

IN THE SUPREME COURT OF OHIO

LISA G. HUFF, et al.	)	SUPREME CT. CASE NO. 10-0857
	)	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)	

MERIT BRIEF OF APPELLANT OHIO EDISON COMPANY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
STATEMENT OF FACTS 1

ARGUMENT

Proposition of Law No. 1: There can be no third party beneficiary to a contractual promise when the contracting parties do not intend one.

Proposition of Law No. 2: A general on-the-job safety provision in a contract does not create a perpetual duty and should not be construed to provide incidental benefits to third parties where the contracting parties did not intend to create rights in parties without privity.

Proposition of Law No. 3: The recipient of a contractual promise is *not* the benefactor of a third party beneficiary. Restatement of the Law 2d, Contracts, §302, applies only to promisors, *not promisees* (Restatement of the Law 2d, Contracts, §304, *adopted and applied*).

Proposition of Law No. 4: Before a contractual promise can create tort duty to a third party, that promise must satisfy a duty owed by the promisee to the purported beneficiary. (*Hill v. Sonitrol of Southwestern Ohio, Inc.*, (1988), 36 Ohio St.3d 36, *explained and applied*.)

CONCLUSION 18
PROOF OF SERVICE 20

APPENDIX

Appendix A: Judgment Entry of the Trumbull County Common Pleas Court (July 15, 2009) A1
Appendix B: Opinion and Judgment Entry of the Eleventh District Court of Appeals (March 31, 2010) B1
Appendix C: Ohio Edison’s Notice of Appeal to Ohio Supreme Court (May 13, 2010) C1
Appendix D: Judgment Entry of the Eleventh District Court of Appeals Denying Applications for Reconsideration (May 27, 2010) D1

Appendix E: Judgment Entry of the Eleventh District Court of Appeals Denying Asplundh’s Motion to Certify (June 8, 2010)..... E1

Appendix F: Ohio Supreme Court Entry Declining Jurisdiction (August 25, 2010)..... F1

Appendix G: Ohio Supreme Court Entry Granting Motion for Reconsideration And Accepting Jurisdiction (October 27, 2010).....G1

TABLE OF AUTHORITIES

CASES:

Acuity v. Interstate Construction, Inc., 2008 Ohio 1022 (Ohio App. 11 Dist.).....13

Amborski v. Toledo, 67 Ohio App.3d 47, 52 (Ohio App. 6 Dist. 1990)10

Anderson v. Olmsted Utility Equipment, Inc. (1991), 66 Ohio St.3d 124, 13014

Ankeny v. Vodrey (September 23, 1999), Seventh District Case No. 96-CO-00047 (Ohio App. 7 Dist.).....14

Brewer v. H&R Concrete, Inc. (February 5, 1999), 2nd Dist. Case No. 17254.....7

Chemical Realty Corp. v. Home Federal Savings & Loan Assn. of Hollywood (Ct. App. N.C. 1987), 351 S.E.2d 786, 791.....11

Cincinnati Ins. Co. v. Cleveland, 2009 Ohio 40437,10

City of Painesville Employees Credit Union v. Hietanen, 2006 Ohio 3770 (Ohio App. 11 Dist.).....6

Clearwater Constructors, Inc. v. Gutierrez (Ct. App. Tex. 1981), 626 S.W.2d 789, 790....7,11

Cleveland Electric Illuminating Co. v. City of Cleveland (1988), 37 Ohio St.3d 5011

Cleveland Metal Roofing & Sealing Co. v. Gaspard (1914), 89 Ohio St. 185.....7

Commercial Bank of Bluefield v. St. Paul Fire & Marine Ins. Co. (S. Ct. W. Va. 1985).....11

Conver v. EKH Co., 2003 Ohio 5033 (Ohio App. 10 Dist.)17

Cook v. Kozell (1964), 176 Ohio St. 332, 3366

Davis v. Loopco Industries, Inc. (1993), 66 Ohio St.3d 64, 669

Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth. (1997), 78 Ohio St.3d 353, 36110

Graham v. Drydock Coal Co., 76 Ohio St.3d 311, 313, 1996 Ohio 393.....9, 12

Heckert v. Patrick (1984), 15 Ohio St.3d 40214, 15

Hill v. Sonitrol of Southwestern Ohio, Inc. (1988), 36 Ohio St.3d 36.....6, 7, 8, 13, 14

Kelly v. Med. Life Ins. Co. (1987), 31 Ohio St.3d 13013

King v. Rainbolt (S. Ct. Ok. 1973), 515 P.2d 228, 23011

Laughlin v. Cleveland (1959), 168 Ohio St. 57614

McDonough v. Butler Rural Electric (July 9, 1984), 12 Dist. Case No. CA84-01-01317

Menifee v. Ohio Welding Products, Inc. (1984), 15 Ohio St.3d 75, 7715

Mussivand v. David (1989), 45 Ohio St.3d 314, 318.....14

New Mexico Livestock Board v. Dose (S. Ct. N.M. 1980), 94 N.M. 68, 73, 607 P.2d 606, 611.....11

New York, Chicago & St. Louis Rd. Co. v. Heffner Construction Co. (1967), 9 Ohio App.2d 174.....8

Norfolk & Western Co. v. United States (C.A. 6, 1980), 641 F.2d 12017, 8, 10, 14, 18

Otte v. Dayton Power & Light Co. (1988), 37 Ohio St.3d 3317

Parke v. Ohio Edison, 2005 Ohio 6153 (Ohio App. 11 Dist.).....15, 16

Platt v. Cleveland Elec. Illuminating Co., 2009 Ohio 7003 (Ohio App. 11 Dist.).....16

Purcell v. Foremost Machine Builders, Inc. (October 8, 1982), 6th Dist. Case No. L-82-19815

Ruprich v. Cincinnati Gas & Electric Co., (November 24, 1986), 12 Dist. Case No. CA86-02-00917

