

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

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STATEMENT OF FACTS

On May 8, 2001, a contract was executed between Appellants, whereby Asplundh would provide utility vegetation management services for Ohio Edison/First Energy effective January 1, 2001 through December 31, 2004. The contract entered into between the Appellants provided that Asplundh:

"shall do the work specified in such orders according to the terms and conditions thereof and of this Contract, according to the First Energy Vegetation Management Specifications set forth in Attachment A and made a part hereof as may be applicable, according to the National Electric Safety Code and **accepted forestry practice**, in a good and workmanlike manner, in compliance with applicable laws, codes, all regulatory requirements of governmental authorities as otherwise set out in this Contract or required, and in general to the entire satisfaction of First Energy." Emphasis added. (See Supplement to the Merit Brief of Appellant Asplundh Tree Expert Company Exhibit 1).

In addition to the aforementioned provisions, Appellants were subject to a protocol whereby the decision to remove a tree that's greater than 30 inches in diameter, that has been identified by Asplundh's crew foreman as a tree that should be removed (i.e. a "priority tree"), must first have the approval of the forestry technician. The forestry technician is not an employee of Asplundh; but rather is an employee of First Energy or Ohio Edison. (T.d. 57, Carrier Deposition p. 47, lines 1-20). The employee of First Energy or Ohio Edison would come to the site to look at the identified priority tree and make the decision. (T.d. 57, Carrier Deposition p. 47, lines 21-23). The reason why First Energy/Ohio Edison had to be consulted prior to the removal of a tree exceeding 30 inches in diameter was due to the substantially higher time and cost involved in removal of a tree of such considerable size. (T.d. 92, Shaffer Deposition, p. 54, lines 2-6). First Energy/Ohio Edison wanted and mandated a final say in such decisions.

On June 14, 2004, 41 year old Appellee Lisa Huff, a wife and mother of two minor children, Appellees, Samantha Huff (age 14) and Faith Huff (age 3) was taking a walk with a girlfriend along the public roadway, King Graves Road in Fowler Township, Trumbull County, Ohio. Caught in what was classified as a moderate rain storm, Lisa proceeded along the road, past a tree on the property located at 6717 King Graves Road. The tree was in the front yard of the residence next to King Graves Road. The south side of that tree was next to and facing King Graves Road. The north side was facing power lines owned by Ohio Edison. Ohio Edison maintained a prescriptive easement where the tree stood, and the tree was located within the inspection zone/corridor for utility line vegetation management of the Appellants and was approximately 48 inches in diameter. As Lisa proceeded past the tree, the tree broke approximately 28 feet from the ground fell north of parallel to the road in the direction of the power lines and struck her from behind on the road, resulting in grave and permanent injuries.

The subject tree was an open and obvious detectable hazard prior to the accident at issue. It included a series of defects which taken in totality created the hazardous classification. First, the total removal of branches on the north side of the tree created a tree top or crown of multiple tons in weight that was unbalanced to the south, toward the road. This obvious removal of branches on the north side of the tree, to clear for the utility lines in that direction, resulted in the pronounced absence of a crown on the north side up to a height of 46 feet creating a ten degree lean toward the road and the scars from these removals contributed to the tree's internal decay. Decay within the trunk created a substantial strength loss and risk of failure under commonly occurring wind conditions based on commonly employed arboricultural guidelines. Most significantly, the subject tree had several other, readily visible signs of extensive decay. These signs in totality, together with the presence of a public road nearby, constituted a detectable

hazard with multiple targets. (T.d. 19, T.d. 73, Report, Dr. Kim C. Steiner, June 27, 2007, pp. 7-8). Due to the weakened condition of the tree and the predominate wind angles, the tree posed a hazard to the utility lines on the north side of the tree simultaneously with targets along the roadway. (T.d. 19, Deposition, Dr. Kim C. Steiner, February 22, 2008, pp. 214-215 and Court of Appeals Record No. 14).

The total condition of the tree as being hazardous due to a history of line clearance practices was open and obvious in May of 2001, when Asplundh Tree Expert Company went to the property located at 6717 King Graves Road to perform the contracted services for First Energy/Ohio Edison. (T.d. 19, Deposition of Dr. Kim C. Steiner). Despite the presence of a priority or hazardous tree in the inspection zone/corridor caused by line clearance practices, neither Asplundh nor First Energy/Ohio Edison took any steps to remove the subject tree. Despite the fact that the tree was clearly located within the Appellants' inspection zone/corridor and easement, nothing was done to the tree to safeguard the public from its altered hazardous condition. That tree remained in that altered hazardous state from at least May, 2001 up until Lisa Huff's accident of June 14, 2004 when the tree collapsed toward the power lines and a twenty four inch diameter limb stretched across the roadway causing Lisa Huff severe, permanent injuries.

