneficiary. The Court of Appeals' Opinion holds the recipient of a contractual promise to a duty

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where the recipient otherwise owed none. That Opinion takes a worksite safety provision and, contrary to the agreed intent of the contracting parties, expands it into a perpetual obligation to insure safety at times and in places outside of the worksite. This *misapplication* of §302, *Hill*, and *Norfolk & Western* unravels the very fabric of tort duty. It subjects any Ohio landowner, utility, maintenance contractor, or arguably any other person or entity who performs, or contracts for, any activity in the vicinity of a potentially defective rural tree, to unforeseeable liability.

The Court of Appeals found Ohio Edison breached no tort duty. It cited no Contract promise by Ohio Edison. Relying on a promise made *to* Ohio Edison, the Eleventh District theorized that Ohio Edison could be liable as a contractual benefactor of Lisa Huff. Restatement of the Law 2d, Contracts, §304, entitled "Creation of Duty to Beneficiary," states:

> A promise in a contract creates a duty ***in the promisor*** to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty. (Emphasis added.)

The Court of Appeals' strained application of contract law imposed a potential duty upon Ohio Edison where this Court has held none exists. The crews of vegetation management contractors, such as Asplundh, visit the distribution easement once in every five years. In *Heckert v. Patrick* (1984), 15 Ohio St.3d 402, this Court confirmed that, absent knowledge of a defective condition, even a homeowner, presumably at the site daily, owes no duty to inspect rural trees.

The Court of Appeals' analysis cries for this Court to further develop *Hill,* to explain (a) that the promisee under a contract is not the benefactor of third party rights, (b) the delegation of a duty by contract does not expand its nature or scope, and (c) where the intent of a contract is not to primarily or directly benefit a third party, no *intended* third party beneficiary rights are created.

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Hill did not involve an assertion that Mrs. Hill's employer, the promisee of the contract, owed her a duty. Therefore, *Hill* did not address the Restatement §304. The Opinion below evidences the need for this Court to adopt Restatement §304 and confirm that, in analyzing potential third party rights to a contract, the promisee is *not* the third party benefactor.

The parties to the Contract, Ohio Edison and Asplundh, agreed that the purpose of the Contract was to prune and remove vegetation so it would not encroach Ohio Edison's power lines and that they did not intend to create a third party duty to Lisa Huff, as a member of the general public (App. B., ¶¶20, 50). Appellants also confirmed that the Contract excerpt upon which the Court of Appeals relied was only intended to be an on-the-job accident prevention provision. When the *Hill* Court adopted the intent-to-benefit test, it surely did not envision that the intent of a contract would be determined by indulging an interpretation urged by a stranger to the contract which was inconsistent with both contracting parties' own agreed intent. Further, *Hill* should not be interpreted to allow a stranger to the contract to assert that a general duty to the public was intended to benefit her, nor should she be able to claim that the contract assigned a duty neither party otherwise owed under controlling law.

The Contract provision relied upon by the Court of Appeals was what the *Norfolk & Western* Court called an "on-the-job accident prevention" provision (*Norfolk & Western, supra* at p. 1209). This provision is only intended to benefit those present while the work is being performed; it is not intended to perpetually insure safety outside the worksite long after the work was completed.

The Opinion of the Eleventh District Court of Appeals creates a dangerous precedent. It makes the recipient of the promise liable for the promise. It expands contractual promises to include duties which the contracting parties did not intend. The Court of Appeals' Opinion allows strangers

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to the contract to create duties which neither contracting party previously had. It is important that this Ohio Supreme Court accept this appeal and reverse the Court of Appeals' Opinion as to Ohio Edison, thereby eliminating speculation among the citizenry of Ohio that, as plaintiffs, they can make up and impose contractual duties upon others for which those parties did not contract and, as defendants, eliminate concern that outsiders will change their contract terms and intent.

STATEMENT OF THE CASE AND FACTS

During a June 2004 storm, Appellee Lisa Huff was injured when a rural tree on private property broke and fell upon her as she was walking in the roadway. Lisa Huff does not remember the accident. The only two witnesses at the property describe a severe storm. Wendy Kowalski described the wind as "fierce," "very strong" and "unusual" and acknowledged that her "first thought was . . . get out of here because another tornado was coming." Gerald E. Braho also described the wind as "severe" and estimated its speed at 50, 60, 70 miles per hour. The National Weather Service had issued a severe storm warning.

Twenty feet from the privately-owned tree was a utility pole line. The electrical line was part of Ohio Edison's Hartford W220 distribution circuit.

All utility vegetation management experts offered by both Appellants and Appellees uniformly confirmed that utilities hire contractors to maintain trees and other vegetation in close proximity to electrical distribution lines in an effort to preserve electrical reliability. Such work is also performed to reduce the risk of electrical contact. Nothing refuted that goal. To accomplish the goal, Ohio Edison entered the Contract with an independent contractor, Asplundh. Ohio Edison did not contract with Asplundh to accomplish any safety goal broader than that necessary to meet its obligations to provide reliable electrical service.

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In 2001, Asplundh performed work at the property where the tree was located. There was no evidence that Asplundh worked on this tree or that this tree, in any way, was a hazard to Ohio Edison's electrical equipment (App. B, ¶20). There was no evidence Ohio Edison was on this property or that this tree was called to Ohio Edison's attention.

Upon that state of evidence, FirstEnergy Corp., Ohio Edison and Asplundh moved for summary judgment. On July 15, 2009, the Trial Court granted summary judgment to all three Defendants (App. A), finding a "complete lack of any evidence that . . . Ohio Edison had notice whatsoever that the interior of one tree on a rural township road was decaying."

Upon appeal, the Eleventh District affirmed the summary judgment in favor of FirstEnergy, but reversed as to Ohio Edison and Asplundh (App. B). The Court of Appeals confirmed that "there was no evidence indicating the subject tree was pruned or otherwise inspected [in 2001]" (App. B, ¶20), that "it is undisputed that the tree was not a hazard to the power lines" (App. B, ¶20), and that the Huffs "were unable to demonstrate that [Ohio Edison] had notice of a patent defect in the tree" (App. B, ¶28). The Eleventh District confirmed that, if Ohio Edison owed Appellees a duty, it could not arise from tort, but must arise, if at all, from the Contract (App. B, ¶52) ("the duty analysis in this case . . . turns on the language of the contract into which Ohio Edison and Asplundh entered"). The Court of Appeals focused upon the following Contract provision (the "on-the-job-accident prevention provision"):

> The Contractor shall plan and conduct the work to adequately safeguard all persons and property from injury.

Parenthetically, the Court of Appeals also discussed "priority" trees which might affect transmission lines. (Opinion, ¶61.) The electrical lines located 20 feet from this tree were *distribution* lines, not the *subtransmission* or *transmission* lines discussed in the provision relied upon by the Court of Appeals. That is, the Court of Appeals relied upon an inapplicable provision.

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At ¶¶60-61 of its Opinion, the Court of Appeals discussed two interpretations of the on-the-job accident prevention provision, one where Lisa Huff was a mere incidental beneficiary with no enforceable rights, and another which expanded the on-the-job accident prevention provision into an agreement by Asplundh *and Ohio Edison* to prevent harm to the public who traveled the neighboring roadway in subsequent years.