Saunders v. Mortensen, 101 Ohio St.3d 86, 89, 2004 Ohio 249, 10

Shevling v. Shevling (S. Ct. Kan. 2004), 278 Kan. 356, 361, 97 P.3d 1036, 104010

Standard Accident Ins. Co. v. Knox (S. Ct. Tex. 1944), 144 Tex. 296, 303, 184 S.W.2d 612, 615.....11

Walker v. Wittenberg, Delony & Davidson, Inc. (S. Ct. Ark. 1967), 247 Ark. 97, 106, 412 S.W.2d 621, 630.....11

Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 221, 2003 Ohio 58499

RESTATEMENT PROVISIONS

Restatement of the Law 2d, Contracts, §3024, 18

Restatement of the Law 2d, Contracts, §30412, 13

Restatement of the Law 2d, Contracts, §3157

STATEMENT OF FACTS

The Ohio Edison-Asplundh Contract

In 2001, Ohio Edison Company ("Ohio Edison") entered into an agreement with Asplundh Tree Expert Company ("Asplundh"), the Contract for Overhead Line Clearance (the "Contract"), wherein Asplundh, as an independent contractor, was to maintain trees and vegetation which threatened Ohio Edison's electrical facilities. A provision in the Vegetation Management Guidelines incorporated into the Contract required Asplundh to maintain a safe work area (the "on-the-job-accident prevention provision"):

SAFETY PRECAUTIONS AND PROTECTION TO PROPERTY

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.

That provision appears among others discussing traffic control, guards and protective devices, and work scheduling and progression.

At ¶24, the Contract expressly confirms that "[t]here are no understandings or agreements, written, oral or implied, between the Parties with respect to the subject matter of this Contract except those herein contained. No amendment of or change in this Contract shall be effective unless made in writing and executed by the Parties."

In order to fulfill the Contract, Asplundh inspected vegetation along Ohio Edison's electrical circuits to determine what trees or other vegetation posed a hazard to Ohio Edison's

lines and equipment. Asplundh then rectified offending vegetation pursuant to the Vegetation Management Guidelines. Thereafter, an Ohio Edison representative would look down a line of utility poles to see if Asplundh left any trees interfering with the electrical lines. Ohio Edison did not perform a tree-by-tree retracing of Asplundh's work nor did Ohio Edison perform its own tree-by-tree inspection. Ohio Edison would only evaluate a specific tree if it was expressly brought to Ohio Edison's attention. This procedure was confirmed in Shaffer Affidavit, T. 21.¹

The June 2004 Storm and Lisa Huff's Accident

During a June 2004 storm, Appellee Lisa Huff was injured when a rural tree on private property broke and fell upon her as she was walking in the roadway. Lisa Huff does not remember the accident. The National Weather Service had issued a severe storm warning. The only two witnesses at the property described a severe storm. Wendy Kowalski characterized the wind as "fierce," "very strong" and "unusual" and acknowledged that her "first thought was . . . get out of here because another tornado was coming." Gerald E. Braho, the property owner's father, also described the wind as "severe" and estimated its speed at 50, 60, 70 miles per hour.

Twenty feet from the privately-owned tree was a utility pole line. The electrical line was part of Ohio Edison's Hartford W220 distribution circuit.

Appellants' and Appellees' utility vegetation management experts uniformly confirmed that electrical utilities hire contractors to maintain trees and other vegetation in close proximity to electrical distribution lines in an effort to preserve electrical reliability and to reduce the risk of electrical contact.

¹ In this Brief, the designation "T." refers to the trial document designation as provided by the Clerk of Courts, "A." refers to the appellate court docket number," and "App." refers to documents in the appendix hereto.

In 2001, Asplundh had performed work at the property where the tree was located. There was no evidence that Asplundh worked on this specific tree or that this tree, in any way, was then a hazard to Ohio Edison’s electrical equipment (App. B, ¶20). There was no evidence that Ohio Edison was on this property in 2001 or that this tree was called to Ohio Edison’s attention at any time before Lisa Huff’s accident.

In 2006, Lisa Huff and her family sued the township, the homeowners, Ohio Edison, Asplundh, and Ohio Edison’s holding company, FirstEnergy Corporation (“FirstEnergy”). With Summary Judgment Motions pending, Appellees dismissed that first lawsuit. In 2008, Appellees refiled their claims against the homeowners, Ohio Edison, Asplundh and FirstEnergy. Appellees settled with the homeowners.

The Trial Court Grants Summary Judgment

Ohio Edison, FirstEnergy and Asplundh again moved for summary judgment. In opposing Ohio Edison’s Summary Judgment Motion, Appellees did not assert that the Contract created any duty on the part of Ohio Edison in favor of Lisa Huff (see T. 65, T. 70). In opposing Asplundh’s Summary Judgment Motion, Appellees made references to the Vegetation Management Guidelines incorporated into the Contract. Beyond that, Appellees confirmed that they were claiming “that Asplundh negligently undertook to perform a duty owed to Ohio Edison.” (T. 63, p. 9 – emphasis changed from original.)

On July 15, 2009, the Trial Court granted summary judgment to all Defendants (App. A), finding a “complete lack of any evidence that . . . Ohio Edison had notice whatsoever that the interior of one tree on a rural township road was decaying.” Further, the Trial Court agreed “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 of Appeals Reversal

In their Court of Appeals’ Briefs, Appellees twice cited the on-the-job-accident prevention provision but never argued that it or any part of the Contract created a duty for Ohio Edison to

Lisa Huff. Appellees' appeal to the Court of Appeals was based entirely upon tort theories. (See A. 5, A. 14.)

The Eleventh District affirmed the summary judgment in favor of FirstEnergy, but reversed as to Ohio Edison and Asplundh (App. B). The Court of Appeals confirmed that "there was no evidence indicating the subject tree was pruned or otherwise inspected [in 2001]" (App. B, ¶20), that "it is undisputed that the tree was not a hazard to the power lines" (App. B, ¶20), and that Appellees "were unable to demonstrate that [Ohio Edison] had notice of a patent defect in the tree" (App. B, ¶28). The Eleventh District confirmed that, unless there was a contractual basis of liability for Ohio Edison, the Trial Court had properly dismissed Ohio Edison (App. B, ¶52) ("the duty analysis in this case . . . turns on the language of the contract into which Ohio Edison and Asplundh entered"). The Court of Appeals focused upon one sentence from the Contract's on-the-job-accident prevention provision:

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

At ¶¶60-61 of its Opinion, the Court of Appeals discussed two interpretations of this provision, one where Lisa Huff was, at best, a mere incidental beneficiary with no enforceable rights, and another which expanded that provision into an agreement to insure the safety of anyone who traveled the neighboring roadway in subsequent years.

