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*Harrington, Hoppe & Mitchell, Ltd.*

LISA G. HUFF, et al.	)	SUPREME CT. CASE NO. 2010 0857
	)	On Appeal from the
Plaintiffs-Appellees	)	Trumbull County Court
	)	of Appeals, Eleventh
v.	)	Judicial District
	)	
FIRSTENERGY CORP., et al.	)	Court of Appeals
	)	Case No. 2009 T 00080
Defendants-Appellants	)	

**MOTION OF APPELLANT OHIO EDISON COMPANY  
FOR RECONSIDERATION**

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## MOTION

Now comes Appellant Ohio Edison Company (“Ohio Edison”), by and through counsel and, pursuant to S. Ct. Prac. R. XI, §2, moves this Ohio Supreme Court to reconsider the August 25, 2010 four-to-two decision<sup>1</sup> to decline jurisdiction of this case. Mindful that a motion for reconsideration “shall be confined strictly to the grounds urged for reconsideration” and “shall not constitute a re-argument of the case,” Ohio Edison seeks only to emphasize the significant legal concerns and collateral consequences arising from the Eleventh District’s Decision.

### BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

The Eleventh District’s Opinion muddles the sparse Ohio case law regarding third party beneficiary analysis and ravages fundamental and long-standing tenets of contract law.

The consequence of the Eleventh District’s Opinion is to allow strangers to a contract to interject their interpretation to contradict the intent of the actual contracting parties. The “purpose of contract construction is to discover and effectuate the intent of the parties.” See, e.g., *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 313, 1996 Ohio 393. Ohio case law likewise confirms that the contracting parties’ intent is paramount to determining whether a contract provides benefits to strangers to the contract. In *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St.3d 36, this Court accepted the “intent to benefit” test described in *Norfolk & Western Co. v. United States* (C.A. 6, 1980), 641 F.2d 1201, 1208 (“Under this analysis, if the promisee intends that a third party should benefit from the contract, then that third party is an ‘intended beneficiary’”). In the past, this Court has reconsidered prior decisions which “consciously [depart] from the tenet that the intent

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<sup>1</sup> Judge Lanzinger not participating.

of the parties controls the interpretation of a contract. See *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 221, 2003 Ohio 5849, ¶19.

The Eleventh District's Opinion empowers an attack upon well-established contract law by allowing third parties and courts to disregard the intent given to a written contract by the contracting parties themselves. A "plaintiff who is not a party to the contract is not in the position to urge a construction of the contract which would be detrimental to both parties to the contract." *Cook v. Kozell* (1964), 176 Ohio St. 332, 336. This precedent creates an anomalous and untenable situation where contracting parties will be forced to litigate with strangers portions of their agreements *upon which the contracting parties wholly agree*.

- A. **The Eleventh District's Opinion allows strangers to a contract to interject their interpretation of contract provisions in direct contradiction of the agreed and unrefuted intent of the actual contracting parties.**

This is not a case where the contracting parties disagree as to the intent of the contract provision at issue. Both contracting parties are present and agree what was intended by the "on-the-job accident prevention" provision. Further, the provision is unambiguous and the contracting parties have operated under it for years without dispute. The Opinion below threatens to create a watershed where third parties can change the meaning of a contract to which the contracting parties agreed and have operated for years.

The Court of Appeals took the first line from the following paragraph of the contract between Ohio Edison and Asplundh and, purportedly applying contract law, determined that those contracting parties *may have* intended to 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” (Opinion, ¶61):

The Contractor shall plan and conduct work to adequately safeguard all persons and property from injury. The Contractor shall take the necessary precautions to render the work secure in order to decrease the probability of accident from any cause and to avoid delay in completion of work. The Contractor shall use proper safety appliances and provide first aid treatment and ambulance for emergency treatment of injuries and shall comply with all applicable Federal, State, and local laws, rules and regulations with regard to the safe performance of the work.

“The construction of the written contract is a matter of law.” *Saunders v. Mortensen*, 101 Ohio St. 3d 86, 88, 2004 Ohio 24, ¶9. “A court, however, is not permitted to alter a lawful contract by imputing an intent contrary to that expressed by the parties.” *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 219, 2003 Ohio 5849, ¶12.

Initially, the Court of Appeals somehow found the foregoing contract provision potentially supported a contractual duty for Ohio Edison. *Nothing* in that entire paragraph, let alone in the excerpt relied upon by the Eleventh District, even mentions Ohio Edison. The “Contractor” here is Asplundh. Restatement of the Law 2d Contracts, §304, expressly confirms that, where a third party beneficiary right exists, it creates a duty “in the promisor,” again Asplundh, *not the promisee*, here Ohio Edison. Nevertheless, the Eleventh District expressly stated that, if “a party is an intended beneficiary, the promisee and the promisor owe that party a duty pursuant to the contract into which they entered” (Opinion, ¶53). Not only did the Court of Appeals’ Opinion disregard the contracting parties’ intent and the foregoing Restatement provision, it disregarded the clear wording of the contract.

