

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

MOTION FOR RECONSIDERATION

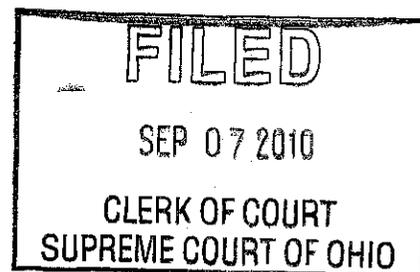
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Now comes the appellant, Asplundh Tree Expert Company, and, pursuant to S. Ct. Prac. R. XI, §, requests this court reconsider the August 25, 2010 denial of jurisdiction to review the matter at bar. The appellate court's decision concludes that a party may be deemed an intended beneficiary to a contract between an electric utility and a tree service contractor for the provision of vegetation line clearance work for utility lines. The appellate court reached this conclusion in spite of finding that the subject tree which caused injury to Lisa Huff did not pose a threat to utility equipment. The court premised its conclusion on the basis of a boilerplate "on the job" safety provision in the contract. This conclusion will necessarily impact the meaning of similarly worded "on the job" safety provisions found in service and construction contracts throughout this state. Separate and apart from the foregoing, the decision of the appellate court imposes a duty on Ohio electric utility providers to protect the general public from tree hazards which pose no threat to utility equipment.

I. THE ORIGINAL DECISION

In the original decision issued by the Eleventh District Court of Appeals on March 31, 2010, Judge Rice, writing for the majority, identified the following contract language as setting forth a "plausible" basis by which Lisa Huff could be deemed an "intended beneficiary" under an overhead line clearance contract entered into between Ohio Edison and contracting tree service company, Asplundh: "The contractor shall plan and conduct the work to adequately safeguard all persons and property from injury." (Appellate decision, pg. 18).

The appellate court thereafter concluded that this provision could be construed to impose a duty on the contracting tree service and the electric utility to protect the general public from a tree hazard to a public road when read in conjunction with another contractual provision: "[a]ll priority trees located adjacent to the sub-transmission and transmission clearing zone corridor

that are leaning towards the corridor, are diseased, or are significantly approaching the clearing zone corridor.” (Appellate decision, pg. 19).

II. THE APPELLATE COURT RULING ON THE MOTION FOR RECONSIDERATION.

Appellant filed a motion for reconsideration arguing, among other things, that the secondary contractual provision cited in support of the appellate court’s decision was not applicable under the facts of this case. On March 27, 2010, the motion for reconsideration was denied in a 2 – 1 vote. The dissenting vote was issued by Judge Rice, who authored the original opinion. Therein, Judge Rice warned that the holding of the two judge majority would impose an unreasonable and impractical duty on the electric utility and its contracted tree service provider, stating:

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 impractical, excessive, and unreasonable.” (See ruling on motion for reconsideration, pg. 5).

The two member majority denied the motion for reconsideration, concluding that the “on the job” safety clause in the contract between First Energy and Asplundh was ambiguous as to whether it applied only when work was performed under the contract or to incidents occurring long after the work was completed (in this case, more than five years). (See ruling on motion for reconsideration, pg. 5).

III. THE APPELLATE COURT DECISION INTERPRETS A BOILERPLATE “ON THE JOB” SAFETY PROVISION COMMONLY FOUND IN SERVICE AND CONSTRUCTION CONTRACTS THROUGHOUT THIS STATE SO AS TO IMPOSE OBLIGATIONS TO INTENDED BENEFICIARIES FOR RISKS WHICH BEAR NO RELATION TO THE SUBJECT MATTER OF THE CONTRACT AND WHICH OCCUR LONG AFTER THE CONTRACTED WORK IS COMPLETED.

The “on the job” safety provision at issue in this case is commonly found in service and construction contracts. Numerous Ohio courts have reviewed similar safety provisions and rejected a claimant’s reliance on such language as a means of obtaining rights as an “intended beneficiary” to the contract. For instance, in *New York, Chicago and St. Louis v. Hefner Construction Company* (1967) 9 Ohio App.2d 174, the court considered a claimant’s argument that he was an “intended beneficiary” under the terms of a contract between the State of Ohio and a roadwork contractor for the construction of a public highway. The “on the job” safety provision examined in *Hefner* provided::

“The Required Contract Provisions for Federal Aid Projects” prescribe that “the contractor shall provide all safeguards * * * and take any other needed actions * * * *reasonably necessary to protect the life and health of employees on the job and the safety of the public and to protect property in connection with the performance of the work governed by the contract.*” (Emphasis added) *Id.* at 178.

In rejecting the claimant’s argument that he was an “intended beneficiary” to the contract with respect to an injury occurring off site, the *Hefner* court held:

It is also the opinion of this court that the provisions of “Section VIII. Safety; Accident Prevention” of “Required Contract Provisions for Federal Aid Projects” are unambiguous and certain, have application only to the safety and accident prevention on the work project, and have no application to a collision, occurring here, off the work project. *Id.* at 178.

