

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2010-0857

On Appeal from the Eleventh Appellate District
Trumbull County, Ohio

Court of Appeals Case No. 2009-T-00808

LISA G. HUFF, et al.

Plaintiffs-Appellees

vs.

FIRST ENERGY CORPORATION, et al.

Defendants-Appellants

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT ASPLUNDH TREE EXPERT COMPANY**

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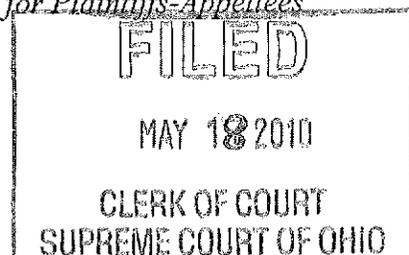


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I. STATEMENT OF PUBLIC AND GREAT GENERAL INTEREST

This appeal brings into issue the scope of legal duties owed to the general public by an electrical utility provider (Ohio Edison) and a tree service company retained to provide overhead vegetation line clearance work to the utility (Asplundh Tree Expert Company "Asplundh") with respect to a tree that fell in a public roadway in the midst of a thunderstorm. The tree was located on private property situated between utility lines running parallel to the road and the public road. The incident did not arise when any actual work was being performed under the contract, but occurred some three years after work was performed in that area. The undisputed evidence reflected that the subject tree did not pose a threat to the utility equipment for a number of reasons including the fact that the tree had a ten degree lean away from the utility distribution lines. Finally, the only provisions in the contract between Ohio Edison and Asplundh which related to a tree located in the area of the subject tree required Asplundh to maintain the tree to "mitigate obvious hazards" to utility equipment and/or required removal of "dead or defective" trees deemed to "constitute a hazard to the conductor."

The trial court granted summary judgment to the utility and the tree service company finding, among other things, that neither party owed a legal duty to protect the general public from falling trees which did not pose a threat to utility equipment. The Eleventh District Court of Appeals reversed the trial court's decision, finding a genuine issue of material fact existed as to whether Plaintiff could be considered an intended beneficiary to the contract between the utility and the tree service provider. (A copy of the trial court's 7/15/09 judgment entry is attached as A1, a copy of the Eleventh District Court's 3/31/10 opinion is attached as B1). The appellate court premised this decision by citing to a generic on-the-job safety provision in the contract which required Asplundh to "conduct the work to adequately safeguard all persons and

property from injury”. The court relied on this on-the-job safety provision, common to many contracts governing work to be performed in this state, to conclude that there was a genuine issue of material fact as to whether Plaintiff, Lisa Huff, was an intended beneficiary to the contract between Ohio Edison and Asplundh.

The decision rendered by the Eleventh District Court of Appeals potentially impacts hundreds of contracts governing work performed in this state as the on-the-job safety provision contained in these contracts can now be construed to bestow intended beneficiary rights to third parties with respect to incidents which neither occur during the performance of the contract nor relate to the work performed under the contract. Moreover, this decision distorts the following outstanding areas of Ohio jurisprudence:

1. The decision expands the recognized duty of the utility to exercise the highest degree of care in the construction, maintenance, and inspection of its equipment to now require the protection of third parties on public roadways from injury to trees which may be situated close to utility power lines; and
2. The decision expands the law governing a third party’s status as an intended beneficiary to a contract by no longer requiring proof that the performance of the promise satisfies a duty owed by the promisee to the beneficiary.
3. The decision expands traditional notions of tort law by recognizing a contracting party’s liability to third parties not based upon recognized legal duties, but upon the existence of generic on-the-job safety language

contained in many commercial contracts never intended to apply to the general public.

Appellant would respectfully submit that the ramifications of this holding go far beyond the facts of this particular case. By relying on a generic on-the-job safety requirement to impose a duty with respect to an event which did not occur while work was taking place, the decision permits claimants to assert rights under other contracts as an intended beneficiary based on similar generic on-the-job safety provisions. The appellate court's holding also greatly expands the liability risks confronted by both utilities and/or their retained tree service contractors to the general public when conducting overhead line clearance work along the thousands of miles of roads and streets in Ohio. Finally, the decision impacts future claims involving third parties seeking to enforce rights under a contract as an intended third party beneficiary permitting the assertion of this claim absent proof that the performance of the promise does not satisfy a duty owed by the promisee to the beneficiary.

For the foregoing reasons, this court should accept this matter for review and provide clarification on these matters of common interest to commercial contracts written throughout this state.