On January 9, 2006, Appellees Lisa Huff, her husband Reggie Huff, and their children, Samantha and Faith Huff, filed a Complaint in the Trumbull County Court of Common Pleas against Appellants First Energy Corporation, Ohio Edison, and Asplundh Tree Expert Company. The complaint was voluntarily dismissed and on June 5, 2008, Appellees re-filed the Complaint against Appellants First Energy Corporation, Ohio Edison, and Asplundh Tree Expert Company. (T.d. 1, Civil Complaint) Subsequent thereto, Ohio Edison, First Energy, and Asplundh Tree

Expert Company filed Motions for Summary Judgment. On July 15, 2009, the trial court awarded Summary Judgment to First Energy, Ohio Edison, and Asplundh Tree Expert Company. (T.d. 101 Judgment Entry)

On August 12, 2009, the Huffs filed an appeal in the 11th District Court of Appeals. In its Opinion of March 31, 2010, the Court of Appeals reversed the trial court's decision as it pertained to Appellants Ohio Edison and Asplundh. The matter was remanded to the Trumbull County Court of Common Pleas for further proceedings.

On May 13, 2010, Ohio Edison filed its Notice of Appeal and Memorandum of Jurisdiction to this Ohio Supreme Court; and on May 18, 2010, Asplundh did the same, both identifying this matter as a discretionary appeal and a case of public or great general interest. On May 27, 2010, the Court of Appeals denied Appellants' applications for reconsideration of the March 31, 2010 Opinion. Subsequent thereto, the 11th District Court of Appeals denied Asplundh's request to certify this matter as a conflict of laws to this Supreme Court.

This Court declined to exercise jurisdiction on August 25, 2010. However, on October 27, 2010, this Court granted applications for reconsideration that were filed by Asplundh and Ohio Edison. This matter is now before this Honorable Court as a discretionary appeal pursuant to S. Ct. Prac. R. II, (1)(A)(3).

ARGUMENT IN OPPOSITION TO APPELLANTS' PROPOSITIONS OF LAW

In its decision, the Appellate Court quoted specifications which are incorporated into the Appellants' contract which provide details and guidelines on how a contractor must execute its work orders. Specifically the Appellate Court quoted the following: "The Contractor shall plan and conduct the work to adequately safeguard **all persons** and property from injury." (Emphasis

added) (See Court of Appeals Record No. 15 Appellate Decision pg. 18) The Appellate Court ruled that a plausible reading of the contract between the Appellants, “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...” (See Court of Appeals Record No. 15 Appellate Decision pg. 18)

Courts must examine a contract as a whole and presume that the intent of the parties is reflected in the language used. *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216, 219, 797 N.E.2d 1256, 1261, citing *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, 509 N.E.2d 411, paragraph one of the syllabus. “When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties.” In the case *sub judice*, the Appellate Court applied the Appellants' intent. The Appellate Court determined that a plausible application of the plain and ordinary meaning of the language includes an obligation that the Appellant should plan and conduct its work so that all persons, regardless of when the work was done, are adequately safeguarded from injury. The Appellants ask this Court to ignore the plain language in the contract, and apply the purported, post calamity, intent of the contracting parties. To do so the Court would have to resort to speculation outside the record, outside of the language of the contract and would be a complete departure from Ohio's law regarding contract interpretation.

In *Fed. Ins. Co. v. Executive Coach Luxury Travel, Inc.* 2010 Ohio 6300, 2010 WL 5392904, (Ohio,2010) this Court ruled that when the language in a contract is straightforward and none of the words are unusual, the intent of the parties is illustrated in the words. In *Fed. Ins. Co.* this Court determined that the argument of the insurance company was disingenuous

when it attempted to argue that there was no intention for insurance coverage for someone the insurance company considered an unforeseen third party. *Id.* This Court determined, the insurance clause was broad. Therefore, the purported intent of the insurance company is immaterial because the language of the policy is clear. *Id.* In the case *sub judice*, the contract between the parties states "The Contractor shall plan and conduct the work to adequately safeguard **all persons** and property from injury." (Emphasis added) In this case, the intent of the Appellants is set forth in the terms used in their contract.