The Court of Appeals, itself, confirmed that, unless there was a contractual basis of liability for Ohio Edison, the Trial Court had properly extricated Ohio Edison from this case. Although the Court of Appeals invoked Restatement of the Law 2d, Contracts, §302, it identified no Contract promise by Ohio Edison or a breach thereof by Ohio Edison. Instead, it reversed the grant of summary judgment to Ohio Edison based upon unspecified actions *outside of the contract* (App. B, ¶62):

> . . . Further, even though Asplundh was the contractor, the evidence indicates Ohio Edison oversaw and directed Asplundh's work through its field specialists. However, we do not know the precise extent of this oversight and direction. Accordingly, if Lisa Huff is an intended beneficiary, there is also a material issue of fact as to whether Ohio Edison owed her a duty of care under the contract pursuant to the control it exercised over Asplundh through its field specialist.

The Court of Appeals reached the impossible conclusion that Ohio Edison could somehow be liable for problems caused by a tree which Ohio Edison never saw and of which it had no knowledge whatsoever.

Ohio Edison and Asplundh have both applied to the Court of Appeals for reconsideration, and Asplundh has also asked the Court of Appeals to certify a conflict.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: The recipient of a contractual promise is *not* the benefactor of a third party beneficiary. Restatement of the Law 2d, Contracts, §302, applies only to promisors, *not promisees* (Restatement of the Law 2d, Contracts, §304, *adopted and applied*).

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The Court of Appeals agreed that, under established tort law, Ohio Edison did not owe or breach a duty to Lisa Huff. The Court of Appeals also confirmed that "the duty analysis in this case . . . turns on the language of the contract into which Ohio Edison and Asplundh entered" (App. B, ¶52). The Court of Appeals proceeded to base its analysis upon a Contract provision which stated "The contractor shall plan and conduct the work to adequately safeguard all persons and property from injury" (App. B, ¶59). The Court of Appeals acknowledged that "Asplundh was the contractor" (App. B, ¶62). It cited no other promise from within the Contract.

Ohio Edison is the *recipient* of the promise cited by the Court of Appeals. That is, Ohio Edison is the *promisee,* not the promisor. See Restatement of the Law 2d, Contracts, §302, Comment a (A " 'promisee' [is] the person to whom a promise is addressed"). The Court of Appeals held that Ohio Edison, the promisee, might owe a duty "under the contract."

§304 of the Restatement of the Law 2d, Contracts, states:

> §304. Creation of Duty to Beneficiary
>
> A promise in a contract creates a duty **in the promisor** to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty. (Emphasis added.)

Absent the Opinion below, it would be axiomatic that a party to a contract could not breach a contractual promise which it did not make.

<u>Proposition of Law No. 2:</u> A contract provision which delegates work creates no greater tort duty than that which otherwise existed.

<u>Proposition of Law No. 3</u>: The duty of an electrical utility to "exercise the highest degree of care consistent with the practical operation of the utility" does not elevate the utility to the role of an insurer for all calamities in the vicinity of its electrical wires and equipment.

The Court of Appeals did not dispute the Trial Court's finding that this accident was not

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foreseeable. The Court of Appeals, however, determined that foreseeability was not at issue because the Contract required Asplundh to "plan and conduct the work to adequately safeguard all persons and property from injury." The Court of Appeals suggested provision could "require a contractor, in meeting its obligations under the contract, to plan and conduct its work so that all persons, regardless of when the work was done, are adequately safeguarded from injury" (App. B, ¶61). The Court of Appeals' leap from that provision to potential liability created strict liability for Ohio Edison simply because this tree was in the vicinity of Ohio Edison's electric lines. It converted the Contract into a perpetual insurance policy for all calamities in the vicinity of the electrical lines.

In *Laughlin v. Cleveland* (1959), 168 Ohio St. 576, syllabus 1, this Court confirmed that the "mere happening of an accident gives rise to no presumption of negligence . . ." The only way to reach the decision of the Court of Appeals regarding Ohio Edison is to hold that the on-the-job accident prevention provision dispenses with Appellees' obligation to demonstrate foreseeability and breach of duty, thereby disregarding tort law.

In *Heckert, supra,* this Court confirmed that, even as to a homeowner, no duty to seek out latent defects exists. Moreover, while a homeowner is presumably at his property on a regular, if not daily, basis, in maintaining vegetation interfering with utility lines, the vegetation management contractors, pursuant to a plan approved by the Public Utilities Commission of Ohio, travel along the property only once every four years. Ohio Edison was not shown to have ever been there.

In *Parke, supra* at ¶17, the Eleventh District found the duty urged by Appellees was excessive and unreasonable:

> Without notice or apprehension of the danger, Ohio Edison was under no duty to guard against it . . . But Ohio Edison is not responsible for every tree that is felled near its lines. The implication of appellants' concept of Ohio Edison's duty is that a utility company is responsible for ensuring that no trees, whether healthy or not, exist in such proximity to its lines that the possibility of contact exists. Such a standard of care is clearly excessive and

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unreasonable.

In *Hill, supra* at p. 40, this Court, citing *Norfolk & Western, supra,* confirmed that "the performance of that promise must also satisfy a duty owed by the promisee to the beneficiary." In *Anderson v. Olmsted Utility Equipment, Inc.* (1991), 66 Ohio St.3d 124, 130, fn 5, this Court reiterated that requirement. *Hill* and *Anderson* did not, however, develop that aspect of the intent-to-benefit test. The Court of Appeals wholly disregarded that requirement.

The Trial Court found that Ohio Edison owed no tort duty to Appellees. The Court of Appeals did not disagree with that conclusion. Prior to this lawsuit, Ohio Edison had no relationship with Appellees and, therefore, owed no contractual duty to them. Clearly, the Contract did not "satisfy a duty owed by the promisee to the beneficiary" and any claim of third party rights under it must fail.

Further, even in cases where the plaintiff is an intended third party beneficiary and owed a contractual duty, there must still be proof that the contract was breached. See, for example, *Conver v. EKH Co.,* 2003 Ohio 5033 (Ohio App. 10 Dist.), ¶46. The Court of Appeals could not explain how Ohio Edison breached any duty regarding a tree it didn't know existed.

In their post-Opinion filings in the Court of Appeals, Appellees seek to bandage the Court of Appeals' decision as to Ohio Edison by invoking the standard of care set forth in *Hetrick v. Marion-Reserve Power Co.* (1943), 141 Ohio St. 347, syllabus 2. In *Hetrick,* this Court confirmed that a power company "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." By not citing any action or inaction by Ohio Edison, Appellees proponent strict liability.

An electrical utility is not strictly liable in tort. See *Otte v. Dayton Power & Light Co.*

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(1988), 37 Ohio St.3d 33, 39-41. Moreover, *Hetrick* confirmed the necessity of proof of *foreseeable* injury before an electrical utility can be found negligent even under the "highest degree of care" standard. At p. 358, *Hetrick* expressly approved the often-quoted doctrine of reasonable anticipation, i.e., foreseeability, as set forth in Shearman and Redfield:

> 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 consequent 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."

Millions of trees surround Ohio Edison's facilities. Every year contractors for Ohio Edison work on thousands of trees. "[A]n electric utility is not an insurer of public safety when it comes to contact with its own equipment." See *Ruprich v. Cincinnati Gas & Electric Co.,* (November 24, 1986), 12 Dist. Case No. CA86-02-009, unreported, citing *McDonough v. Butler Rural Electric* (July 9, 1984), 12 Dist. Case No. CA84-01-013, unreported.

By acknowledging the lack of evidence that Ohio Edison breached any tort duty, and by relying upon a Contract provision which was not intended to protect travelers on the roadway and which, more importantly, did not involve a promise by Ohio Edison, the Court of Appeals impermissibly applied a strict liability and improperly elevated Ohio Edison to the role of an insurer for all calamities in the vicinity of its wires and equipment at any future point in time.

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<u>Proposition of Law No. 4</u>: An independent contractor's promise to work safely is only incidental to the work assumed under the contract and creates no third party rights.