Although the Court of Appeals invoked Restatement of the Law 2d, Contracts, §302, it identified no Contract promise by Ohio Edison or a breach thereof by Ohio Edison. Instead, it reversed the grant of summary judgment to Ohio Edison based upon unspecified actions *outside of the Contract* (App. B, ¶62):

. . . 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 Huff 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 specialist.

The Court of Appeals disregarded the unrefuted testimony which, in fact, disclosed “the precise extent of [Ohio Edison’s] oversight and direction” and established that Ohio Edison did not inspect this tree and, pursuant to its relationship with Asplundh, would not have inspected this tree since it had not been called to Ohio Edison’s attention. (Shaffer Affidavit, T. 21; Carrier dep., T. 57, pp. 76-81.) Even the Court of Appeals acknowledged that there was no evidence that this tree was ever called to Ohio Edison’s attention. The Court of Appeals reached the impossible conclusion that Ohio Edison could somehow be liable for problems caused by a tree which Ohio Edison never saw and of which it had no knowledge whatsoever.

Ohio Edison and Asplundh moved for reconsideration in the Court of Appeals. Upon reflection, the Judge who wrote the original opinion did reconsider and confirmed that she would reinstate summary judgment for Ohio Edison and Asplundh (A. 24; App. D). The other two Court of Appeals Judges did not and Appellants timely brought this matter before this Ohio Supreme Court. No cross-appeal has been filed.

ARGUMENT

Proposition of Law No. 1: There can be no third party beneficiary to a contractual promise when the contracting parties do not intend one.

Proposition of Law No. 2: A general on-the-job safety provision in a contract does not create a perpetual duty and should not be construed to provide incidental benefits to third parties where the contracting parties did not intend to create rights in parties without privity.

A Litigant Who is Not a Party to the Contract Cannot Urge a Construction of the Contract Detrimental to the Contracting Parties

The Opinion below creates a watershed where third parties can contradict the meaning of a contract given to the contract by the contracting parties and pursuant to which they have

operated for years. 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. Even the Eleventh District has previously confirmed that, when third party beneficiary claims are asserted, any claimed ambiguity must be interpreted in favor of the contracting parties and cannot be interpreted to their detriment. See *City of Painesville Employees Credit Union v. Hietanen*, 2006 Ohio 3770 (Ohio App. 11 Dist.), ¶31.

Only Persons Intended by the Contracting Parties to Benefit From a Contract
Can Have Third Party Rights Under the Contract

In *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St.3d 36, this Court adopted the Restatement of the Law 2nd Contracts, §302:

§302. Intended and Incidental Beneficiaries

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

The foregoing provision expressly confirms that the existence of third party rights only exists to the extent necessary “to effectuate the intention of the parties [to the contract].” Only *intended* third party beneficiaries are entitled to enforce provisions within contracts to which they are not direct parties. No right of enforcement is available to an incidental beneficiary. See Restatement of the Law 2d, Contracts, §315 (“An incidental beneficiary acquires by virtue of the promise no right against the promisor or the promisee.”)

While courts applying third party beneficiary law uniformly attempt to ascertain the intention of the contract as to whether such rights exist or not, it has been noted that there has been some disagreement among the courts as to “whether the controlling intent is that of the promisor, the promisee or the mutual intent of the contracting parties.” See *Clearwater Constructors, Inc. v. Gutierrez* (Ct. App. Tex. 1981), 626 S.W.2d 789, 791. In *Hill*, 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. The *Norfolk & Western* Court took the position that the *promisee’s* intent was controlling. (“Under this analysis, if the promisee intends that a third party should benefit from the contract, then that third party is an ‘intended beneficiary’”). *Id.* Other Ohio Courts have appeared to similarly analyze the issue. “[T]he promisee must intend a benefit to flow to the third party that is not merely incidental to the contract.” *Cincinnati Ins. Co. v. Cleveland*, 2009 Ohio 4043, ¶30. See also *Brewer v. H&R Concrete, Inc.* (February 5, 1999), 2nd Dist. Case No. 17254, unreported (“[T]here must be evidence, on the part of the promisee, that he intended to directly benefit a third party, and not simply that some incidental benefit was conferred on an unrelated party by the promisee’s actions under the contract.” “[I]t must appear that the contract was entered into directly or primarily for the benefit of the third person.” *Id.* at ¶33, citing *Cleveland Metal Roofing & Sealing Co. v. Gaspard* (1914), 89 Ohio St. 185.

In the present case, whether the intent of the promisee, promisor or both contracting parties is controlling need not be decided. Both Ohio Edison and Asplundh agree that the provision cited by the Court of Appeals is a worksite safety provision and is not intended to indefinitely protect future visitors at or near the former work site.

The On-the-Job Accident Prevention Provision Does Not Perpetually Insure
the Work Site After the Work is Completed

In *Norfolk & Western*, the agreement between the United States and its contractor, Dunbar, contained, among other provisions, a provision that Dunbar “shall take proper safety and health precautions to protect the work, the workers, the public, and the property of others.” Norfolk & Western was not a party to that contract. When a dock collapsed, Norfolk & Western sued Dunbar and the United States, claiming that it was a third party beneficiary of the contract between Dunbar and the United States, by virtue of the foregoing and other provisions in that contract. The Sixth Circuit Court of Appeals reviewed the District Court’s analysis, including the District Court’s review of *New York, Chicago & St. Louis Rd. Co. v. Heffner Construction Co.* (1967), 9 Ohio App.2d 174. In *Heffner*, a third party beneficiary claim was pursued upon a contract provision which asserted 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 covered by the contract.” The Sixth Circuit agreed both with the *Heffner* Court and the *Norfolk & Western* District Court that those types of provisions, read in the context of the entire contract, “applied only to on-the-job accident prevention” and did not apply to general public safety outside the worksite.