II. STATEMENT OF THE CASE AND FACTS

The fact pattern giving rise to this appeal involves an accident on June 14, 2004 when a section of a tree broke and fell on Lisa Huff as she was jogging home with a friend on Kings Grave Road located in Hartford Township, Ohio. The incident occurred in the midst of a wind event in a thunderstorm which had been designated as "severe" by the National Weather Service. The subject tree was located on private property between distribution lines owned and operated by Ohio Edison and Kings Grave Road. The utility distribution lines ran parallel with Kings

Grave Road. While Ohio Edison owned an easement for purposes of maintaining the utility lines, the record is undisputed that the subject tree was located outside of the utility easement.

In the furtherance of protecting the utility equipment, Ohio Edison entered into a contract with Asplundh for purposes of obtaining overhead line vegetation clearance work in Ohio Edison's northeast Ohio territory. Under the terms of the contract, Asplundh was directed to perform all vegetation clearing work pursuant to Ohio Edison's Vegetation Management Specifications. The "scope of services" to be provided under the Vegetation Management Specifications was defined as "the right-of-way shall be free of all vegetation obstructions which interferes with the construction, operation, and repair of the electric facility." Along the same lines, the Vegetation Management Specifications identified the objective of the contracted service as to "maintain reliable and economical electric service, through effective line clearance and satisfactory public relations."

With respect to Ohio Edison's distribution line adjacent to the subject tree, the Vegetation Management Specifications established a primary vegetation clearing zone of fifteen feet on either side of the overhead distribution lines. The specifications establish a secondary outer zone for trees located within fifteen and twenty feet from the center of the distribution lines. The record in this case is undisputed that the subject tree was located within the secondary outer zone. Under the terms of the Vegetation Management Specifications, trees located within the secondary zone were to be managed so as to "mitigate obvious hazards" to the utility facilities. The specifications also provided that dead or defective trees in the distribution line clearing zone were to be removed if they "constitute a hazard to the conductor." It is important to note that neither the Vegetation Management Specifications nor industry practice imposed a duty on

Asplundh to conduct a general inspection of the health of trees located within the secondary clearing zone.

Pursuant to the overhead line clearance contract, Asplundh performed work on the Kings Grave Road area in May of 2001. The weekly vegetation management timesheets reflect that on May 3, 2001, three years before the incident giving rise to the claim in issue, an Asplundh crew removed two trees at the address where the subject tree was located. Asplundh was not scheduled to perform any further work in this area for another four years. While the worksheets reflect that Asplundh performed services in the vicinity of the subject tree, it was never established that any Asplundh personnel performed any actual work on the subject tree in 2001 or ever. In this regard, the experts retained on behalf of Lisa Huff were unable to determine if any of the limbs were removed from this tree when Asplundh performed work in the area in 2001. Along the same lines, the property owner testified that while he recalled seeing Asplundh trucks in front of his house in 2001, he never saw any evidence that the Asplundh crew members had worked on the subject tree that ultimately fell on Ms. Huff. Finally, the record in this case is undisputed that the subject tree did not pose a threat to any utility equipment as the tree had a ten degree lean away from the utility lines. The Eleventh District Court of Appeals acknowledged this fact when it concluded “due to [the ten degree lean in the direction of Kings Grave Road], it is undisputed that the tree was not a hazard to the power lines.” (See B1, p. 6).

As against this record, the trial court granted summary judgment to Ohio Edison and Asplundh, finding that these parties did not have a legal duty to protect the general public on public road from a tree which did not constitute a threat to utility equipment. The Eleventh District Court of Appeals reversed this holding and determined that there was a genuine issue of material fact as to whether Lisa Huff could be deemed an “intended beneficiary” to the contract

between First Energy and Asplundh. In so holding, the appellate court determined that two contractual provisions in the contract between Ohio Edison and Asplundh created an ambiguity in the contract. The provisions cited by the appellate court were neither cited nor relied upon by either party when briefing the summary judgment before the trial court. More importantly, the cited contractual provisions had no application to the facts at issue in this case.

The first provision was a generic safety on-the-job provision which required Asplundh “to adequately safeguard all persons and property from injury.” The second cited provision related to tree removal requirements for trees “located adjacent to the subtransmission and transmission clearing zone” corridors. The utility line adjacent to the subject tree was a distribution line, not a subtransmission or transmission line which carry much greater voltage.¹ The court relied on these two provisions to justify the court’s conclusion that there was a genuine issue of material fact as to whether the contract required removal of a tree “regardless of whether it posed a danger to utility equipment”. (See B1, p. 19). Based on this holding, the court remanded the matter back to the trial court to determine if Lisa Huff had enforceable rights under the contract as an intended beneficiary to the contract.