Under Appellants post calamity redefinition of the intent of the subject contract, it would be perfectly acceptable for Appellant Asplundh to leave a tool in a tree which years later could fall and impale an innocent third party. Here Appellants left a much more dangerous hazardous condition caused, exacerbated and maintained by the Appellants. This conduct does not represent "accepted Forestry Practice" (See Supplement to the Merit Brief of Appellant Asplundh Tree Expert Company, Exhibit 1). Appellants' arguments that Lisa Huff is not an intended beneficiary of the contract is disingenuous.

In an attempt to avoid the obligations imposed by the plain meaning of the language used in their contract Appellants allege several "dire" consequences which will result from the Appellate Court's decision. As a practical matter, these scenarios will never come to pass. This is baseless speculation. Furthermore, the subject contract in question is expired. Moreover, the terms of any contract can be changed at anytime by agreement of the parties. The bottom line is the Appellants control the language utilized in their contracts and can change the contract with the stroke of a pen or eliminate it.

- I. **Where a contract for necessary tree removal between a utility company and tree removal company includes specifications that priority trees as defined by the utility company must be removed after (1) the tree company identifies a tree as being within the classification;**

(2) the utility company goes to the work site and reviews all work including but not limited to priority classifications; and (3) the utility company gives the order to remove the tree to the tree company--both the utility company and the tree removal company are no longer passive participants in the contract, but really play an active role in determining whether or not priority trees in the inspection corridor are removed.

Appellees' first proposition of law addresses Ohio Edison's Propositions of Law 1 and 2; and Asplundh's Proposition of Law 2 and 4. In the judgment entry following the motions for reconsideration, the Court of Appeals correctly applied the Restatement 2d Contracts and applicable Ohio law in finding:

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. (See Court of Appeals Record No. 24, Judgment Entry May 27, 2010, p. 6.)

The evidence presented in the summary judgment motions included the deposition of Michael Carrier, an employee of Asplundh who supervises all crews in the First Energy Area. (T.d. 57, Deposition of Michael Carrier, p. 7, lines 5-7). Carrier signed an Affidavit and attached a weekly vegetation management time sheet from May 3, 2001, showing that Asplundh removed two trees at 6717 King Graves Road. (*Id.*, p. 20, lines 16-21). That sheet was signed by a general foreman, whose job is: "You're the liaison between your forester and the utility and the tree company. You route the work; you inspect the work that they do; you make sure that they're being proactive and safe, all aspects of the job." (*Id.*, p. 23, lines 1-12). Carrier also verified another weekly management time sheet for the following week of May 7, 2001. This sheet shows trim work around the utility lines at 6717 King Graves Road. (*Id.*, pp. 34-37).

Appellees' summary judgment evidence included testimony of Douglas Shaffer (hereinafter "Shaffer"), Manager of Forestry Services for Ohio Edison and a certified arborist

within the State of Ohio, who confirmed that field specialists employed by Ohio Edison always go out to the site to review the work of the hired tree company. He confirmed that there would have been a review of Asplundh's work by an Ohio Edison field specialist after Asplundh was at 6717 King Graves Road in May of 2001. (T.d. 92, Deposition of Douglas Shaffer, p. 13, lines 11-15; and p. 44, lines 4-7). Shaffer confirmed that the reason why First Energy/Ohio Edison had to be consulted with the removal of a tree exceeding 30 inches in diameter was because of the substantial time and cost involved. (Id., p. 54, lines 2-6).

Citing *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St.3d 36; 521 N.E.2d 780 and *Norfolk & Western Co. v. U.S.* (1980), 641 F.2d 1201, 1980 U.S. App. Lexis 12984, Ohio Edison tries to compare itself to the defendants in those cases who were found to owe no duty to safeguard the plaintiffs for their injuries. In *Hill*, 36 Ohio St.3d at 37; 521 N.E.2d at 782, an employee sued the manufacturer and monitoring companies of a work site security system for injuries she and her husband sustained from an assailant after the place of business was closed for the evening. The award of summary judgment in favor of the defendants was affirmed, because the contract was to monitor property after all employees left for the day; and plaintiffs' injuries were caused by an assailant, not by any conduct of the defendants.

Similarly in *Norfolk & Western*, 641 F.2d at 1202-1203, the plaintiff dock owner sued the United States and a construction contractor hired by the United States when his dock collapsed. The district court granted the defendants' motion to dismiss the dock owner's complaint after finding that the cause of the collapse was a latent defect in the dock, not overloading by the contractor.