Purportedly relying upon *Hill*, the Court of Appeals took the first line from the following Contract section and determined that Ohio Edison and Asplundh *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” (App. B, ¶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.

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. The Contract’s “on-the-job accident prevention” provision is unambiguous. “If a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined.” *Davis v. Loopco Industries, Inc.* (1993), 66 Ohio St.3d 64, 66. Clearly, that provision discussed Asplundh’s safe work practices while the work site was active. The contracting parties agree to its intent and scope.

The Contract exists solely to promote Ohio Edison’s need to have its electrical facilities free of interference from vegetation. In working to accomplish that goal, the Contract provides that the Contractor will work safely. Nothing in the Contract states that “work” was intended to have a meaning beyond utility vegetation maintenance, such as the arboricultural inspection of the health of trees in furtherance of protecting travelers on the adjacent roadway. At best, this on-the-job accident prevention provision created a duty on the part of Asplundh, *while Asplundh*

was performing its work. Appellate courts have held that a promise “made to the public at large” “does not lend itself to suit by third-party beneficiaries.” *Cincinnati Ins. Co. v. Cleveland*, *supra*, at ¶33, citing *Amborski v. Toledo*, 67 Ohio App.3d 47, 52 (Ohio App. 6 Dist. 1990).

While the Court of Appeals tried to imagine what interpretations it could find for the first sentence of the on-the-job-accident prevention, in the context of the entire section and entire Contract, it is irrefutable that the foregoing provision is an “on-the-job accident prevention” provision as discussed in *Norfolk & Western*, *supra* at p. 1209. 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.

In *Norfolk & Western*, *supra* at p. 1209, the Court confirmed that provisions such as this on-the-job-accident prevention provision “evidenced the [promisee’s] interest in saving itself the unnecessary expense that would result from any careless conduct on the part of [the promisor] and not an intent by the [promisee] that [a third party] should benefit by its agreement with [the promisor].” Similarly, Ohio Edison’s intent here was that Asplundh work safely and, while doing so, not incur unnecessary expense for Ohio Edison.

Contracting Parties Are Presumed to Act For Themselves

Further, courts of other states have repeatedly held that contracting parties are presumed to act for themselves and therefore an intent to benefit a third person must be clearly expressed in the contract. See, e.g., *Shevling v. Shevling* (S. Ct. Kan. 2004), 278 Kan. 356, 361, 97 P.3d 1036, 1040 (“Contracting parties are presumed to act for themselves and therefore an intent to benefit a third person must be clearly expressed in the contract”); *Walker v. Wittenberg, Delony &*

Davidson, Inc. (S. Ct. Ark. 1967), 247 Ark. 97, 106, 412 S.W.2d 621, 630 (“The presumption is that parties contract only for themselves and a contract will not be construed as having been made for the benefit of a third party unless it clearly appears that such was the intention of the parties”); *Standard Accident Ins. Co. v. Knox* (S. Ct. Tex. 1944), 144 Tex. 296, 303, 184 S.W.2d 612, 615 (A “contract will not be construed as having been made for the benefit of a third party, unless it clearly appears that such was the intention of the contracting parties”); *Commercial Bank of Bluefield v. St. Paul Fire & Marine Ins. Co.* (S. Ct. W. Va. 1985), 175 W.Va. 588, 595, 336 S.E.2d 552, 559; *King v. Rainbolt* (S. Ct. Ok. 1973), 515 P.2d 228, 230; *New Mexico Livestock Board v. Dose* (S. Ct. N.M. 1980), 94 N.M. 68, 73, 607 P.2d 606, 611; *Clearwater Constructors, Inc. v. Gutierrez* (Ct. App. Tex. 1981), 626 S.W.2d 789, 790 (“If there is doubt concerning such intent the doubt will be resolved against the existence of the required intent”); and *Chemical Realty Corp. v. Home Federal Savings & Loan Assn. of Hollywood* (Ct. App. N.C. 1987), 351 S.E.2d 786, 791 (“When a third party seeks enforcement of a contract made between other parties, the contract must be construed strictly against the party seeking enforcement”).

Conversely, *nothing* before the Appellate Court suggested that the contracting parties ever considered the foregoing provision would perpetually insure future visitors to or near the former worksite, such as Lisa Huff, who was on the nearby roadway more than three years after Asplundh worked near this site. As stated in *Cleveland Electric Illuminating Co. v. City of Cleveland* (1988), 37 Ohio St.3d 50, syllabus 3, in “matters of construction, it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used.”

Remand is a Vain Act; Extrinsic Evidence Corroborates Intent

Since the Contract is unambiguous, there was no reason to remand to the Trial Court the claim against Ohio Edison. A review of the Contract, alone, is sufficient. Extrinsic evidence is necessary only when the Contract's meaning is truly ambiguous. Moreover, the extrinsic evidence bearing upon the parties' intent to enter the Contract confirms that the *sole* proper interpretation of this provision was as a worksite safety requirement. 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 on-the-job accident prevention provision, there would be no need for the site to be revisited. Moreover, such cyclical inspection is mandated by the Public Utilities Commission of Ohio. 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, PUCO guidelines, and even Nature corroborate the jobsite safety meaning of this provision under which Ohio Edison and Asplundh have operated for years.

The Court of Appeals relied upon a strained interpretation of the single sentence from a section of the multi-page Contract. The perpetuation of this case has been founded upon disregard of the unrefuted intent of the contracting parties, as that intent has been demonstrated both by the Contract language itself and relevant extrinsic evidence. Unless this Court wishes to abrogate the aforementioned foundations of contract interpretation, disregard the Restatement's analysis of third-party beneficiary law, and allow third parties to retrospectively dictate the contracting parties' intent in forming a contract, this Court must reverse the Court of Appeals and reinstate the Trial Court's judgment in favor of Ohio Edison.