<u>Proposition of Law No. 5</u>: An unforeseeable accident can not form the basis of a third party beneficiary claim.

Ohio Edison implemented its vegetation management program, in part, through the Contract. Pursuant to *Ohio Adm. Code* 4901:1-10-27(E)(1), an electrical utility "shall establish preventative requirements for the electric utility to maintain safe and reliable service and these programs "shall include, but are not limited to, the following facilities: *** (f) Right-of-way vegetation control." See *Corrigan v. Illuminating Company,* 122 Ohio St.3d 265, 268, 2009 Ohio 2524, ¶15. "Vegetation management is necessary to maintain safe and reliable electrical service." See *Corrigan,* 122 Ohio St.3d at 269, 2009 Ohio 2524 at ¶16. The Court of Appeals acknowledged that it was the position of Ohio Edison and Asplundh that their relationship, under the Contract, existed in order "to keep troublesome vegetation from interfering with electrical distribution lines" (App. B, ¶50). The Court of Appeals disregarded the purpose of vegetation management around electrical utility lines. It entertained a broader Contract intent to perpetually safeguard future travelers from latent defects in rural trees in the vicinity of Ohio Edison's electrical equipment. That analysis and conclusion wholly disregards the rules of contract interpretation and the clear intent of the parties.

A court is to "presume the intent of the parties to a contract resides in the language used in the written instrument." *Acuity v. Interstate Construction, Inc.,* 2008 Ohio 1022 (Ohio App. 11 Dist.), ¶11, citing *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, syllabus 1. "A contract is to be read as a whole and the intent of each part gathered from a consideration of the whole." *Acuity, supra,* citing *Saunters v. Mortenson,* 101 Ohio St.3d 86, 89, 2004 Ohio 24.

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At Opinion, ¶59, the Eleventh District cited the following "on-the-job accident prevention provision":

> "The Contractor shall plan and conduct the work to adequately safeguard all persons and property from injury."

The Contract exists solely to promote Ohio Edison's need to have its electrical facilities free of interference from vegetation. In working to accomplish that goal, the Contract provides that the Contractor will work safely. Nothing in the Contract states that "work" was intended to have a meaning beyond utility vegetation maintenance, such as the arboricultural inspection of the health of trees in furtherance of protecting travelers on the adjacent roadway. At best, this on-the-job accident prevention provision created a general duty, *on the part of Asplundh,* while Asplundh was performing its work. Appellate courts have held that a promise "made to the public at large" "does not lend itself to suit by third-party beneficiaries." *Cincinnati Ins. Co. v. Cleveland,* 2009 Ohio 4043, ¶33, citing *Amborski v. Toledo,* 67 Ohio App.3d 47, 52 (Ohio App. 6th Dist. 1990).

Moreover, only *intended* third party beneficiaries are entitled to enforce provisions within contracts to which they are not direct parties. No right of enforcement is available to an incidental beneficiary. See Restatement of the Law 2d, Contracts, §315 ("An incidental beneficiary acquires by virtue of the promise no right against the promisor or the promisee.") "[T]he promisee must intend a benefit to flow to the third party that is not merely incidental to the contract." *Cincinnati Ins. Co., supra* at ¶30. See also *Brewer v. H&R Concrete, Inc.* (February 5, 1999), 2nd Dist. Case No. 17254, unreported ("[T]here must be evidence, on the part of the promisee, that he intended to directly benefit a third party, and not simply that some incidental benefit was conferred on an unrelated party by the promisee's actions under the contract." "[I]t must appear that the contract was entered into

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directly or primarily for the benefit of the third person." *Id.* at ¶33, citing *Cleveland Metal Roofing & Sealing Co. v. Gaspard* (1914), 89 Ohio St. 185.

In *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St.3d 36, this Court adopted the third party beneficiary "intent-to-benefit" test described in *Norfolk & Western Co. v. United States* (C.A. 6, 1980), 641 F.2d 1201, 1208.

In *Norfolk & Western,* the agreement between the United States and its contractor, Dunbar, contained, among other provisions, a provision that Dunbar "shall take proper safety and health precautions to protect the work, the workers, the public, and the property of others." Norfolk & Western was not a party to that contract. When a dock collapsed, Norfolk & Western sued Dunbar and the United States, claiming that it was a third party beneficiary of the contract between Dunbar and the United States, by virtue of the foregoing and other provisions in that contract. The Sixth Circuit Court of Appeals reviewed the District Court's analysis, including the District Court's review of *New York, Chicago & St. Louis Rd. Co. v. Heffner Construction Co.* (1967), 9 Ohio App.2d 174. In *Heffner,* a third party beneficiary claim was pursued upon a contract provision which asserted that "the contractor shall provide all safeguards . . . and take any other needed actions . . . reasonably necessary to protect the life and health of employees on the job and the safety of the public and to protect property in connection with the performance of the work covered by the contract." The Sixth Circuit agreed both with the *Heffner* Court and the *Norfolk & Western* District Court that those types of provisions, read in the context of the entire contract, "applied only to on-the-job accident prevention" and did not apply to general public safety outside the worksite.

In the context of the full Contract, it is clear that the safe work provision means that the tree trimming, tree removal, and clearance of rights of way must be done in such a manner so that the

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public will not be harmed, not that the very purpose of doing the work (i.e., the trimming or removing of vegetation) is to prevent harm to the public.

CONCLUSION

The Court of Appeals did not dispute the Trial Court's finding that Ohio Edison breached no tort duty. The issue, then, becomes how did the Court of Appeals envision that Ohio Edison could have any liability for a tree of which it had no knowledge whatsoever. The Court of Appeals invoked Restatement of the Law 2d, Contracts, §302, and staked a claim against Ohio Edison based upon a gross misapplication of that area of contract law. The aberrational Opinion below must be promptly extinguished as it wholly perverts this area of contract law into a vehicle for needless tort litigation where no duty exists or has been breached.

Restatement of the Law 2d, Contracts, §302, confirms that there are instances where a promisee owes a duty to a third party and, by contract, seeks to assign that duty to the promisor. Both the Trial Court and the Court of Appeals acknowledged that the promisee here, Ohio Edison, owed no duty to Appellees. Instead of properly finding that a third party beneficiary discussion was inappropriate, however, the Court of Appeals misapplied contract law and found that the promisee might be liable for the contractual promise made *to it.*

In misapplying the contractual analysis, the Court of Appeals has created a precedent where Ohio Edison may be strictly liable for calamities in the vicinity of its electrical equipment, and where the Contract created to maintain electrical reliability is converted to an insurance policy for unintended third parties.

Appellees are not the only ones potentially wronged by the errant Opinion below. Any person or entity owning a real property interest and any person or entity contracting with such a

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person, bears the risk of needless and improper claims of liability, purportedly based upon contract, when they would otherwise be wholly exonerated under traditional tort analysis.

Ohio Edison asserts that this is a case of public and great general interest and that the damage caused by the Opinion below to the structure of both tort and contract law merit its acceptance for review by this Ohio Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing *Memorandum in Support of Jurisdiction of Appellant Ohio Edison Company* has been served via ordinary U.S. Mail this 12th day of May, 2010 upon the following:

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IN THE COURT OF COMMON PLEAS
- GENERAL DIVISION -
TRUMBULL COUNTY, OHIO

CASE NUMBER: 2008 CV 1641
2008 CV 0383
2008 CV 3412

LISA G. HUFF, et al.,

PLAINTIFFS.

vs.

JUDGE PETER J KONTOS

FIRSTENERGY CORP.,

DEFENDANTS.

JUDGMENT ENTRY

This matter comes before the Court on the Motions for Summary Judgment filed by the Defendants FirstEnergy, Ohio Edison, and Asplundh Tree Expert Company. The Court has reviewed the Motions, the numerous affidavits and expert reports, and the other relevant evidence.