This holding was reviewed and followed by the appellate court in *Fitzpatrick v. Miller Bros. Construction* (Sept. 4, 1986), Adams Cty. App. No. 428-429-430. Therein, the court similarly reviewed a contract between the State of Ohio Department of Transportation and a contractor for construction of a highway improvement project. The “on the job” safety provision contained in this contract provided:

X Safety: Accident Prevention

In the performance of this contract, the contractor shall comply with all applicable federal, state and local laws governing safety, health and sanitation. The contract shall provide all safeguards, safety devices and protective equipment and take all other needed actions, on its own responsibility, as the state highway department contracting officer may determine, *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 governed by this contract.* (Emphasis added) *Id.* at ¶ 3.

Similar to the claimant in *Hefner Construction*, the claimant in *Fitzpatrick* was not injured during the course of work under the contract, but nevertheless claimed that he was an intended beneficiary contract by virtue of the “on the job” safety provision. The *Fitzpatrick* court rejected this argument, citing to the reasoning set forth in *Hefner Construction*.

Finally, in *Norfolk Western Co. v. United States America* (6 Cir. 1980) 64 F.2d 1201, the Sixth Circuit, applying Ohio law, reviewed a claimant’s allegation that he was an intended beneficiary under the terms of a construction contract between the United States and a contractor for the construction of a disposal facility to contain spoiled dredge from the Huron River. The “on the job” safety provision at issue in *Norfolk Western* provided:

Accident Prevention

In order to provide safety controls for protection to the life and health of the employees and other persons; for the prevention of damage to property, materials, supplies, and equipment; and for avoidance of work interruptions in the performance of this contract, the contractor shall comply with all pertinent provisions in the Corps of Engineers Manual, EM385-1-1, dated March, 1967, entitled: “The General Safety Requirements” as amended, and will also take and cause to be taken such additional measures as the contracting officer may determine to be reasonably necessary for the purpose.

The Sixth Circuit citing again to *Hefner Construction*, held that this common “on the job” safety provision did not impose legal responsibility upon the contracting parties for events which did not occur where the work was being performed. *Id.* at 1207.

The holdings in these decisions illustrate both the common nature of the “on the job” safety provision in service and construction contracts and the prior precedent which rejects the interpretation of such provisions so as to impose obligation on the contracting parties to protect persons and property from events which do not occur during the actual performance of the contracted work. The appellate court’s interpretation of these boilerplate safety provisions will subject an untold number of service and construction contracts to claims of intended beneficiaries for events occurring long after the contracted construction has been completed.

IV. THE APPELLATE COURT DECISION IMPOSES A DUTY ON AN ELECTRIC UTILITY AND TREE SERVICE PROVIDER TO PROTECT THE GENERAL PUBLIC FROM HAZARDS WHICH POSE NO THREAT TO UTILITY EQUIPMENT.

The law in Ohio regarding the duty of care owed by an electric utility to the general public is that the utility has a duty to exercise the highest degree of care consistent with the practical operation of such a business in the construction, maintenance, and inspection of such equipment. *Hetrick v. Marion-Reserve Power Co.* (1943), 140 Ohio St.3d 347. No Ohio court, however, has ever held that this duty applies to risks wholly unrelated to the “operation . . . construction, maintenance and inspection” of utility equipment. In fact, numerous Ohio courts have held that there is no duty of care to maintain trees to protect the general public on roads in close proximity to utility equipment. *Walker v. Dudson* (May 6, 1996), Claremont Cty. App. No. CA 45-10-071; *Estate of Durham v. Amhert* (1989), 52 Ohio App.3d 106; *Massir v. Dayton Power & Light Co.* (Sept. 21, 1992), Fayette Cty. App. No. 91-10-21 and CA-91-10-205.

The decision by the appellate court in this case departs from this established body of law so as to impose a duty on an electric utility equipment despite finding that “it is undisputed that the tree was not a hazard to the power lines.” (Appellate decision, pg. 6). The appellate court held that the electric utility and its contracted tree service provider potentially owed a duty to the

general public by virtue of the finding that Ms. Huff could be deemed an intended beneficiary to the contract between the utility and Asplundh. This holding unquestionably expands the liability exposure of all electric utility providers who maintain utility power running along some thousands of miles of Ohio roadways.

V. CONCLUSION

Appellant would respectfully request that this court reconsider its refusal to accept jurisdiction in this case. This case involves a matter which impacts service and construction contracts containing similar “on the job” safety provisions. It likewise greatly expands the liability exposure of all Ohio electric utility providers which maintain power lines along the thousands of miles of Ohio’s public roadways.

Respectfully submitted,



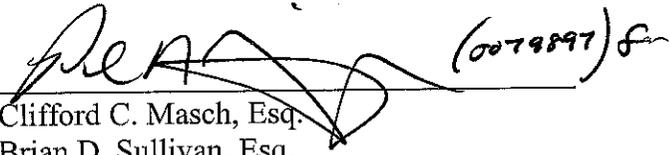
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CERTIFICATE OF SERVICE

A copy of the foregoing document was sent by regular U.S. mail this 7th day of September, 2010 to:

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