Proposition of Law No. 3: The recipient of a contractual promise is *not* the benefactor of a third party beneficiary. Restatement of the Law 2d, Contracts, §302, applies only to promisors, *not promisees* (Restatement of the Law 2d, Contracts, §304, *adopted and applied*).

Somehow, the Court of Appeals found the foregoing Contract provision potentially supported a contractual duty for Ohio Edison. A court is to “presume the intent of the parties to a contract resides in the language used in the written instrument.” *Acuity v. Interstate Construction, Inc.*, 2008 Ohio 1022 (Ohio App. 11 Dist.), ¶11, citing *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, syllabus 1. *Nothing* in that entire section, let alone in the excerpt relied upon by the Eleventh District, even mentions Ohio Edison. The “Contractor” is Asplundh.

Further, 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. Despite this, 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 disregard Restatement §304, it disregarded the Contract’s clear wording and undisputed intent.

The Court of Appeals reinstated this action against Ohio Edison based upon the misinterpretation of a promise *given to Ohio Edison*. Before litigants and courts below waste time and resources analyzing whether a party to a contract can be liable in tort based upon that party’s status *as a promisee*, this Court should properly confirm that such pursuit is irrational by the express adoption of Restatement of the Law 2d, Contracts, §304.

Proposition of Law No. 4: Before a contractual promise can create tort duty to a third party, that promise must satisfy a duty owed by the promisee to the purported beneficiary. (*Hill v. Sonitrol of Southwestern Ohio, Inc.*, (1988), 36 Ohio St.3d 36, *explained and applied*.)

In *Hill, supra* at p. 40, this Court, citing *Norfolk & Western, supra*, confirmed that, before a tort duty to a third-party can be found to exist in a contract, “the performance of that promise must also satisfy a duty owed by the promisee to the beneficiary.” In *Anderson v. Olmsted Utility Equipment, Inc.* (1991), 66 Ohio St.3d 124, 130, fn 5, this Court reiterated that requirement. The Court of Appeals wholly disregarded that requirement.

Like the Trial Court, the Court of Appeals confirmed that Appellees had no evidence that Ohio Edison breached any tort duty. That conclusion was consistent with applicable negligence law, both generally and specifically regarding rural trees, and even the Eleventh District’s own conclusions regarding trees with potential problems unknown to the utility.

Since Ohio Edison did not even know of this tree or any of the claimed problems with it, it logically could not owe a duty to Appellees. In *Laughlin v. Cleveland* (1959), 168 Ohio St. 576, syllabus 1, this Court confirmed that the “mere happening of an accident gives rise to no presumption of negligence . . .” “It is well settled in Ohio that where negligence revolves around the question of the existence of a hazard or defect, notice, either actual or constructive, is a prerequisite to the duty of reasonable care.” *Ankeny v. Vodrey* (September 23, 1999), Seventh District Case No. 96-CO-00047 (Ohio App. 7 Dist.), citing *Heckert v. Patrick* (1984), 15 Ohio St.3d 402, 405.

“To establish actionable negligence, one must show in addition to the existence of a duty, a breach of that duty and injury resulting proximately therefrom.” *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318. “The existence of a duty in a negligence action is a question of law for the court to determine.” *Id.* “Negligence is gauged by the ability to anticipate. Precaution is a duty only so far as there is reason for apprehension. Reasonable apprehension does not include

anticipation of every conceivable injury. There is no duty to guard against remote and doubtful dangers." *Parke v. Ohio Edison*, 2005 Ohio 6153 (Ohio App. 11 Dist.), fn 2. "The foreseeability of harm usually depends on the defendant's knowledge." *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77.

Beyond questioning whether Asplundh was required to perpetually insure the safety of future visitors near its 2001 worksite, the Court of Appeals articulated no duty breached by Asplundh. Regardless, it is unrefuted that Asplundh was an independent contractor. "As a general rule, the employer of an independent contractor entails no liability for injury sustained by a third party as a consequence of the contractor's acts or omissions." *Purcell v. Foremost Machine Builders, Inc.* (October 8, 1982), 6th Dist. Case No. L-82-198.

Further, in *Heckert, supra* at syllabus, this Court held that, absent knowledge of a patently defective condition, no duty exists as to trees on rural property:

Although there is no duty imposed upon the owner of property abutting a rural highway to inspect trees growing adjacent to the roadway or to ascertain defects which may result in injury to a traveler on the highway, an owner having actual or constructive knowledge of a patently defective condition of a tree which may result in injury to a traveler must exercise reasonable care to prevent harm to a person lawfully using the highway from the falling of such tree or its branches. (*Hay v. Norwalk Lodge No. 730, B.P.O.E.*, 92 Ohio App.14, 109 N.E.2d 481, 49 O.O. 189, approved and followed.)

Moreover, while a homeowner is presumably at his property on a regular, if not daily, basis, in maintaining vegetation interfering with utility lines, the vegetation management contractors, pursuant to a plan approved by the Public Utilities Commission of Ohio, travel along the property only once during every five-year cycle. Ohio Edison never inspected the tree involved in this case nor was the tree ever otherwise called to Ohio Edison's attention.

In *Parke v. Ohio Edison*, 2005 Ohio 6153 (Ohio App. 11 Dist.), ¶17, the Eleventh District

found the duty urged by Appellees was excessive and unreasonable:

Without notice or apprehension of the danger, Ohio Edison was under no duty to guard against it . . . But Ohio Edison is not responsible for every tree that is felled near its lines. The implication of appellants' concept of Ohio Edison's duty is that a utility company is responsible for ensuring that no trees, whether healthy or not, exist in such proximity to its lines that the possibility of contact exists. Such a standard of care is clearly excessive and unreasonable.

