

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-0080

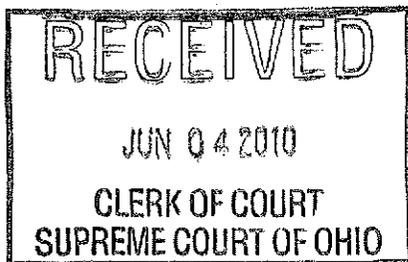
LISA G. HUFF, et al.

Plaintiffs-Appellees

vs.

FIRST ENERGY CORPORATION, et al.

Defendants-Appellants



**JOINT NOTICE OF SUPPLEMENTAL AUTHORITY TO APPELLANTS'
MEMORANDUM IN SUPPORT OF JURISDICTION**

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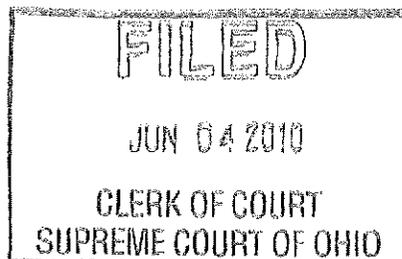
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Now comes appellants, Asplundh Tree Expert Company and Ohio Edison Company, by and through counsel, and pursuant to Supreme Court Rule of Practice III(3)(A), hereby gives this Court notice of additional relevant authority. On May 27, 2010, the Eleventh District Court of Appeals ruled on the pending motions for reconsideration. Judge Cynthia Westcott Rice, the authoring judge in the original opinion, ruled to grant applications for reconsideration and vacate the opinion previously issued by the court on March 31, 2010. Judges O'Toole and Trapp denied the applications for reconsideration. A complete copy of the court's ruling on the application for reconsideration is attached hereto as Exhibit "A."

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing document was sent by regular U.S. mail this 2ND day of June,

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STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

LISA G. HUFF, et al.,

JUDGMENT ENTRY

Plaintiffs-Appellants,

CASE NO. 2009-T-0080

- vs -

FIRST ENERGY CORPORATION, et al.,

FILED
COURT OF APPEALS

MAY 27 2010

Defendants-Appellees.

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

Pursuant to App.R. 26(A), appellees Ohio Edison and Asplundh have filed applications for reconsideration. Each appellee seeks reconsideration of this court's opinion in *Huff v. First Energy Corp.*, 11th Dist. No. 2009-T-0080, 2010-Ohio-1456, released March 31, 2010. For the reasons below, appellees' applications are denied.

A court addressing an application filed pursuant to App.R. 26(A) must determine whether the application for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been. See, e.g., *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, 143. App.R. 26(A) was not designed for use in instances where a party simply disagrees with the conclusions and logic of the appellate court. *In re Estate of Phelps*, 7th Dist. No. 05 JE 19, 2006-Ohio-1471, ¶3.

In *Huff*, supra, this court reversed the trial court's entry of summary judgment in appellee Asplundh's and appellee Ohio Edison's favor, holding there



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remained genuine issues of material fact to be litigated as to whether these appellees owed appellant Huff a duty of care as an intended third-party beneficiary under the "Overhead Line Clearance" contract into which appellee Ohio Edison entered with Asplundh. After reviewing the contract, in conjunction with other evidence submitted during the summary judgment exercise, this court observed:

"The specifications [utilized by Ohio Edison in its electrical maintenance practices] 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:

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

"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.

"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.

"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." *Id.* at ¶¶58-62.

In their applications, appellees make several arguments which we shall address in no particular order.¹ They first assert this court misinterpreted the type of power conductors at issue in this case which led to an obvious error requiring reconsideration. Specifically, appellees point out that the conductors on the King Graves Road corridor are distribution lines, not subtransmission or transmission lines. To the extent this is the case, appellees maintain removal of

1. As pointed out at the outset, both Ohio Edison and Asplundh filed separate applications for reconsideration. Some of their arguments overlap, but others do not. Nevertheless, for convenience, we shall refer to each argument as though each appellee asserted it.

the subject tree was necessary per the specifications *only if* it constituted a hazard to the conductors themselves. Given that this tree exhibited a ten degree lean towards the road, appellees observe it did not constitute an obvious hazard. As a result, appellees maintain they had no obligation to remove the tree.

Although the distinction regarding the lines was not directly addressed in the underlying opinion, and this court appreciates the clarification, we nevertheless fail to see how the point is pivotal to the disposition of this case. The underlying opinion held that a genuine issue of material fact remained to be litigated regarding whether appellees owed Lisa a duty of care as an intended third-party beneficiary under the contract. If so, the contract specified that one category of "trees expected to be removed" are "[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."

Although appellees insist that the foregoing disjunctive applies only to those priority trees within the subtransmission and transmission clearing zone corridor, we believe such a construction is too restrictive, particularly for purposes of a Civ.R. 56 exercise. Although appellees' interpretation is reasonable, the clause can also be reasonably construed to require the removal of all priority trees (1) located adjacent to the subtransmission and transmission clearing zone corridor that are leaning towards the conductors, OR (2) are diseased, OR (3) are significantly encroaching the clearing zone corridor. As we held in the underlying opinion, the contract's directive on tree removal "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.” (Emphasis added.) *Huff*, supra, at ¶61.

Appellees' initial argument is therefore not well-taken.

Next appellees contend that the contract, read as a whole, was intended to further electrical reliability, not establish a broad duty of care to any party who may be traveling near electrical lines after work has been completed. Notwithstanding appellees' assurances regarding their intent, the contract fails to unambiguously admit to such an exclusive interpretation. Indeed, the intent of the contract is the threshold issue upon which this court premised its remand order. See *Id.* at ¶¶58-61 (discussing the ambiguity pertaining to the intent of the contracting parties).