The *Hill* and *Norfolk & Western* cases are clearly distinguishable from the case *sub judice* in which Ohio Edison and Asplundh both had a clearly defined and necessary protocol in the

vegetation management and line clearance contract at issue. Despite the presence of a self-generated hazardous tree in the inspection zone caused by line clearance practices, neither Asplundh nor Ohio Edison took any steps to remove the subject tree. Despite the fact that the tree was clearly located within the Appellants' easement and inspection zone/corridor, nothing was done to the tree to safeguard the public from its altered hazardous condition. Evidence was presented that Appellants caused the hazardous condition. Dr. Kim C. Steiner testified:

Q. The first of your findings is the removal of branches on the North side created a crown that was unbalanced to the south toward the road. This is probably the cause of the 10 percent (degree) trunk lean in that direction. **Are there any other causes that you are aware of that may have caused that tree to lean in that direction?**

A. **No, we covered that, No.** (Emphasis added) (See T.d. 19, Deposition, Dr. Kim C. Steiner, pp. 101.)

Moreover, evidence was presented in summary judgment proceedings that due to the weakened condition of the tree, the tree posed a hazard to the utility lines on the north side of the tree as well. (See T.d. 19, Deposition, Dr. Kim C. Steiner, pp. 214-215.) These facts were never developed as a trial on the merits never transpired.

The reviewing court considered all relevant evidence and included it into the summary of salient facts contained in its decision. (See Court of Appeals Record No. 15, Opinion of March 31, 2010 ¶7-27.) Ohio Edison was no less subject to First Energy's Vegetation Management Specifications than Asplundh was. In its effort to save money, Ohio Edison made itself an active participant in the vegetation management process. Now, to avoid liability, Ohio Edison wants to distance itself from the process and its responsibilities promulgated under its own Contract and Vegetation Management Specifications. The Court of Appeals in reversing the decision of the trial court found that Appellants were not entitled to judgment as a matter of law. Ironically, Appellants now want this Supreme Court as a matter of public interest to reverse the Court of

Appeals decision, narrowly define Appellants' obligations under the contract and preclude Lisa Huff from her day in court. Accordingly Appellants request to reverse the Court of Appeals and reinstate the trial court's judgment should be denied.

II. A utility company and tree removal company's construction of a contract that serves to restrict its' duty to power lines not people and limits its' liability for creating and/or maintaining a hazardous condition to the day that the tort is committed or contract is breached is a dangerously narrow proposition of the law and contrary to the best interest and safety of the public.

This Proposition of Law addresses Ohio Edison's Propositions of Law 3 and 4; and Asplundh's Propositions of Law 1 and 3. Appellants argue that they should be afforded the same absolution from liability that they were afforded in *Parke v. Ohio Edison, Inc.*, 2005 WL 3096914 (Ohio App. 11 Dist.), 2005-Ohio-6153. In *Parke*, the Court of Appeals found 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 *2. In *Parke*, co-administrators of decedent's estate filed an action against Ohio Edison for negligence after the decedent was electrocuted trying to remove a tree that was near transmission lines. The plaintiff alleged that the tree, which was in her backyard, was diseased or dying. However, all photographs and expert testimony showed a healthy tree. Ohio Edison also had no notice that the homeowner was going to attempt to take the tree down. *Id.* at *3. The Court of Appeals concluded therefore: "Without notice or apprehension of the danger, Ohio Edison was under no duty to guard against it." *Id.* at *3. However the reviewing court distinguished the *Parke* case from another case in which the utility company misjudged the hazard posed by branches. In *Brady-Fray v. Toledo Edison Co.*, 2003 Ohio 3422, at ¶4-5, (Ohio Ct. App., Lucas County June 30, 2003), the utility company should have apprehended the danger and was therefore negligent.

As in the *Brady-Fray* case rather than the *Parke* case, Appellants misjudged at best, or were willing to risk at worst, the detectable hazard posed by the self-generated damaged state of the tree at issue. Asplundh also attempts to compare the case before this Supreme Court with the case of *Hetrick v. Marion-Reserve Power Co.* (1943), 141 Ohio St. 347, 48 N.E.2d 103. In *Hetrick*, the decedent was doing public road work and accidentally drove his grader into a utility pole causing the pole to break off and fall onto his machinery. *Id.* at 360; 48 N.E.2d 109. He then attempted to remove the uninsulated wire by using a hammer to break a glass insulator bringing him in contact with a live wire, causing his immediate death. The decedent's wife sued the utility company for causing her husband's death. *Hetrick*, stands for the proposition that . . . "negligence is gauged by the ability to anticipate. Precaution is a duty only so far as there is reason for apprehension. ." *Id.* at 359; 48 N.E. 2d at 109.