In *Parke*, *supra* at fn 2, and again in *Platt v. Cleveland Electric Illuminating Co.*, 2009 Ohio 7003 (Ohio App. 11 Dist.), ¶¶56-57 (Judge Trapp concurring), the Eleventh District acknowledged the following cogent discussion of the doctrine of reasonable anticipation contained in 1 Shearman and Redfield on Negligence (Rev. Ed.) 50, §24:

Foresight, not retrospect, is the standard of diligence. It is nearly always easy, after an accident has happened, to see how it could have been avoided. But negligence is not a matter to be judged after the occurrence. It is always a question of what reasonably prudent men under the same circumstances would or should, in the exercise of reasonable care, have anticipated. Reasonable anticipation is that expectation created in the mind of the ordinarily prudent and competent person as the consequence of his reaction to any given set of circumstances. If such expectation carries recognition that the given set of circumstances is suggestive of danger, then failure to take appropriate safety measures constitutes negligence. On the contrary, there is no duty to guard when there is no danger reasonably to be apprehended. Negligence is gauged by the ability to anticipate. Precaution is a duty only so far as there is reason for apprehension. Reasonable apprehension does not include anticipation of every conceivable injury. There is no duty to guard against remote and doubtful dangers."

The Court of Appeals concluded that the on-the-job-accident prevention provision could serve as a substitute for foreseeability in this case. The Eleventh District posited that a duty contrived in that manner would dispense with the negligence analysis of foreseeability. Specifically, at ¶32, the Eleventh District suggested that the "duty analysis in this case, however, does not turn on the foreseeability of the danger which caused Lisa's injury." In dispensing with

the foreseeability requirement, the Eleventh District opened the door for a finding of strict liability against Ohio Edison. An electrical utility is not strictly liable in tort. See *Otte v. Dayton Power & Light Co.* (1988), 37 Ohio St.3d 33, 39-41.

Millions of trees surround Ohio Edison's facilities. Every year contractors for Ohio Edison work on thousands of trees. "[A]n electric utility is not an insurer of public safety when it comes to contact with its own equipment." See *Ruprich v. Cincinnati Gas & Electric Co.*, (November 24, 1986), 12 Dist. Case No. CA86-02-009, unreported, citing *McDonough v. Butler Rural Electric* (July 9, 1984), 12 Dist. Case No. CA84-01-013, unreported.

Whether Asplundh breached any duty or not, Asplundh's unrefuted status as an independent contractor insulates Ohio Edison from being vicariously liable for Asplundh. Since Ohio Edison owed no duty to Appellees, either directly or vicariously, the Contract could not have delegated a duty owed by Ohio Edison and the subject provision could not have created a tort duty where none otherwise existed.

Further, even in cases where the plaintiff is an intended third party beneficiary, there must still be proof that the contract was breached. See, for example, *Conver v. EKH Co.*, 2003 Ohio 5033 (Ohio App. 10 Dist.), ¶46. The Court of Appeals could not explain how Ohio Edison breached any duty regarding a tree Ohio Edison didn't know existed.

In the context of the full Contract, the on-the-job-accident prevention safe work provision means that the tree trimming, tree removal, and clearance of rights of way must be done in such a manner so that the public will not be harmed, not that the very purpose of doing the work (i.e., the trimming or removing of vegetation) is to prevent harm to the public.

CONCLUSION

The Court of Appeals did not dispute the Trial Court's finding that Ohio Edison breached no tort duty. The issue, then, becomes how did the Court of Appeals envision that Ohio Edison could have any liability for a tree of which it had no knowledge whatsoever. The Court of Appeals invoked Restatement of the Law 2d, Contracts, §302. Restatement of the Law 2d, Contracts, §302, confirms that there are instances where a promisee owes a duty to a third party and, by contract, seeks to assign that duty to the promisor. Both the Trial Court and the Court of Appeals acknowledged that the promisee here, Ohio Edison, owed no duty to Appellees. Instead of properly finding that a third party beneficiary discussion was inappropriate, the Court of Appeals grossly misapplied contract law and has placed Ohio Edison in the absurd position of defending a promise it did not make.

Like the provision in *Norfolk & Western*, the provision in this case should properly be given its only proper interpretation as an on-the-job accident prevention provision. The alternative interpretation engaged by the Court of Appeals threatens to create unanticipated third party duties to persons who were not in privity with the contracting parties, who had no association with the work site, and who were not even contemplated by the contracting parties as they were addressing work site safety in their Contract. The aberrational Opinion below must be promptly extinguished as it wholly perverts contract law into a vehicle for needless tort litigation where no duty exists or has been breached.

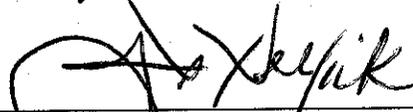
The Court of Appeals has created a precedent where Ohio Edison may be strictly liable for calamities in the vicinity of its electrical equipment, and has converted the Contract which was created to maintain electrical reliability into a perpetual insurance policy for unintended third parties.

Appellees are not the only ones potentially wronged by the errant Opinion below. In a wide variety of premises liability cases, any party owning a real property interest and any party contracting with such property owner, bears the risk of needless and improper claims of liability, purportedly based upon contract, when they would otherwise be wholly exonerated under traditional tort analysis. From an even broader perspective, every contracting party serves to lose considerably by the perpetuation of the Opinion below. Such contracting parties will fear that their agreements will be attacked by third parties for whom they had no intent of providing a benefit, thereby impairing their ability to contract or increasing the expense associated therewith.

Negligence law has been established and developed to address the breach of societal duties. By contrast, contract law exists to fulfill the intent of the contracting parties. Where, as in this case, the tort duties have been properly analyzed and exonerate the Defendants from liability, it is wholly unnecessary and inappropriate to revise contracting parties' agreements to create an intent contrary to the parties' agreement.

Ohio Edison asserts that the damage caused by the Opinion below to the structure of both tort and contract law requires reversal by this Ohio Supreme Court.

Respectfully submitted,



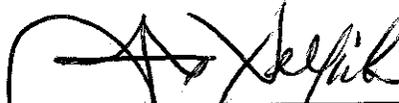
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **Merit Brief of Appellant Ohio Edison Company** has been served via ordinary U.S. Mail this 11th day of January, 2011 to:

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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 status 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.