III. PROPOSITIONS OF LAW

A. **A Utility and/or its Retained Tree Service Contractor has no Duty to Protect the General Public on Public Roadways from Trees not Located on Utility Property or within an Utility Easement which do not Pose a Threat to Utility Equipment.**

In *Hetrick v. Marion-Reserve Power Co.* (1943), 140 Ohio St.3d 347, this Court considered a utility’s responsibility for injuries which resulted from a claimant’s contact with a utility power line running adjacent to a public road. In considering the scope of a utility’s duty under Ohio law, this court took judicial notice of the fact that in response to the general public’s

demand for electrical services at reasonable rates, the Ohio General Assembly had granted permission to telephone an electrical utility to construct lines along public roads “subject only to the restriction that such installation shall not incommode the public use of the public roads.” *Id.* at 351. The *Hetrick* court took further notice of the fact that pursuant to this authority, “upon and among almost all of the many thousands of miles of roads in Ohio are strung wires of telephone or light companies or both.” *Id.* at 352. While the *Hetrick* court recognized that a utility has a duty to exercise the highest degree of care consistent with the practical operation of such business in the construction, maintenance, and inspection of such equipment, the court nevertheless concluded that the utility is not liable for injuries resulting from an unusual occurrence that cannot be fairly anticipated or foreseen and is not within the range of reasonable probability.”

The *Hetrick* case undisputedly recognized a utility’s duty of care with respect to the construction, maintenance, and inspection of utility equipment in the context of a case where a claimant came into contact with the electrical power transmitted in the utility lines. However, this case did not impose a duty of care on a utility company to protect the general public on public roads from trees not located on utility property, not located within a utility easement, and which do not pose a threat to utility equipment. In point of fact, established Ohio authority recognizes that the mere existence of the utility’s easement of a right-of-way does not impose a general duty on the utility so as to maintain trees to protect the public simply because the trees may be in close proximity with a public road. See *Walker v. Dodson* (May 6, 1996), Claremont County App. No. CA 95-10-071; *Estate of Durham v. Amherst* (1988), 52 Ohio App.3d 106;

¹ A motion to have the appellate court reconsider its improper reliance on these inapplicable contractual provision remains pending with the Eleventh District Court of Appeals.

Massir v. Dayton Power & Light Company (Sept. 21, 1992) Fayette County App. No. 91-10-21 and CA-91-10-205.

The appellate court's decision in *Durham* is particularly instructive relative to the facts of this case. In *Durham*, the plaintiff was killed while driving down a road when a large tree fell on top of his automobile. Plaintiff alleged that the City of Durham was negligent in their failure to remove the tree based on the fact that the tree was in an area of the city's easement which gave the city the right to remove trees that could interfere with electrical lines. In rejecting this argument, the *Durham* court concluded that neither statutory nor common law imposed a duty on the city to remove a tree on private property where the city's only interest is through an easement for the maintenance of utility lines. *Id.* at syllabus No. 1.

The holding by the court in *Durham* mirrors decisions from other states which have analyzed fact patterns even more analogous to this situation. For example, in *Voelker v. Delmarva Power & Light Co.* (Dist. Maryland, 1989), 727 F.S. 991, a ten year old was killed when climbing a tree adjacent to utility power lines. The decedent's family alleged that a tree service company retained by the utility to maintain vegetation clearance for a utility's power lines owed a duty to protect the general public. In rejecting this argument, the *Voelker* court held that any such duty must necessarily arise out of the contractual relationship between the utility and the tree service provider. The court found that the sole purpose of the tree service contract was to protect the power lines through which the utility transmits electricity to its customers. The court further noted that at the time the subject tree was last trimmed under the contract, the tree did not pose a threat to utility property. Accordingly, the *Voelker* court held that because there was no mention in the contract requiring trimming for purposes of maintaining public safety, the claimant could not be deemed an intended beneficiary to the contract

A similar conclusion was reached by the Texas appellate court in *Felts v. Bluebonnet Electrical Cooperative, Inc.* (1998), 972 S.W. 2nd 166. In *Felts*, a dead tree existing just outside of utility company's easement fell on a car as it was traveling down a public roadway. Although the plaintiff acknowledged that the physical location of the tree was outside of the scope of the easement, the Plaintiff nevertheless argued that the utility company still owed a duty of exercising reasonable care so as to not jeopardize or endanger the safety of persons legally using the adjacent roadway. Under such a claimed duty, the Plaintiff argued that the utility was legally obligated to remove "dangerous trees" because of the tree's proximity to the utility company's easement. The *Felts* court declined to impose such an onerous duty on the utility.