In the present case Lisa Huff was walking on a public road. She did nothing to instigate or promote failure of the tree. Expert witness, Raymond L. Lee, Ph.D. prepared a Meteorological Analysis finding that the weather according to the evidence presented by Appellants was not extreme, but typical for the locale. (Deposition Transcript of Raymond L. Lee, Ph.D., March 10, 2008). Lisa's accident is distinguishable from the cases cited by Ohio Edison. The injuries were not an unforeseen calamity because they were caused by a priority tree and the removal thereof solely under the responsibility of the Appellants.

The Court of Appeals in reversing summary judgment found that Appellants' construction of their legal obligations was far too narrow. (Court of Appeals Record No. 15, Judgment Entry March 31, 2010, p. 5.) Appellants argue that their duty was only to power lines, not to people. Included in the summary judgment evidence was a deposition of testimony of Appellants' expert, Robert Cool:

- Q Okay. In performing a utility vegetation management inspection, do you take into consideration the tree falling on anything aside from the utility lines?
- A. From the utility standpoint I have to make sure it does not fall on the lines. It can fall and it often falls on other things.
- Q. Okay. Meaning do you take into consideration any other objects that might be in-
- A. No, there's no duty.
- Q. That wasn't my question. When you're looking at-when you're inspecting a tree from a utility vegetation management perspective, do you look at any other dangers aside from the utility line?
- A. I don't and I feel that there's no duty.
- Q. Okay. So if the tree were leaning towards a school playground, you don't feel that there's a duty to notify someone?

Mr. Masch: Objection.

The Witness: if I were hired by the utility for-to make sure that tree didn't knock the wires down and electrocute kids I would perform that duty. I'm sure other people are hired to protect the children on the playground. (Deposition of Robert Cool, April 9, 2008, page 21, lines 13-25; page 22, lines 1-10).

Now, in face of the Court of Appeals reversal, Appellants still insist that they had no duty to people, only to utility lines and argue that the Contract with Vegetation Management Specifications creates a duty to the public only for "on-the-job accident prevention." Appellant's contention is that if in the course of their performance of the contract, they create a hazard to the public that extends after the completion of the work performed, they are not liable. Asplundh calls the safety provisions in the Contract at issue "generic" and not intended to impose liability for any injuries caused by their work once the work is completed.

These interpretations of the law by Appellants are a continuation of their dangerous perception of duty and public safety. Moreover, the issues of foreseeability, causation and contract interpretation raised by Appellants are matters of factual dispute and are not for a discretionary appeal to this Supreme Court. As Appellants both concede that they have a duty to guard the power lines at issue, this issue remains a factual dispute in this case. Evidence was presented in summary judgment proceedings that due to the weakened condition of the tree, it posed a simultaneous hazard to the utility lines on the north side of the tree as well. (T.d. 18, Deposition, Dr. Kim C. Steiner, February 22, 2008, pp. 214-215). These facts were never developed as a trial on the merits never transpired.

The Court of Appeal's reversal and remand to the trial court is a consistent application of the law that protects the public interest and insists that Appellants' perceived insulation from liability is not absolute as a matter of law. Further, the Court of Appeals did not find that the contract issue was the only possible link to liability for the Appellants. This Court would be well within its authority to affirm the Court of Appeals decision as additionally supported by common law, direct negligence and/or common law duty to third parties to maintain an easement for the protection and the safety of third parties. (See Court of Appeals Record No. 14; T.d. 74.) Accordingly, Appellants' request to reverse the Court of Appeals and reinstate the trial court's judgment should be denied.

CONCLUSION

Based on the reasons stated above and upon the authorities cited, Appellees respectfully requests this Court to dismiss the Appellants' appeal as improvidently allowed, or affirm the judgment of the Eleventh District Court of Appeals, and grant such further and additional relief as this Honorable Court deems just.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellees' Merit Brief has been sent to Counsel for Defendants-Appellants, Attorney John T. Dellick, at 26 Market Street, Suite 1200, PO Box 6077, Youngstown, OH 44501-6077; Attorneys Clifford C. Masch and Brian D. Sullivan, at 1400 Midland Bldg., 101 Prospect Avenue West, Cleveland, OH 44115-1091, by regular US Mail, on this 16th day of February, 2011.



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