Also pending before the Court are Motions for Summary Judgment filed by Defendants FirstEnergy, Ohio Edison, and Asplundh Tree Expert Company against the Plaintiffs in Case 08 CV 382 (the Jackson Plaintiffs), and the Plaintiffs in Case 08 CV 3412 (the Harris Plaintiffs), who have each filed a creditors' bill in this case seeking to attach the proceeds of this case, if any, to a Judgment held by each of them.

This case involves an extremely unfortunate occurrence in Hartford Township, Ohio. For purposes of summary judgment, the facts before the Court are as follows: In June of 2004, while walking with her friend during a thunderstorm warning where winds were gusting in the area from 45 to at least 50 miles per hour, the Plaintiff Lisa G. Huff, suffered terrible and permanent injuries when a tree located at 6717 King Graves Road (the Braho property) broke approximately 28 feet from ground level and struck her on the road. The tree was located on the Braho property

and 20 feet from the electrical lines owned and operated by Ohio Edison, a subsidiary of its holding company FirstEnergy. Prior to breaking, the tree was perhaps as high as 80 feet tall and had a lean of about 10 degrees away from said power lines and toward the road. The Plaintiffs assert that the condition of the tree was a hazard to the general public by virtue of the fact that it was leaning toward the road and/or because it was decaying. Plaintiffs' experts opine that the trimming of the subject tree caused the tree to lean, decay, and eventually fall. However, there is absolutely no credible evidence about when the tree began to lean or if it was leaning because of the way it grew. Plaintiffs' expert, Steiner, also opines that a branch was removed from the tree near the point of breakage and on the power line side of the tree "some decades" prior to 2004. Additionally, the same expert also states that this branch was "largely grown over by the time of the incident." Upon deposition, Steiner admitted that he could not testify to a reasonable degree of probability that said branch (Branch 1) was cut off versus falling off on its own. A two inch hole in the subject tree near the scar of Branch 1, along with Branch 2, is primarily blamed by the Plaintiffs for the tree trunk's interior decay. Concerning Branch 2, Dr. Steiner states in his report that the "most visible" sign of structural weakness was the presence of an unusually large cavity on the trunk at a height of 15 feet. Although this break is also considered critical to the tree's decay by the Plaintiffs, the Court notes that the tree eventually broke 13 feet higher than this area, at 28 feet. Gerald Braho, the property owner, then testified that this limb (Branch 2) broke off after Asplundh had trimmed trees in 2001. Upon deposition, Steiner once again was unable to state to the requisite degree of certainty whether or not Branch 2 was cut off or broke. There is no evidence that Ohio Edison or its agents were at the property after 2001 until June of 2004, and there is absolutely no evidence that Ohio Edison, FirstEnergy, or Asplundh were otherwise notified of the subject tree's condition at any relevant time.

The evidence in this matter only demonstrates that Asplundh Tree was at 6717 King Graves Road once, to remove two trees in May of 2001, over three years before the tree fell.

While Asplundh Tree covered the area every four years for Ohio Edison, May of 2001 is the only recorded instance of their presence on said property. There is no evidence that Asplundh or Ohio Edison actually removed any branches from the subject tree, or actually inspected this tree, but rather the Plaintiffs assert that either they did or they should have. However, upon deposition, Dr. Steiner, the Plaintiffs' expert, could not state when exactly the tree became a hazard. Depos. of Steiner 155-56.

Liability for negligence is predicated upon injury caused by the failure to discharge a duty owed to the injured party. Wills v. Frank Hoover Supply (1986), 26 Ohio St.3d 186, 188. 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; Otte v. Dayton Power & Light Co. (1988), 37 Ohio St.3d 33, 38. "Such company is not liable to one injured as the result of some unusual occurrence that cannot fairly be anticipated or foreseen and is not within the range of reasonable probability." Hetrick, 141 Ohio St. 347, paragraph three of the syllabus.

In Parke v. Ohio Edison, Inc. (November 18, 2005), 2005 WL 3096914, the Eleventh District Court of Appeals stated that Ohio Edison 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. Id. at ¶11. In Parke, the Eleventh District further refuted appellant's position that Ohio Edison's duty is that it is "responsible for ensuring that no trees, whether healthy or not, exist in such proximity to its lines that the possibility of contact exists." However, the Eleventh District clearly declined to side with such a position and stated that appellant's position was "clearly excessive and unreasonable." As the Eleventh District opined,

"there is a duty to prune trees that are growing into electrical lines and there is a duty to remove those trees that pose a danger of falling into lines." Id. at ¶17.

In this case, the Plaintiffs have failed to show that any of the moving Defendants were on actual or constructive notice of the interior decay of the tree at any time. Rather, the Plaintiffs primarily assert that a two inch hole that was observed after the accident was evidence of decay 28 feet above the ground, and should have been noticed by Asplundh Tree some three years earlier when they were removing 2 other trees from the property. Plaintiffs assert this, even though the tree was leaning in the opposite direction, twenty feet away from power lines, with no limbs anywhere near said power lines.

The Court agrees with FirstEnergy and Ohio Edison that they did not have actual or constructive notice of any defects in this tree located on someone else's property. The Court further finds as a matter of law that a ten degree lean standard for automatic removal of trees, especially in rural areas like this one, would create an unrealistic and impossible duty upon this and all utility companies. The Court further finds that the trimming of limbs away from power lines under the FirstEnergy/Ohio Edison policy is in the best interest of the public and in furtherance of Ohio Edison's stated duty under Parke. The Court agrees that Ohio Edison's status as an easement holder makes it especially less responsible for trees that do not interfere with its lines than the actual homeowner. The standard of care and the duty that the Plaintiffs ask this Court to impose would require Ohio Edison and other like utilities to inspect all trees that they do not own within range of their power lines, whether interfering with said lines or not.

As to Asplundh, the Court agrees that Asplundh's duty arose by virtue of contract only with Ohio Edison. Under said contract, the Court finds that Asplundh performed its obligations. The Court also agrees that the Plaintiffs are not third party beneficiaries under Asplundh's contract with Ohio Edison. However, assuming that the Court did not find in favor of Asplundh, the Court would still obviate FirstEnergy and Ohio Edison of liability in this case because of the

independent contractor status of Asplundh, and the complete lack of any evidence that either FirstEnergy or Ohio Edison had any notice whatsoever that the interior of one tree on a rural township road was decaying. As the Eleventh District Court of Appeals stated in Parke, Ohio Edison's duty to remove the tree does not arise unless Ohio Edison could have reasonably anticipated the result herein. "[T]here is no duty to guard when there is no danger reasonably to be apprehended." Hetrick, 141 Ohio St. at 359.

Under the above-mentioned circumstances, when the conditions randomly aligned in such a way that an individual walked by a tree during a thunderstorm warning, and where the winds blew with unpredictable force or direction, no party is responsible for the dire consequences of this unfortunate conflation of events. Mother Nature is not now, nor in the past been held to be legally responsible for the consequences of her actions.