Appellant would respectfully submit that the decision rendered by the Eleventh District Court of Appeals is contrary to established Ohio law. If this decision is permitted to stand, it may be cited as authority to impose liability on a utility easement owner relative to risks which have nothing to do with the utility's business of delivering electrical power. This decision subjects a utility and a contracted tree service company to liability exposure to any tree which happens to be situated along the "thousands of miles" of Ohio roads where utilities have strung power lines for purposes of providing reliable electric power at reasonable rates.

B. In Order to Establish a Party's Status as an Intended Third Party Beneficiary in a Contract, the Claiming Party must Demonstrate that the Promise to be Performed under the Contract Satisfies a Duty Owed by the Promissee to the Claiming Beneficiary.

The decision rendered by the Eleventh District Court of Appeals deviates from a longstanding line of cases which set forth the requisites of the "intent to benefit" test necessary to establish a party as an intended beneficiary to a contract. In this regard, this Court has held that in order to satisfy the "intent to benefit" test, the claiming intended beneficiary must prove that the performance of the promise in the contract satisfies a duty owed by the promissee [in this

case Ohio Edison] to the claiming intended beneficiary [in this case Lisa Huff]. See *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St.3d 36; *Trinova v. Pilkington Bros. P.L.C.* (1994), 70 Ohio St.3d 271; *Anderson v. Olmsted Util. Equip., Inc.* (1991), 60 Ohio St.3d 124.

Based on these decisions, numerous other Ohio appellate courts have concluded that a claiming beneficiary may not be deemed an intended beneficiary under contract where there is no evidence that the performance of the contract satisfied a duty owed by the promissee to the claiming beneficiary. See *Grothaus v. Warner*, 2008-Ohio-5563, p. 19 (the record contained no evidence from which the court could conclude that performance of the contract satisfied the duty that [the promissee] owed [the claiming beneficiary]); *Nationwide Mut. Fire Ins. Co. v. Logan*, 2006-Ohio-2513, p. 30 (court rejected claimant's intended beneficiary status finding "Premier and Logan, the promisees, owed no duty to Nationwide"); *Turner v. Isecuretrac Corp.*, 2004-Ohio-2234, p. 54 (the language cited by claiming intended beneficiary did not impose a duty on the promissee to protect claiming party nor does a statutory duty exist); *Brochers v. Baltes* (Sept. 19, 1991), Montgomery County App. No. 12688 (Court rejected beneficiary's claim of an intended beneficiary under a contract, finding ". . . there is simply no duty on the part of the [promissee] to the business invitee . . .").

In finding the existence of a genuine issue of material fact, the appellate court ignored this long standing body of law and permitted the claimant to proceed with her claim absent any proof that Asplundh's performance of the contract satisfied a duty owed by Ohio Edison to Lisa Huff.

C. A Generic On-The-Job Safety Provision in a Contract Cannot Give Rise to a Party's Status as an Intended Beneficiary with Respect to an Accident which Occurs Long after the work is Completed.

In reversing the trial court's granting of summary judgment to the utility and tree service provider, the appellate court cited to a contractual provision which required Asplundh to "adequately safeguard all persons and property from injury." The court's reliance on this on-the-job safety provision as a means of imposing responsibility for an event which occurred three years after the work was performed is improper as a matter of law. In *New York, Chicago & St. Louis Rd. Co. v. The Heffner Construction Co.*, (1967), 9 Ohio App.2d 174, the appellate court reviewed a similar provision in a contract which required the contractor to "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.*" *Id.* at 177. (Emphasis added). A third party to the contract sought to rely on this on-the-job safety provision as a means of justifying that party's recognition as an intended beneficiary to the contract so as to impose liability on the contracting parties for an accident which occurred offsite. The *Heffner* court rejected this argument, finding that the on-the-job safety provision did not create enforceable third party rights with respect to an incident that did not take place during the course of the contracted work. The court held that the cited safety provision had "application only to safety and accident prevention on the work project and have no application to a collision, occurring as here, off the work project." *Id.* at 178. Indeed, the holding in *Heffner Construction* was subsequently cited approvingly by the Sixth Circuit Court of Appeals in *Norfolk & Western Co. v. United States of America, et al.*, (6th Cir. 1980), 641 F.2d 1201, wherein the court referred to such provision as intended for "on-the-job accident prevention." *Id.* at 120. The *Norfolk & Western* decision was subsequently cited approvingly by this Court in *Hill v. Sonitrol, supra*

when this Court formally adopted the “intent to benefit” test to establish a party’s status as an intended beneficiary.