Summary judgment is appropriate when the language of the written contract is plain and unambiguous. Here, the contractual language is susceptible to at least two fairly reasonable interpretations regarding the meaning and intent of the “safety precautions” clause. As a matter of law, there is an ambiguity in the contract necessitating further proceedings. We therefore reject appellees' argument.

Next, appellees assert this court failed to identify a duty owed by appellee Ohio Edison to appellant Lisa Huff. Appellees contend that absent a determination that the promisee (Ohio Edison) owed a duty to Lisa, Lisa cannot be deemed an intended third party beneficiary. We again disagree.

In the underlying opinion, this court determined there was a genuine issue of material fact regarding whether the contracting parties, particularly the promisee (Ohio Edison), intended to create an open-ended obligation under the safety provision when it indicated the work should be conducted to "safeguard all persons." See *Id.* at ¶¶60-61. On one hand, the safety provision could be seen as protecting "all persons" merely during the completion of the work. On the other, it could be construed as creating an obligation such that the contractor must plan and conduct work so that all persons, regardless of when the work was done, are adequately safeguarded from injury. Under the former construction, Lisa would be merely an incidental beneficiary; under the latter, she would be an intended third party beneficiary. If Ohio Edison intended to benefit Lisa, not only would the promisor (Asplundh) owe Lisa a duty, but, as we held in our opinion, a triable issue would arise regarding whether Ohio Edison, through its field specialists, owed her a similar duty. *Id.* at ¶62. We stand by these conclusions and find no obvious errors in the analysis.

Finally, appellees contend that this court's determination relating to the ambiguity of the contract is to the detriment of the contracting parties and contrary to this court's past precedent; to wit, *City of Painesville Employee Credit Union v. Heitanen*, 11th Dist. No. 2005-L-041, 2006-Ohio-3770. In *Heitanen*, this court determined the appellants were not third-party beneficiaries as a matter of law because there was no evidence the contract was entered with the intent to confer a benefit to them. *Id.* at ¶29. Accordingly, this court held that because the appellants were not parties to the contract, nor third-party beneficiaries, any

ambiguity in the contract could not inure to their benefit. Id. at ¶31. Here, the evidence is such that a material issue of fact remains to be litigated regarding whether Lisa was an intended third-party beneficiary. Thus, *Heitanen* is fundamentally distinguishable.

For the reasons discussed in this entry, appellees' applications for reconsideration are hereby denied.


PRESIDING JUDGE MARY JANE TRAPP

COLLEEN MARY O'TOOLE, J., concurs,

CYNTHIA WESTCOTT RICE, J., dissents with Dissenting Opinion.

FILED
COURT OF APPEALS

MAY 27 2010

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

CYNTHIA WESTCOTT RICE, J., dissents with Dissenting Opinion.

Although I authored the underlying opinion remanding the matter for further proceedings, I have reassessed my position in light of the of the parties' respective applications for reconsideration and believe that the conclusion was issued in error. I believe appellees' argument relating to this court's misinterpretation of the type of power conductors at issue in this case is dispositive and merits granting appellees' applications. I therefore respectfully dissent from the majority's conclusion.

A review of the record indicates that the electrical lines in question were in a "distribution" corridor. In issuing the underlying opinion, however, I believe the

importance of the difference between a "distribution" corridor and a "transmission and subtransmission" corridor was not fully realized. The court broached the issue at oral argument. Rather than clarify the dichotomy, however, the difference was unfortunately blurred further.

At oral argument appellee Asplundh's counsel conceded the tree was within 20 feet of the conductor; as such, he conceded it was within the inspection zone. Subsequent to establishing this, the following exchange took place:

"[The Court:] Is that inspection zone adjacent to the transmission clearing zone?

"[Asplundh's Counsel:] It's within five feet, Your Honor.

"[The Court:] So, it is?

"[Asplundh's Counsel:] Yes.

"[The Court:] So it does fall within that - - tree removal, trees that are to be removed are diseased trees.

"[Asplundh's Counsel:] Diseased trees that constitute a hazard to the conductor.

"[The Court:] That's not what the contract says."

The court, with counsel, subsequently perused the portion of the contract highlighting which trees are "expected" to be removed. The court underscored that although trees representing a hazard to the conductors fall within this category, so do priority trees which are adjacent to the transmission clearing zone corridor that are "diseased." At no point during or subsequent to this

discussion did counsel clarify that the clearing zone at issue was a distribution clearing zone which is fundamentally distinct from a transmission clearing zone.

I believe the record failed to clearly delineate the difference between distribution lines and transmission lines. However, aware of the distinction, it is clear to me that appellees were under no obligation to remove the subject tree and, as a result, even assuming a duty was owed, there is no way they could have breached the standard of care.

Under the tree removal provisions, the contract directs that certain trees are "expected to be removed." The underlying opinion relied heavily on the tree removal provision directing 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." I believe, unlike the majority to this judgment, there is no ambiguity in this clause as a matter of law. Following the majority's logic would impose an impossible duty of inspecting all trees in any corridor within an inspection zone and removing those that are priority trees regardless of whether they pose a threat to the lines. Such a standard of care imposes an obligation that is impracticable, excessive, and unreasonable.

In this case, I believe a duty to remove would be triggered *only if* the tree presented a hazard to the lines. Given the ten degree lean away from the lines and the unbalanced crown, I believe as a matter of law, the tree in this case did not constitute such a hazard.

Because I would hold there would be no way in which appellees could have breached the standard of care as defined by the contract, I would grant Ohio Edison's and Asplundh's applications to reconsider and vacate the opinion issued by this court in *Huff v. First Energy Corp.*, 11th Dist. No. 2009-T-0080, 2010-Ohio-1456, released March 31, 2010.