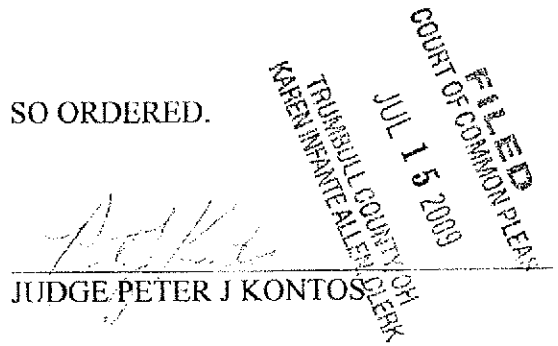
For purposes of this ruling, the Court considered the Plaintiffs' experts testimony, over the Defendants' objections. In this case, the Court finds that the moving Defendants herein, FirstEnergy, Ohio Edison, and Asplundh Tree Expert Company, are all entitled to Judgment as a matter of law because they did not owe a duty to the Plaintiffs in this extremely unfortunate set of events. The Court finds that reasonable minds can come to but one conclusion, and that after construing the evidence in a light most favorable to the Plaintiffs, the Court must award Summary Judgment in favor of the moving Defendants FirstEnergy, Ohio Edison, and Asplundh Tree Expert Company.

Because the Court has awarded Summary Judgment to the Defendants, and for this reason only, the Court also GRANTS the Motions for Summary Judgment filed by Defendants FirstEnergy, Ohio Edison, and Asplundh Tree Expert Company against the Plaintiffs in Case 08 CV 382 (the Jackson Plaintiffs), and the Plaintiffs in Case 08 CV 3412 (the Harris Plaintiffs) on the requisite creditors bills.

Case concluded. Costs of Case 08CV1641 to Plaintiffs. Costs of 08 CV 3412 to the Harris Plaintiffs. Costs of 08 CV 382 to the Jackson Plaintiffs.

This is a final appealable order and there is no just cause for delay.

SO ORDERED.



JUDGE PETER J KONTOS

Date:July 15, 2009

TO THE CLERK OF COURTS:
YOU ARE ORDERED TO SERVE COPIES OF THIS JUDGMENT ON ALL COUNSEL OF RECORD OR UPON THE PARTIES WHO ARE UNREPRESENTED FORTHWITH BY ORDINARY MAIL.

JUDGE PETER J KONTOS

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COURT OF APPEALS
MAR 31 2010
TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

LISA G. HUFF, et al.,	:	OPINION
Plaintiffs-Appellants,	:	CASE NO. 2009-T-0080
- vs -	:	
FIRST ENERGY CORPORATION, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2008 CV 1641.

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

Michael D. Harlan, *Susan G. Maruca*, and *David J. Betras*, Betras, Maruca, Kopp, Harshman & Bernard, L.L.C., 6630 Seville Drive, #1, P.O. Box 129, Canfield, OH 44406-0129 (For Plaintiffs-Appellants).

John T. Dellick, Harrington, Hoppe & Mitchell, LTD., 1200 Sky Bank Building, 26 Market Street, Youngstown, OH 44503 (For Appellees, First Energy Corporation and Ohio Edison).

Clifford C. Masch and *Brian D. Sullivan*, Reminger & Reminger CO., L.P.A., 1400 Midland Building, 101 Prospect Avenue, West, Cleveland, OH 44115-1093 (For Appellee, Asplundh Tree Expert Company).

CYNTHIA WESTCOTT RICE, J.

{¶1} This appeal comes to us from a summary judgment issued by the Trumbull County Court of Common Pleas in favor of appellees FirstEnergy Corporation ("FirstEnergy"), Ohio Edison Company ("Ohio Edison"), and Asplundh Tree Expert Company ("Asplundh"). Appellants Lisa, Reggie, Samantha, and Faith Huff allege

material issues of fact remain to be litigated and therefore the trial court erred in awarding summary judgment in appellees' favor. For the reasons discussed below, the trial court's judgment is affirmed in part, reversed in part, and remanded.

{¶2} On June 14, 2004, at approximately 7:00 p.m., appellant Lisa Huff, and her friend, Wendy Kowalski, took an evening walk on the roadway of King Graves Road, a rural road in Fowler Township, Trumbull County, Ohio. The women began from Wendy's home and traveled west on the roadway. Wendy testified that, even though the weather was beautiful prior to beginning the walk, she was aware that a severe thunderstorm watch had been issued for the area.

{¶3} After walking for a period of time, the skies became cloudy and it began to sprinkle. The women decided to turn around when the wind became "very strong." Wendy testified:

{¶4} "*** the wind got fierce enough for us to look at one another because it was - - it was loud, and actually it was, I should say just like a quick, loud wind. It wasn't like it was just a little bit windy. And [Lisa] looked at me and she said, you want to start jogging? And I said, yes."

{¶5} While jogging, Wendy and Lisa approached the property of Gerald and Michelina Braho. The property was located on the north side of King Graves Road. Near the southwest corner of the Brahos' property stood a large, old, sugar maple tree. As the women passed the Braho property, the maple snapped and struck Lisa rendering her unconscious. Somehow, Wendy escaped unharmed and left the scene to get help. Emergency crews arrived and Lisa was eventually hospitalized with multiple severe injuries.

{¶6} On June 5, 2008, appellants filed a complaint sounding in negligence in the Trumbull County Court of Common Pleas. The complaint asserted claims against the appellees FirstEnergy, Ohio Edison, and Asplundh. Appellants also asserted claims against Gerald and Micheline Braho as well as Hartford Township. In the course of the underlying litigation, Hartford Township was dismissed. Further, appellants subsequently reached a settlement with the Brahos and dismissed them from the action. The remaining defendants filed motions for summary judgment which appellants duly opposed.

{¶7} A summary of the salient evidence is as follows. Ohio Edison owns the electrical distribution lines which travel in an east/west direction along King Graves Road. FirstEnergy, a holding company and primary shareholder of Ohio Edison, developed a series of specifications controlling the manner in which its subsidiary companies would manage vegetation (a term encompassing both trees and brush) for purposes of electrical line clearance. Ohio Edison utilized the specifications promulgated by FirstEnergy in its control of vegetation surrounding its electrical lines.

{¶8} Ohio Edison possessed a prescriptive easement over the property surrounding the poles and lines which traveled parallel to King Graves Road. The easement allowed Ohio Edison to control the vegetation near the electrical lines. To meet its maintenance obligations in this area, Ohio Edison entered into a contract with appellee Asplundh. The contract was effective between January 1, 2001 and December 31, 2004. The contract incorporated the specifications established by FirstEnergy and the agreement expressly required Asplundh to adhere to the

specifications in its management and maintenance of the vegetation surrounding Ohio Edison's electrical distribution lines.

{¶9} In addition to the guidelines set forth in the specifications, Douglas Shaffer, manager for forestry services for Ohio Edison, testified Ohio Edison oversaw Asplundh's work through employees designated as "field specialists." Shaffer stated that field specialists "work with *** the tree contractors that we have on the property to *** ensure that we're staying on cycle, we're getting the adequate clearance that we need *** around the electrical lines ***." According to Shaffer, field specialists will occasionally work on site with the contractor and other times they review the work subsequent to the contractor's completion.

{¶10} Further, Michael Carrier, Asplundh's supervisor of crews in northeastern Ohio, testified that Asplundh workers were required to clear vegetation in the area and manner prescribed by the specifications; however, he indicated that Asplundh workers had the discretion to determine whether general brush (non-tree vegetation) was a threat pursuant to the specifications. With respect to trees, Carrier testified Asplundh workers had the discretion to remove any tree under 30 inches in diameter at four and one-half feet from the ground if it presented a threat. Any tree over 30 inches in diameter at four and one-half feet from the ground, however, required consultation and approval from a forestry technician employed by either FirstEnergy or Ohio Edison. The subject tree in this case was 46 inches in diameter at four and one-half feet from the ground; however, nothing in the record indicates it was considered for removal.

{¶11} Although the specification manual covers a wide array of policies and procedures to which a contractor must adhere, the following specific provisions are

relevant to this case. With respect to safety precautions, the manual establishes a broad standard of care that a contractor must meet. Aside from "utilizing proper safety appliances" in completing work orders, Asplundh was required to "*** plan and conduct the work to adequately safeguard all persons and property from injury."