The decision rendered by the underlying appellate court permits a non-party to a contract to potentially obtain enforceable rights as an intended beneficiary based on a generic on-the-job safety provision with respect to events which have nothing to do with the work performed under the contract. This holding will undoubtedly expand the liabilities of the contracting parties to include parties and events never contemplated under the contract.

D. In Determining Whether a Party is an Intended Beneficiary under a Contract, the Court must Interpret any Ambiguity in Favor of the Contracting Parties.

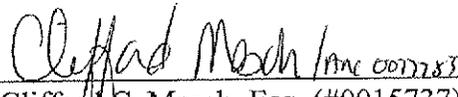
In *City of Painesville Employee Credit Union v. Marilyn Hietanen*, 2006-Ohio-3770, the appellate court specifically held that in the context of determining whether a third party may be considered an intended beneficiary to a contract, a court is “precluded from interpreting any ambiguity in favor of the third party and to the detriment of the contracting parties.” *Id.* at p. 31. Citing to this court’s holding in *Westfield Ins., Co. v. Galatis*, 100 Ohio St.3d 216, the *Hietanen* court noted that a claiming third party beneficiary was not an actual party to the contract. Thus, the claiming third party beneficiary was not entitled to having any ambiguity in the contract resolved in favor of that party. The *Hietanen* court concluded that even assuming an ambiguity existed in the contract, the ambiguous language would have to be read in favor of the contracting parties and not the claiming third party beneficiary.

The appellate court’s identification of an ambiguity in the contract between Ohio Edison and Asplundh ignores this authority and applies a construction favorable to a non-party to the contracts.

IV. CONCLUSION

For all the foregoing reasons cited herein, appellant would respectfully request that this Court accept jurisdiction of this matter and review all Propositions of Law outlined in this memorandum in support of jurisdiction. The holding articulated by the Eleventh District Court of Appeals is of obvious great and general public interest with respect to numerous contracts governing work to be performed throughout this state. If left to stand, this decision will potentially expose the contracting parties to the claims of third party beneficiaries for events which occur years after the work is concluded because the contracts contain similar generic safety provisions intended to address on-the-job safety issues. This decision also imposes obligations on utilities and contracting tree service providers to the general public with respect to matters wholly unrelated to the protection of utility equipment and/or the delivery of electrical power through utility lines. Finally, the court's holding changes the law with respect to the requisite criteria to establish a party's status as an intended beneficiary under a contract. For all the foregoing reasons, this court should accept jurisdiction of this matter.

Respectfully submitted,



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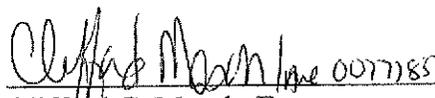
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CERTIFICATE OF SERVICE

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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 states 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.

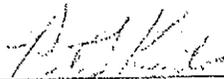
For purposes of this ruling, the Court considered the Plaintiffs' experts testimony, over the Defendants' objections. In this case, the Court finds that the moving Defendants herein, FirstEnergy, Ohio Edison, and Asplundh Tree Expert Company, are all entitled to Judgment as a matter of law because they 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.

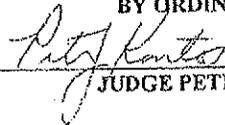


JUDGE PETER J KONTOS

FILED
COURT OF COMMON PLEAS
JUL 15 2009
TRUMBULL COUNTY, OH
KAREN WENTZ ALLEN, CLERK

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

FILED
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, :
- vs - : CASE NO. 2009-T-0080
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 120, 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

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 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. ***

{¶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 threshold 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-4968, 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 Billye 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 "the corporate entity" 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,

JUDGMENT ENTRY

- vs -

CASE NO. 2009-T-0080

FIRST ENERGY CORPORATION, et al.,

Defendants-Appellees.

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 31 2010

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK


JUDGE CYNTHIA WESTCOTT RICE

MARY JANE TRAPP, P.J.,

COLLEEN MARY O'TOOLE, J.,

concur.