

IN THE SUPREME COURT OF OHIO

LISA G. HUFF, et. al.) Supreme Court of Ohio Case No. 2010-0857
)
 Plaintiffs-Appellees)
)
 vs.) Appeal from the Trumbull County
) Court of Appeals, Eleventh Judicial
) District
)
) Court of Appeals Case No. 2009 T 00080
)
 FIRST ENERGY CORP., et. al.)
)
 Defendants-Appellants)

PLAINTIFFS-APPELLEES MOTION TO DISMISS

Pursuant to Sup. Ct. Prac. R. 12.1, Plaintiffs-Appellees by and through the undersigned counsel, respectfully requests this Court to dismiss this appeal as having been improvidently accepted. A memorandum in support is attached.

Respectfully submitted,

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& HARSHMAN, LLC

BY: 

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MEMORANDUM IN SUPPORT OF THE MOTION TO DISMISS

Sup. Ct. Prac. R. 12.1 states,

When a case has been accepted for determination on the merits pursuant to S.Ct. Prac. R. 3.6, the Supreme Court may later find that there is no substantial constitutional question or question of public or great general interest, or that the same question has been raised and passed upon in a prior appeal. Accordingly, the Supreme Court may sua sponte dismiss the case as having been improvidently accepted, or summarily reverse or affirm on the basis of precedent.

On May 13, 2010, Ohio Edison filed its Notice of Appeal and Memorandum of Jurisdiction to this Court; and on May 18, 2010, Asplundh did the same, both identifying this matter as a discretionary appeal and a case of public or great general interest. On August 25, 2010, this Court declined jurisdiction to hear the case. Appellant, Ohio Edison filed a Motion for Reconsideration on September 3, 2010; and Appellant, Asplundh filed its Motion for Reconsideration on September 7, 2010. On October 27, 2010, this Court improvidently granted Appellants motions for reconsideration and ordered that the discretionary appeals are accepted.

In reaching its decision reversing in part the decision of the Trumbull County Court of Common Pleas, the Eleventh District Court of Appeals determined, the contractor's safety obligations set forth under the contract are ambiguous, therefore, there is a genuine issue of material fact regarding whether Lisa Huff has enforceable rights under the contract as an intended third-party beneficiary. The Court stated, "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. ... 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." *Huff v. First Energy Corp.* 2010 WL 1253754, 9 (Ohio App. 11 Dist.) (Ohio App. 11 Dist.,2010)

In the memoranda in support of jurisdiction as well as the motions for reconsideration Appellants direct their arguments to the language of a contract executed between Appellants, whereby Asplundh would provide utility vegetation management services for Ohio Edison effective January 1, 2001 through December 31, 2004. This Court's time is being improvidently utilized reviewing contract terms between parties that expired six years ago and were never controlled by public policy. Appellant, Ohio Edison could eliminate that contract need altogether by choosing to perform the relevant tasks through its own workforce. Therefore, the application of law to this single contract issue is of no public concern or interest. This case involves application of well-settled law to case-specific facts. If the parties to the contract do not want Lisa Huff and/or any third parties to have any enforceable rights under the contract as intended third-party beneficiaries that can be explicitly and unambiguously stated in the contract.

It is axiomatic that a court interpreting a contract is attempting to give effect to the contracting parties' intent. *Aultman Hospital Assn. v. Community Mutual Ins. Co.* (1989), 46 Ohio St.3d 51, 53. This effort is primarily based on the words used by the parties to the contract. *Kelly v. Medical Life Ins. Co.* (1987), 31 Ohio St.3d 130, par. one of syllabus. "The intent of the parties is presumed to reside in the language they choose to employ in the agreement." *Id.* "It is not the function of a court to protect a party to a contract against the consequences ensuing therefrom merely because the action of the party entering into the agreement may later develop an improvident situation as far as he is concerned." *Krueger v. Schoenling Brewing Co.* (1948), 82 Ohio App. 57, 61, 79 N.E.2d 366, 368.

"Ohio courts from the earliest time have recognized the principle that a written contract may be abandoned, waived, superseded, modified or annulled by a later contract * * *." *Individual Damp Wash Laundry Co. v. Meyers* (C.P.1938), 26 Ohio Law Abs. 142, 144, 10 O.O.

517, 519, 3 Ohio Supp. 69, 71 citing *Thurston v. Ludwig* (1856), 6 Ohio St. 1; *Rutherford v. Brachman* (1884), 40 Ohio St. 604; *Sprecher v. Dwyer* (1926), 8th Dist., 5 O.L.A. 52; *Jarmusch v. Otis Iron & Steel Co.* (1901), 3 Ohio Cir.Ct.R.,N.S., 1. As Justice Cardozo stated, although two parties enter into “a contract, no limitation self-imposed can destroy their power to contract again * * *.” *Beatty v. Geggenheim Exploration Co.* (1919), 225 N.Y. 380, 381, 122 N.E. 378. In order to modify a contract the parties to that contract must mutually consent to that modification. *Nagle Heating & Air Conditioning Co. v. Heskett* (1990), 66 Ohio App.3d 547, 585 N.E.2d 866.

In the case at bar, the contract and its terms were written and agreed upon by the Appellants. If the Appellants have determined that the language in the contract does not meet their needs and/or adequately protect their interests, Appellants can simply amend the contract and/or agree on a new contract. The decision of the Eleventh District Court of Appeals fails to raise a question of great general interest or a novel question of law. The Judgment Entry of the Eleventh District Court of Appeals does not announce any change in the law with regard to contracts. Cases that are of “public or great general interest” are cases that present, “novel questions of law or procedure [that] appeal not only to the legal profession but also to this Court's collective interest in jurisprudence.” *Noble v Colwell* (1989), 44 Ohio St 3d 92, 94. The instant case is not of public or great general interest. Instead, this case represents nothing more than an appeal of disappointed litigants. This Court need not, and should not, exercise jurisdiction.

Based on the foregoing, Appellees respectfully request this court to dismiss the case as having been improvidently accepted.

Respectfully submitted,

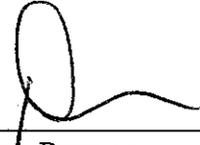
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss has been sent to Counsel for Defendants/ Appellants, Attorney John T. Dellick, at 26 Market Street, Suite 1200, PO Box 6077, Youngstown, OH 44501-6077; Attorneys Clifford C. Masch and Brian D. Sullivan, at 1400 Midland Bldg., 101 Prospect Avenue West, Cleveland, OH 44115-1091, by regular US Mail, on this 2 day of January, 2011.



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