{¶12} With respect to work detail, the specifications establish what is designated as a "distribution clearing zone." In non-maintained lawns, the distribution clearing zone is "*** 15' (fifteen feet) on either side of the pole line." The manual states that "[e]mphasis is to be placed on controlling all incompatible vegetation within this clearing zone." Also under the rubric of "distribution clearing zone," the manual defines an "inspection zone" as "the area between 15' (fifteen feet) and 20' (twenty feet) from the pole line ***." According to Douglas Shaffer, an inspection zone is "the area *** that [Ohio Edison] would like to keep *** clear of vegetation as [much as] we possibly can." The tree in this case was approximately 20 feet from the pole line and therefore fell within the designated inspection zone.

{¶13} With respect to problematic vegetation, "priority trees" are those "located adjacent to the clearing zone corridor that are either dead, diseased, declining, severely leaning or significantly encroaching the clearing zone." "Incompatible vegetation" is defined as "all vegetation that will grow tall enough to interfere with overhead electric facilities." Furthermore, under the heading, "[t]rees that are expected to be removed ***," the specifications provide:

{¶14} "Dead or defective which constitute a hazard to the conductor.

{¶15} "Trees that have fast growth rates or trees that cannot be pruned for effective conductor clearance.

{¶16} "Immature trees, generally classified as brush.

{¶17} "Trees that are overhanging the primary conductors and are unhealthy or structurally weak.

{¶18} "All priority trees located adjacent to the subtransmission and transmission clearing zone corridor that are leaning towards the conductors, are diseased, or are significantly encroaching the clearing zone corridor.

{¶19} "All incompatible trees that are located within the clearing zone corridor."

{¶20} With these provisions in mind, Asplundh performed work on the King Graves Road corridor in the area of the Braho residence on May 3, 2001. On that date, two trees were removed from the area encompassing the Braho property. However, there was no evidence indicating the subject tree was pruned or otherwise inspected on that date. On the day the tree fell, it broke approximately 28 feet up from the ground. As indicated above, it was within the inspection zone as defined by the specifications; however, the tree had a 10 degree lean in the direction of King Graves Road. Due to this lean, it is undisputed that the tree was not a hazard to the power lines. However, according to Dr. Kim Steiner, a certified forester and appellants' expert witness, the previous removal of branches on the north side of the tree (the side facing the lines) created a crown that was unbalanced toward the road which likely caused the trunk to lean.

{¶21} In relation to the subject tree's condition, Dr. Steiner testified, on the date the tree fell, it suffered from extensive internal trunk decay, particularly at the point of failure. In his analysis, the decay extended vertically through the trunk from at least 30 feet above ground to as low as 8 feet above ground creating a "decay pillar" of

approximately 22 feet. Due to the decay, Dr. Steiner asserted that trunk had an estimated strength loss of 65% at the point of fracture in 2004.

{¶22} Dr. Steiner opined that this decay was a function of several "wounds" the tree suffered over multiple decades. The wounds were a result of branches either breaking off from the main trunk or human removal due to trimming. Regardless of the manner in which the wounds originated, he testified all injuries likely existed prior to May of 2001 and would have been readily observable through visual inspection. In particular, in his final report, Dr. Steiner cited the following external signs of decay:

{¶23} "a small, mostly callused-over knot (from Branch 1) on the north or northwest side of the tree and at the point of failure on June 14, 2004,

{¶24} "a hollow, 10-inch branch cavity on the south side of the tree at a height of 30 feet, where Branch 2, was removed some years ago,

{¶25} "a hollow, 34-by 26-inch branch cavity on the southeast side of the tree at a height 15 feet, where Branch 3 broke off some years ago (but before 2004), and

{¶26} "two dead branch scars, one (Branch 4) that is 7 inches in diameter and located about 4 feet directly above Branch 3, and one (Branch 5) that is 10 inches in diameter and 8 feet above ground on the south side of the tree. Neither of these is hollow but both exhibit signs of advanced decay and suggest the presence of decay within the trunk."[1]

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1. Gerald Braho, the owner of the property on which the subject tree stood, testified that "a few years prior to June of 2004" a large limb fell from the tree. That limb was approximately 15 feet from the ground and left a noticeable "socket" in the trunk. He did not specifically state that limb was the cause of the cavity identified by Dr. Steiner. Nor did Braho specifically testify the limb fell after May of 2001.

{¶27} According to Dr. Steiner, the extensive internal decay, in conjunction with the 10 degree lean and the lopsided crown caused the subject tree to fail and fall on Lisa.

{¶28} Notwithstanding Dr. Steiner's testimony, appellees mutually argued they did not owe Lisa, as a member of the general public, a duty of care. They argued that the existence of any duty under such circumstances is based upon the foreseeability of an injury. Because appellants were unable to demonstrate that appellees had notice of a patent defect in the tree, they could not have foreseen the injury suffered by Lisa. Appellees additionally argued that the contract between Ohio Edison and Asplundh did not give Lisa, as a member of the public, any enforceable rights. Rather, the contract merely contemplated the pruning and removal of vegetation so it would not encroach upon or compromise Ohio Edison's power lines. Because the subject tree was leaning away from and thus represented no threat to the power lines, they were under no obligation to inspect, let alone remove, the tree. Finally, FirstEnergy and Ohio Edison asserted that imposing a duty in this case would require utility companies to ensure that no trees exist, healthy or not, within contact range of electrical lines. Appellees argued such a burden would be overly time consuming and cost-prohibitive.

{¶29} On July 15, 2008, the trial court granted summary judgment in favor of each appellee. In support, the court observed FirstEnergy and Ohio Edison:

{¶30} "*** did not have actual or constructive notice of any defects in this tree located on someone else's property. The Court further finds as a matter of law that a <u>ten degree lean standard</u> for automatic removal of trees, especially in rural areas like

this one, would create an unrealistic and impossible duty upon this and all utility companies. ***

{¶31} "As to Asplundh, the Court agrees that Asplundh's duty arose by virtue of contract only with Ohio Edison. Under said contract, the Court finds that Asplundh performed its obligations. The Court also agrees that the Plaintiffs are not third party beneficiaries under Asplundh's contract with Ohio Edison. However, assuming that the Court did not find in favor of Asplundh, the Court would still obviate [sic] FirstEnergy and Ohio Edison of liability in this case because of the independent contractor status of Asplundh, and the complete lack of evidence that either FirstEnergy or Ohio Edison had any notice whatsoever that the interior of one tree on a rural township road was decaying. ***"

{¶32} The trial court also cited this court's holding in *Parke v. Ohio Edison, Inc.*, 11th Dist. No. 2004-T-0144, 2005-Ohio-6153, for the proposition that imposing a duty on Ohio Edison to ensure that all trees within its inspection zone were sound would be unreasonable and too onerous a burden for a utility company to reasonably shoulder. In the trial court's view, a utility company merely has a duty to prune trees growing into distribution lines and a duty to remove those trees that pose a danger to those lines. Because neither of these conditions were present in this case, the trial court concluded Ohio Edison did not breach its standard of care.

{¶33} In light of these conclusions, the trial court ruled the defendants owed no duty of care to Lisa. Rather, in the trial court's analysis, each defendant met its obligations under the law. Therefore, the court determined there were no genuine

issues of material fact to be litigated and, as a result, each defendant was entitled to judgment as a matter of law on appellants' claims.

{¶34} On August 12, 2009, appellants filed a timely appeal of the foregoing judgment and have assigned two errors for our consideration. Before addressing the arguments, a brief review of the law relating to summary judgment is appropriate.