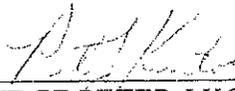
For purposes of this ruling, the Court considered the Plaintiffs' experts testimony, over the Defendants' objections. In this case, the Court finds that the moving Defendants herein, FirstEnergy, Ohio Edison, and Asplundh Tree Expert Company, are all entitled to Judgment as a matter of law because they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

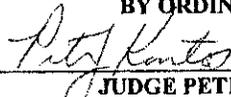


JUDGE PETER J KONTOS

FILED
COURT OF COMMON PLEAS
JUL 15 2009
TRUMBULL COUNTY OH
KAREN ANANTE 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

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.

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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-4958, 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 "**** 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.

Harrington, Hoppe & Mitchell, Ltd.

IN THE SUPREME COURT OF OHIO 10-0857

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

NOTICE OF APPEAL OF OHIO EDISON COMPANY

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FILED
 MAY 13 2010
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 SUPREME COURT OF OHIO

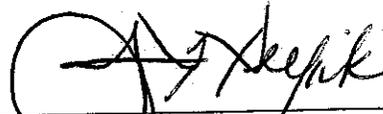
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**NOTICE OF APPEAL OF APPELLANT, THE CLEVELAND
ELECTRIC ILLUMINATING COMPANY**

Appellant, Ohio Edison Company, by and through counsel, hereby gives notice of its appeal, pursuant to S. Ct. Prac. R. II, (1)(A)(3), of the judgment (copy attached) of the Trumbull County Court of Appeals, Eleventh Judicial District, entered in Case No. 2009 T 00080 on March 31, 2010, which reversed in part the judgment of the Trumbull County Common Pleas Court. The Trial Court had granted summary judgment to Ohio Edison.

This case involves questions of public or great general interest (discretionary appeal pursuant to S. Ct. Prac. R. II, (1)(A)(3)).



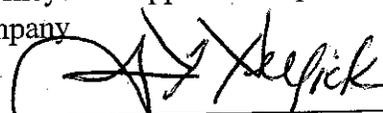
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Edison Company

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing *Notice of Appeal of Ohio Edison Company* has been served via ordinary U.S. Mail this 12th day of May, 2010 upon the following:

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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

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.

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COURT OF APPEALS

MAY 27 2010

TRUMBULL COUNTY, OHIO
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

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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.

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

LISA G. HUFF, et al.,

Plaintiffs-Appellants,

- vs -

FIRST ENERGY CORPORATION, et al.,

Defendants-Appellees.

JUDGMENT ENTRY

CASE NO. 2009-T-0080

FILED
COURT OF APPEALS

JUN 08 2010

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

Appellee, Asplundh Tree Expert Co., has timely moved this court to certify a conflict to the Supreme Court of Ohio pursuant to App.R. 25(C). The purported conflict arises out of this court's opinion and judgment entry issued on March 31, 2010 in *Huff v. First Energy Corporation*, 11th Dist. No. 2009-T-0080, 2010-Ohio-1456. For the reasons discussed below, appellee's motion is overruled.

Section 3(B)(4), Art. IV, of the Ohio Constitution provides:

"Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination."

To certify a conflict, the Supreme Court of Ohio has observed:

****there must be an actual conflict between appellate judicial districts on a rule of law before certification of a case to the Supreme Court for review and final determination is proper; and *** when certifying a case as in conflict with the judgment of another court of appeals, either the journal entry or opinion of the

court of appeals so certifying must clearly set forth the rule of law upon which the alleged conflict exists." *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 599, 1993-Ohio-223.

In this case, Asplundh asserts this court's holding in *Huff* stands in conflict with several different appellate districts on two separate issues. First, Asplundh queries whether a third party can be deemed an intended beneficiary to a contract with enforceable rights absent evidence that the performance of the contract by the promisor satisfies a duty owed by the promisee to the beneficiary. Asplundh contends:

"[n]umerous other appellate court jurisdiction[s] have held the mere conferring of some benefit on the supposed beneficiary by the performance of a particular promise in the contract is insufficient to establish a third party's status as a third party beneficiary under a contract. Rather, the performance of that promise must also satisfy a duty owed by the promisee to the beneficiary."

In support of the asserted conflict, Asplundh cites the decision of the Eight Appellate District in *Cincinnati Ins. Co. v. City of Cleveland*, 8th Dist. No. 92305, 2009-Ohio-4043; as well as this court's holding in *City of Painseville Employees Credit Union v. Heitanen*, 11th Dist. No. 2005-L-041, 2006-Ohio-3770.

We first point out that *Heitanen* is a decision issued from this court and is therefore outside the gamut of Section 3(B)(4), Art. IV, of the Ohio Constitution. Accordingly, that case is irrelevant to our analysis. Regardless of this point, a

careful analysis of the issue identified by *Asplundh* reveals *Cincinnati Ins. Co.* does not stand in conflict with any point of law announced in *Huff*.

In *Huff*, this court did not hold that appellant Lisa Huff was, as a matter of law, an intended third-party beneficiary. Rather, 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, *Huff*, ¶¶60-61.

On one hand, this court held 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. This court therefore held the record was such that summary judgment was inappropriate because a material issue of fact remained to be litigated regarding *whether* Lisa was an intended third-party beneficiary under the contract. We therefore discern no conflict between this case and the Eighth Appellate District's holding in *Cincinnati Ins. Co.*, *supra*.

Next, Asplundh asserts *Huff* is in conflict with the Eighth District's decision in *Cincinnati Ins. Co.* as well as the Sixth District's decision in *Ambroski v. City of Toledo* (1990), 67 Ohio App.3d 47 to the extent it acts to confer a duty to "the general public at large." Asplundh contends that these cases stand for the proposition that a contract entered to protect the public at large does not lend itself to suit by third-party beneficiaries. We disagree.