The contracting parties, Ohio Edison and Asplundh, both confirmed that it was their intent that the foregoing provision be an “on-the-job accident prevention” provision as discussed in *Norfolk*

& *Western, supra* at p. 1209. In fact, during the entire duration of this contract, both contracting parties treated it as such.

Further, while the Court of Appeals focused solely upon what interpretations it could generate from the first sentence of the foregoing provision, in the context of the entire paragraph and entire contract, it is irrefutable that the foregoing provision relates to job site safety. A “contract is to be read as a whole and the intent of each part gathered from a consideration of the whole.” *Saunders, supra* 101 Ohio St.3d at p. 89, citing *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.* (1997), 78 Ohio St.3d 353, 361.

Conversely, *nothing* before the Appellate Court supported the theoretical suggestion that the foregoing provision was intended to benefit a traveler on the nearby roadway, such as Lisa Huff, more than five years after Asplundh worked near this site. This contract deals with the dynamics of nature, including tree growth and weather. It is unrefuted that contractors inspect these circuits once during every five-year cycle. If perpetual safety was being guaranteed by the foregoing provision, there would be no need for the site to be revisited. Moreover, such cyclical inspection is mandated by the PUCO. See, for example, OAC 4901:1-10-27(D)(1). “Extrinsic evidence is admissible to ascertain the intent of the parties when . . . circumstances surrounding the agreement give the plain language special meaning.” *Graham, supra* at pp. 313-14. Industry standards and PUCO guidelines corroborate the jobsite safety meaning of this provision under which Ohio Edison and Asplundh have operated for years.

Appellees presented no extrinsic evidence and relied only upon the single sentence from a single paragraph of the multi-page contract. Appellees’ entire case has been founded upon an effort

to disregard the unrefuted intent of the contracting parties, as that intent has been demonstrated in the contract language itself. Unless this Court wishes to abrogate the aforementioned foundations of contract interpretation, and allow third parties to retrospectively dictate the contracting parties' intent in forming a contract, this Court must accept jurisdiction and reverse the Court of Appeals.

**B. What is left to be decided upon remand of this case or in the presentation of any case where the contracting parties agree to the meaning and intent of *their* contract?**

The absurdity of the Court of Appeals' remand is readily evident from a consideration of the likely trial presentation. The contract will be placed in evidence. A jury will review that provision's directive that the "Contractor shall use proper safety appliances and provide first aid treatment and ambulance for emergency treatment of injuries," and realize that those requirements were not intended to be perpetually available. Ohio Edison and Asplundh will confirm that the foregoing provision is for on-the-job safety and not a perpetual insurance policy.

Unless the Trial Court abdicates its responsibility to determine the contracting parties' intent and further abdicates its duty to determine issues of law, the Trial Court would have to enter a directed verdict. The only way in which this matter could be decided favorably to Appellees would be if the contracting parties' agreed intent was thrown out and a wholly contrary interpretation assigned to the contract provision. While a remand of this case to the Trial Court clearly would involve a waste of resources of the courts and the parties, the broader concern is that such a remand condones a colossal shift in the long-standing tenets of contract law.

## CONCLUSION

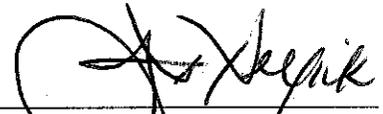
In the jurisdictional memoranda filed in this case, the one sentence of the on-the-job safety provision relied upon by the Court of Appeals was presented without citing that provision in context. Even without context, two justices concluded that the Eleventh District's handling of that provision merited review by this Court. Ohio Edison anticipates that, with that sentence in its full context, a majority of this Court will rightfully see that there is absolutely no basis for this action to continue and, more importantly, that, if left unreversed, the Eleventh District's Opinion threatens to wreck the structure of contract law in Ohio. The havoc that the Opinion below can create is not limited to the parties of this case nor even to similarly-situated personal injury plaintiffs, utilities and their contractors. The Eleventh District's Opinion has the potential to undermine the *legal* interpretation of contract intent by condoning the substitution of a third party's belief as to what a contract may mean for the agreed intent of the actual parties to the contract.

Every contracting party and every stranger claiming third party beneficiary rights which are contrary to the intent of the contracting parties serves to lose by the perpetuation of the Opinion below. The trial scenario, described above, aimed at contradicting the undisputed intent of a contract provision, will allow courts to abandon their duties of legally interpreting contracts and will breed personal injury cases exploring any contract which may be related by a thread to an accident, all in derogation of fundamental contract law and at the cumulative expense of judicial resources and the parties' finances.

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Because the contracting parties' intent here is irrefutable and because the intent of contracting parties must remain sacrosanct in contract interpretation, Ohio Edison reiterates its request that this Court reconsider its August 25, 2010 Entry and accept jurisdiction of this action.

Respectfully submitted,



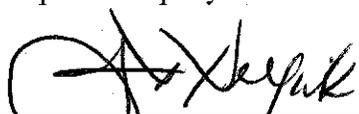
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**CERTIFICATE OF SERVICE**

This is to certify that a true and accurate copy of the foregoing *Motion of Appellant Ohio Edison Company for Reconsideration* has been served via ordinary U.S. Mail this 2<sup>nd</sup> day of September, 2010 upon the following:

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