{¶35} Summary judgment is a procedural tool that terminates litigation and therefore should be awarded with great caution. *Davis v. Loopco Industries, Inc.* (1993), 66 Ohio St. 3d 64, 66, 1993-Ohio-195. Keeping this in mind, an award of summary judgment is proper where (1) there is no genuine issue of material fact remaining to be litigated; (2) the movant is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence in favor of the non-movant, that conclusion favors the moving party. Civ.R. 56(C); see, also, *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶36} Upon filing a motion pursuant to Civ.R. 56, the movant has the initial burden of providing the trial court a basis for the motion and is required to identify portions of the record demonstrating the absence of genuine issues of material fact pertaining to the non-movant's cause of action. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. If the movant meets its prima facie burden, the burden then shifts to the non-movant to set forth specific facts that would establish a genuine issue for trial. Id. With respect to evidential quality, the movant cannot discharge its initial burden under Civ.R. 56 simply by making a blank assertion that the non-movant 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). *Dresher*, supra. Similarly, the non-movant may not rest on conclusory allegations or denials contained in the pleadings; rather, he or she must submit evidentiary material sufficient to create a genuine dispute over material facts at issue. Civ.R. 56(E); see, also, *Dresher*, supra.

{¶37} In ruling on a motion for summary judgment, a trial court may not weigh the proof or choose among reasonable inferences. *Dupler v. Mansfield Journal Co.* (1980), 64 Ohio St. 2d 116, 121. To the contrary, all "[d]oubts must be resolved in favor of the non-moving party." *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 359, 1992-Ohio-95. Moreover, arguments pertaining to evidential credibility and persuasiveness are not fodder for consideration in the summary judgment exercise. In effect, a trial court is bound to overrule a motion where conflicting evidence exists and alternative reasonable inferences can be drawn therefrom. See *Pierson v. Norfolk Southern Corp.*, 11th Dist. No. 2002-A-0061, 2003-Ohio-6682.

{¶38} A reviewing court must adhere to the same standard employed by the trial court. In the argot of appellate law, we review an award of summary judgment de novo. See, e.g., *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336. That is, an appellate court considers the entire record anew and accords the trial court's determination on summary judgment no deference. *Brown v. Cty. Commrs.* (1993), 87 Ohio App.3d 704, 711. If, upon review, there is a sufficient disagreement on a material issue of fact such that the case cannot be resolved as a matter of law, an award of summary judgment must be reversed and the cause submitted to a jury. "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly

preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

{¶39} With the foregoing in mind, appellants' assigned errors are related and shall be addressed together for convenience. They provide:

{¶40} "[1.] It was an error of law and an abuse of the trial court's discretion to weigh the evidence and find that the tree's hazardous condition was undetectable and appellees did not have reasonable apprehension of its danger.

{¶41} "[2] The trial court committed an error of law and abused its discretion in finding that appellees had no duty, when the evidence presented in a light most favorable to appellant's clearly demonstrates that the hazardous condition of the tree and resulting grave injury to Lisa Huff were reasonably apprehended."

{¶42} Initially, as pointed out above, we review an award of summary judgment using non-deferential de novo standard, not the more restrictive standard of an abuse of discretion. That said, we shall first discuss the legal issue of whether appellees, individually or collectively, owed Lisa a duty of care.

{¶43} A complaint sounding in negligence must allege facts sufficient to show the existence of a duty; a breach of that duty by the defendant, and injury to the plaintiff which was proximately caused by the defendant's breach. See, e.g., *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 142. In negligence cases, the threshhold question toward establishing a "genuine issue for trial," and surviving summary judgment is whether a defendant owed the plaintiff a duty of care. *Baker v. Fowlers Mill Inn & Tavern*, 11th Dist. No. 2007-G-2753, 2007-Ohio-4958, at ¶13. Generally, the existence of a duty is dependent upon the foreseeability of the injury sustained. See, e.g., *Menifee v. Ohio*

Welding Products, Inc. (1984), 15 Ohio St.3d 75, 77. The court in *Menifee* set forth the following test for foreseeability: "whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act." Id. at 77.

{¶44} First, we shall address the award of summary judgment as it pertains to FirstEnergy. The evidence indicates that FirstEnergy is a holding company that is the primary shareholder of Ohio Edison. Both companies exist independent of one another and conduct business separately from each another. It is undisputed that FirstEnergy created the specifications used by Ohio Edison in its vegetation clearance practices. However, there is nothing in the record that indicates FirstEnergy, as merely a holding company which owns Ohio Edison, exercised any control over the day-to-day vegetation clearance practices of Ohio Edison or supervised such activities in any way.

{¶45} In *North v. Higbee Co.* (1936), 131 Ohio St. 507, the Supreme Court of Ohio observed:

{¶46} "'It is familiar law in all jurisdictions in this country that ownership of stock alone will not render the parent corporation liable. This is but a statement of the fundamental rule that stockholders are not liable for the corporate obligations. The result is the same whether the parent company owns all the stock, or all except directors' qualifying shares or a small amount in outside hands.'" Id. at 512, "Parent and Subsidiary Corporations," (1931), Powell, p. 10.

{¶47} Further, where all the legal requirements of the subsidiary as a separate corporation are scrupulously observed and the parent corporation's control of the subsidiary is limited to its ownership of stock, the parent corporation will not be held

liable for the subsidiary's obligations. *North,* supra. Rather, "*** the corporate entity will be disregarded and the individual shareholder or parent corporation held liable only where there is proof that the corporation 'was formed for the purpose of perpetuating a fraud, and that domination by the parent corporation [shareholder] over its subsidiary [corporation] was exercised in such manner as to defraud [a] complainant.'" *LeRoux's Billyle Supper Club v. Ma* (1991), 77 Ohio App.3d 417, 420-421, quoting *North*, supra, at syllabus.

{¶48} Here, Ohio Edison was not created or formed by FirstEnergy. Moreover, there is no indication FirstEnergy obtained its controlling interest in Ohio Edison to defraud or engage in any other malfeasances. Even though FirstEnergy promulgated the specifications used by Ohio Edison, there is nothing in the record indicating FirstEnergy supervised Ohio Edison's implementation of the specifications or had any say in who Ohio Edison contracted with to conduct its vegetation-maintenance work. In light of these considerations, we hold FirstEnergy owed no duty of care to Lisa. Thus, the trial court properly granted summary judgment in its favor.

{¶49} Appellants' assignments of error are therefore overruled as they pertain to FirstEnergy.

{¶50} We shall next address the trial court's decision concluding neither Ohio Edison nor Asplundh owed Lisa a duty of care. In its decision, the trial court determined these appellees met their obligations under their contract and, in any event, no defendant could have been expected to apprehend the danger the tree posed. In their respective appellate briefs, Ohio Edison and Asplundh echo these points, arguing they cannot be held "*** liable to one injured as the result of some unusual occurrence that

cannot fairly be anticipated or foreseen and is not within the range of reasonable probability." *Hetrick v. Marion--Reserve Power Co.* (1943), 141 Ohio St. 347, paragraph three of the syllabus. They submit that their mission, as set forth in their contract, was to keep troublesome vegetation from interfering with electrical distribution lines. In light of this objective, they argue, their legal obligation was limited to pruning trees that are growing into electrical lines and removing trees that posed a danger of falling into the lines. See *Parke*, supra, at ¶17. Because it is undisputed that the subject tree was not a hazard to these lines, Ohio Edison and Asplundh maintain they had no obligation to inspect, prune, or remove the tree and therefore owed Lisa no duty of care. Given the evidence submitted during the motion exercise, we believe Ohio Edison's and Asplundh's construction of their legal obligations is far too narrow.