Initially, neither Asplundh nor Ohio Edison contest that the clause at issue creates an obligation to safeguard "all persons," i.e., the public at large. As discussed above, the important issue is *when* that obligation was triggered. It is therefore disingenuous for Asplundh to argue third parties never have enforceable rights pursuant to the contract because this issue has never been in dispute. For purposes of this case, the point can be construed as legally conceded. Regardless of this point, we believe each case cited by Asplundh is distinguishable from the instant case.

In *Ambroski*, a contract, the language of which does not appear in the Sixth District's opinion, was entered between a city and an emergency medical services company for the latter to perform emergency response services when necessary. The plaintiff, an employee of a separate, private ambulance company called to transport an injured person, was assaulted by a bystander after placing the injured person on a stretcher. The plaintiff filed suit against the city alleging, inter alia, negligence. The plaintiff moved to amend his complaint to assert a third-party beneficiary claim. The court overruled the plaintiff's motion to amend and awarded the city summary judgment. With respect to the plaintiff's

motion to amend, the trial court observed that, under the contract between the city and the emergency services company, “ambulance companies and drivers or members of its [sic] crew could at most be only incidental or an [sic] indirect beneficiary of the contract by receiving compensation for calls and runs made by the City [and the promisor.]” *Id.* at 49.

On appeal, the Sixth District affirmed the judgment, pointing out that “[t]he language of the contract indicates that its sole direct beneficiary was the public at large.” *Id.* at 52. As a result, the court determined the trial court properly denied the motion to amend because the plaintiff was an incidental beneficiary, entitled to no rights under a contract between parties to a contract. *Id.*

We recognize that the court in *Ambroski* made a statement regarding the enforceability of a contract made to the public at large. We do not, however, know the precise content of the contract at issue and the short opinion in *Ambroski* fails to disclose why the promise to the public-at-large in that case would preclude the use third-party beneficiary theory. All we know is that, prior to making the statement, the court observed “[t]he contract relied upon by appellant in the instant case does not support a third-party cause of action. (Emphasis added) *Id.* This point underscores that there is no actual conflict on a rule of law between *Ambroski* and this case, but merely different contracts upon which each court premised its unique decision. Such is a conflict of fact, not of law. It is fundamental that, before an appellate court certifies a conflict, there must be an actual conflict between appellate districts on a rule of law, not mere facts.

Whitelock, supra, at 596. We therefore hold there is no certifiable conflict between *Ambroski* and the case sub judice.

In *Cincinnati Ins. Co.*, an insurer argued its insured was a third-party beneficiary of a city's contract with a non-profit utilities locator, which the city breached by not marking a water main. In entering the contract, the city and its water department, became "members" of the utilities locator. The contract between the city and the utilities locator was entered to:

"operate a statewide one-call system to receive notification prior to excavation or prior to any activity which may damage underground facilities and to relay the notification to the corporation members in order to reduce dig-in damages, periods of utility service disruptions, and the risk of injury to excavators and the public." *Id.* at ¶30.

The contract further indicated that all members "be responsible individually for taking such action as it may deem necessary to protect the public, its underground facilities, and the continuation of it service." *Id.* at ¶32.

In light of these provisions, the Eighth District found that the insurer could not sue for the city's alleged breach of the contract because the city's contractual promise to take "any action it deemed necessary" and support the locator's purposes was so ambiguous as to be illusory. *Id.* at ¶31-33. The court further observed that the agreement to support the utilities locator's purpose was incidental, as a matter of law, to its promise to pay for the service the locator provided. *Id.* at ¶33. The court therefore held "[t]he reduction of risk to the public

is incidental to the operation of a statewide on-call system for the convenience of those requesting location and marking of underground utilities." *Id.*

The Eighth District did point out that a promise made to the public at large does not lend itself to suit by third-party beneficiaries. *Id.* This observation, however, was made in the wake of its determination that any promise was illusory and, in any event, any benefit received from the contract was incidental. *Id.* It is clear, consequently, that the Eighth District's observation regarding the effect of a promise made to the public at large merely supplemented its primary disposition. The Supreme Court of Ohio has held that "there is no reason for a Court of Appeals to certify its judgment as conflicting with that of another Court of Appeals where * * * the point upon which the conflict exists had no arguable effect upon the judgment of the certifying court." *Pincelli v. Ohio Bridge Corp.* (1966), 5 Ohio St.2d 41, 44. "Questions certified should have actually arisen and should be necessarily involved in the court's ruling or decision." *Id.* Because the alleged point of law upon which Asplundh relies was surplusage to its principle holding, it is merely obiter dicta. There is therefore no reason to certify the underlying judgment as conflicting with *Cincinnati Ins. Co.*

Because we find no conflict of law between *Huff* and any of the cases cited by Asplundh in its motion, the motion is overruled.

FILED
COURT OF APPEALS

JUN 08 2010

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK


JUDGE CYNTHIA WESTCOTT RICE

FILED

AUG 25 2010

CLERK OF COURT
SUPREME COURT OF OHIO

The Supreme Court of Ohio

Lisa G. Huff et al.

Case No. 2010-0857

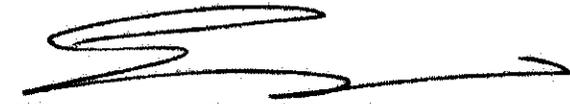
v.

ENTRY

First Energy Corporation et al.

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case.

(Trumbull County Court of Appeals; No. 2009T0080)



ERIC BROWN
Chief Justice

The Supreme Court of Ohio

FILED

27 2010

CLERK OF COURT
SUPREME COURT OF OHIO

Lisa G. Huff et al.

Case No. 2010-0857

v.

RECONSIDERATION ENTRY

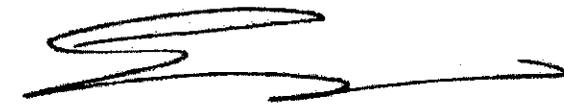
First Energy Corporation et al.

Trumbull County

It is ordered by the Court that the motions for reconsideration in this case is granted.

It is further ordered by the Court that the discretionary appeals are accepted. The Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Trumbull County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio.

(Trumbull County Court of Appeals; No. 2009T0080)



ERIC BROWN
Chief Justice