{¶51} We shall begin by pointing out that this matter is distinguishable from our holding in *Parke.* In that case, a homeowner hired the decedent to cut down a dying tree. In the process, a branch hit an electrical wire which caused the decedent's electrocution. This court held that summary judgment was properly granted because the appellants failed to establish a duty on the part of the utility company toward the decedent. Without notice or apprehension of a danger, this court reasoned the utility company was under no duty to guard against it. Id. at ¶17. The evidence indicated that the tree appeared healthy and the utility company regularly inspected the lines. Quoting the Supreme Court in *Hetrick,* supra, at 359, this court underscored: "'There is no duty to guard when there is no danger reasonably to be apprehended.'" *Parke,* supra, at ¶14.

{¶52} In *Parke*, this court determined the utility company had no notice that the tree was dying nor was it in danger of contacting its power lines. Without some notice or apprehension of the danger, this court held the utility company had no duty to guard against it. Id. at ¶17. The duty analysis in this case, however, does not turn on the foreseeability of the danger which caused Lisa's injury. Rather, it turns on the language of the contract into which Ohio Edison and Asplundh entered.

{¶53} In *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St.3d 36, the Supreme Court of Ohio adopted Section 302 of the Restatement of the Law 2d, Contracts regarding third-party beneficiaries to a contract. In particular, that section distinguishes between an "incidental" and an "intended" beneficiary to a contract. If a party is an intended beneficiary to a contract, the promisor and promisee owe that party a duty pursuant to the contract into which they entered. To determine whether an individual is an intended or merely an incidental beneficiary to a contract, the Court adopted the "intent to benefit test," which provides:

{¶54} "'Under this analysis, if the promisee *** intends that a third party should benefit from the contract, then that third party is an "intended beneficiary" who has enforceable rights under the contract. If the promisee has no intent to benefit a third party, then any third-party beneficiary to the contract is merely an "incidental beneficiary," who has no enforceable rights under the contract.

{¶55} "'*** [T]he mere conferring of some benefit on the supposed beneficiary by the performance of a particular promise in a contract [is] insufficient; rather, the performance of that promise must also satisfy a duty owed by the promisee to the

beneficiary.'" *Hill*, supra, 40, quoting *Norfolk & Western Co. v. United States* (C.A. 6, 1980), 641 F.2d 1201, 1208.

{¶56} In applying the foregoing test, the Supreme Court in *Hill* determined that an employee for a commercial establishment was merely an incidental beneficiary to a contract between the establishment and a security alarm company. The facts and application of the law in *Hill* are helpful in guiding our analysis of the instant matter. In *Hill*, the plaintiffs, an employee of a bookstore and her husband, were accosted by an intruder in the store after the establishment was closed for the day. They filed a complaint for negligence against the alarm company for the physical and emotional injuries they allegedly suffered. In concluding the plaintiffs were not intended beneficiaries to the security contract between the bookstore and the company, the Court observed: "[t]he clear terms of the contract indicate that the contract was entered into for the protection of property, not people." Id. The court further underscored that the system in question was designed to become operative only after the establishment was vacated by employees. Therefore, the Court held that the employee was merely an incidental beneficiary to the contract between the bookstore and the security alarm company.

{¶57} With this in mind, the issue becomes whether Lisa was owed a duty of care as an intended third-party beneficiary pursuant to the contract signed by Ohio Edison and Asplundh. Upon careful consideration of the contract and application of the "intent to benefit" test delineated in *Hill*, there is a genuine issue of material fact as to whether Lisa was an intended beneficiary with enforceable rights or merely an incidental beneficiary to whom appellees owed no duty.

{¶58} As discussed above, the specifications established by FirstEnergy were utilized by Ohio Edison in its electrical maintenance practices. The specifications were expressly incorporated into the "Overhead Line Clearance" contract into which Ohio Edison entered with Asplundh. The specifications provide elaborate details and guidelines on how a contractor must execute its work orders. Moreover, and most significantly, under the rubric of "SAFETY PRECAUTIONS AND PROTECTION TO PROPERTY," the specifications provide:

{¶59} "The Contractor shall plan and conduct the work to adequately safeguard all persons and property from injury."

{¶60} On one hand, this provision indicates that the contractor must safeguard all persons from injury while in the act of planning and conducting its work, i.e., sufficiently safeguarding all persons in the particular area the work is occurring while that work is occurring. Under this construction, Lisa would be a mere incidental beneficiary with no enforceable rights because, while the tree was within the inspection zone, her injury occurred three years after work was completed on the King Graves corridor.

{¶61} An equally plausible reading, however, would require a contractor, in meeting its obligations under the contract, to plan and conduct its work so that all persons, regardless of when the work was done, are adequately safeguarded from injury. Under this construction, Lisa would be an intended beneficiary entitled to a duty of care to have adequate assurance that this tree, located in the inspection zone, did not cause her injury due to a failure to meet specific obligations set forth under the contract. As pointed out above, under the category of "Tree Removal," the

specifications indicate that "[a]ll priority trees located adjacent to the subtransmission and transmission clearing zone corridor that are leaning towards the conductors, are diseased, or are significantly encroaching the clearing zone corridor." This directive, phrased in the disjunctive, indicates any diseased priority tree is expected to be removed. Thus, pursuant to the specifications, removing the tree would be expected regardless of where it leaned if, after inspection, it was deemed diseased.

{¶62} Because the contractor's safety obligations set forth under the contract are ambiguous, there is a genuine issue of material fact regarding whether Lisa has enforceable rights under the contract as an intended third-party beneficiary. If Lisa is an intended beneficiary under the contract, Asplundh owed her a duty of care. Further, even though Asplundh was the contractor, the evidence indicates Ohio Edison oversaw and directed Asplundh's work through its field specialists. However, we do not know the precise extent of this oversight and direction. Accordingly, if Lisa is an intended beneficiary, there is also a material issue of fact as to whether Ohio Edison owed her a duty of care under the contract pursuant to the control it exercised over Asplundh through its field specialists.

{¶63} Accordingly, as they relate to appellees Ohio Edison and Asplundh, appellant's assigned errors are sustained.

{¶64} Because there is no evidence indicating FirstEnergy owed Lisa a duty, appellants' two assignments of error are overruled as they pertain to FirstEnergy. However, because we hold there is a genuine issue of material fact as to whether Lisa was an intended third-party beneficiary and therefore owed a duty of care by appellees Ohio Edison and Asplundh, appellants' assigned errors are sustained as they relate to

these appellees. In light of these conclusions, it is the judgment and order of this court that the judgment entry of the Trumbull County Court of Common Pleas is affirmed in part, reversed in part, and remanded for further proceedings consistent with the analysis set forth in this opinion.

MARY JANE TRAPP, P.J.,

COLLEEN MARY O'TOOLE, J.,

concur.

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

LISA G. HUFF, et al.,

Plaintiffs-Appellants,

- vs -

FIRST ENERGY CORPORATION, et al.,

Defendants-Appellees.

JUDGMENT ENTRY

CASE NO. 2009-T-0080

For the reasons stated in the opinion of this court, the assignments of error are well taken as they relate to Appellees Ohio Edison and Asplundh, but overruled as they relate to Appellee FirstEnergy. It is therefore the judgment and the order of this court that the judgment of the Trumbull County Court of Common Pleas is affirmed in part, reversed in part, and remanded for further proceedings.

Costs to be equally taxed against appellants, Lisa G. Huff, et al., and appellees, Ohio Edison and Asplundh.

FILED
COURT OF APPEALS
MAR 3 1 2010
TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

JUDGE CYNTHIA WESTCOTT RICE

MARY JANE TRAPP, P.J.,

COLLEEN MARY O'TOOLE, J.,

concur.