

ORIGINAL

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)	

REPLY BRIEF OF APPELLANT OHIO EDISON COMPANY

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REPLY ARGUMENT

The Eleventh District Court of Appeals did not dispute the Trial Court's finding that Lisa Huff's accident was unforeseeable. The Court of Appeals decided that 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." (App. B, ¶52.) The Court of Appeals confirmed that "there was no evidence indicating the subject tree was pruned or otherwise inspected [when Asplundh last performed vegetation management on the circuit passing near the accident site]" (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 [this rural] tree" (App. B, ¶28).

Appellees do not contest several of the reasons why the Court of Appeals' contract analysis is so significantly wrong as to threaten the fabric of Ohio's contract law and the interplay of contract and tort law in this State. Their cursory attention to the contract law issues corroborates that the analysis below is unsupportable. Appellees' interjection of a public policy argument is an inappropriate effort to gloss over the shortcomings of the Opinion they attempt to support. Moreover, Appellees' central attack is upon the factual and legal findings of the Court of Appeals which favored the affirmance of the Trial Court's grant of summary judgment. Those arguments were not preserved for review here. Appellees' conclusory assertions are not supported by the record and are based upon the hope of unspecified information which has not been shown to exist through two filings of Appellees' claims.

In their Brief, Appellees do not directly engage the legal principles asserted in Ohio Edison's four Propositions of Law. It appears that Appellees do not contest the validity of any of

those legal propositions. Despite the Court of Appeals basing its reversal upon contract law, Appellees devote the vast majority of their Brief to arguing tort theories. More importantly, in doing so, they argue conclusions expressly rejected by Court of Appeals and not preserved by a cross appeal.¹

Reduced to its essence, Appellees' Brief makes four assertions: (1) that the on-the-job safety provision in the Contract can only be interpreted as providing perpetual safety to future travelers on the highway, (2) that Ohio Edison actively participated in the vegetation management at this site, (3) that Appellants, including Ohio Edison, altered the shape of this tree so as to create a hazardous condition, and (4) that public policy requires Ohio Edison to incorporate into its vegetation management contracts a broader duty than maintaining reliable electrical service while attempting to mitigate potential for electrical contact. Ohio Edison asserts that those arguments are unsupported by the record, unsupported by law, not properly before this Court and, most importantly, do not address let alone undermine the bases upon which this Court has accepted this appeal, bases which require reversal of the Opinion below.

1. Contract Intent

At App. B, ¶¶60-61, the Court of Appeals found that two different interpretations were "equally plausible" for the Contract provision which stated that "The contractor shall plan and

¹ Appellees' arguments seek to reverse express findings of the Court of Appeals regarding (1) the unforeseeability of Lisa Huff's accident, (2) the conclusion that this tree was not a hazard to the power lines, and (3) that Ohio Edison had no knowledge of this tree, let alone a defect in it. This Court has held that "an assignment of error by an appellee, where such appellee has not filed any notice of appeal from the judgment, may be used by the appellee as a shield to protect the judgment of the lower court but may not be used by the appellee as a sword to destroy or modify that judgment." See, for example, *O'Toole v. Denihan*, 118 Ohio St.3d 374, 390, 2008 Ohio 2574, ¶94 and *Duracote Corp. v. Goodyear Tire & Rubber Co.* (1983), 2 Ohio St.3d 160, 163. Appellees are using those arguments as swords to modify the judgment below. Additionally, Appellees also attempt to modify the Court of Appeals' conclusion from one finding ambiguity in the on-the-job accident prevention provision to one solely adopting their assertion.

conduct the work to adequately safeguard all persons and property from injury.”

As to this determination, Appellees assert two conflicting positions. On one hand, Appellees ask this Court to find that it has improvidently accepted this appeal, a result which would leave in place the Court of Appeals’ finding that two equally plausible readings exist.

On the other hand, without having separately appealed the Court of Appeals’ finding in ¶60 of its Opinion, Appellees assert that the foregoing Contract provision can have only one interpretation, the one insuring perpetual safety for travelers on the roadway. Appellees cannot have it both ways. Properly analyzed, the subject Contract provision can never be properly interpreted to impose a duty upon Ohio Edison.

Appellees favorably cite two of the same cases relied upon by Ohio Edison, *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216, and *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, syllabus 1. As acknowledged by Appellees, those cases, as well as the third contract case they cite, *Fed. Ins. Co. v. Executive Coach Luxury Travel, Inc.*, 2010 Ohio 6300 (Ohio 2010), all stand for the proposition that when the contract language is clear and straightforward, the intent of the parties is illustrated in the contract words.

Applying that apparently stipulated maxim of law to this case irrefutably demonstrates the absurdity of Appellees’ efforts to support the Court of Appeals’ conclusion as to Ohio Edison. By its express terms, the on-the-job accident prevention provision applies only to “The Contractor.” It is unrefuted that “The Contractor” is not Ohio Edison. Appellees cannot insist upon a straightforward reading of a portion of this contract provision while asserting a contorted and clearly unsupportable assertion as to another. As Appellees, themselves note, “[w]hen 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.” (Appellees’ Brief, p. 7.) The Contract sentence which has brought this case to the Supreme Court contains no promise by Ohio Edison, and such provision only creates a duty “in the promisor.” See Restatement of the Law 2d, Contracts, §304.

Appellees’ assertion that the Contract could be changed does not resolve either the dispute between the parties in this action nor the watershed created by the Court of Appeals in finding that a potential third party beneficiary could exist under a circumstance where the contracting parties intended none.

Appellees do not even begin to address the other principles of contract interpretation cited by Ohio Edison which demonstrate the absence of a rational basis for maintaining a third party beneficiary claim in this case.

2. Active Participation

Despite there being no evidence that Ohio Edison was on the property when Asplundh performed its work there in 2001, and despite there being no evidence that Asplundh inspected or performed any work on this tree in 2001 or brought it to Ohio Edison’s attention, Appellees now assert that Ohio Edison actively participated so as to have potential liability in this case.

In *Hirschbach v. Cincinnati Gas & Electric Co.* (1983), 6 Ohio St.3d 206, syllabus, this Court decided that “[o]ne who engages the services of an independent contractor, and who actually participates in the job operation performed by such contractor and thereby fails to eliminate a hazard which he, in the exercise of ordinary care could have eliminated, can be held responsible for the injury or death of an employee of the independent contractor.” Since *Hirschbach*, this Court has refined the law regarding active participation.

In *Bond v. Howard Corp.* (1995), 72 Ohio St.3d 332, this Court analyzed *Hirschbach* and the intervening cases regarding independent contractors and confirmed that while a party who engages the work of an independent contractor may owe a duty if that party “actively participated” in the specific job operation, a duty does not attach where that party “had inspectors at the job site, but only to insure that the job was completed according to specifications.” *Id.* at p. 335. In fact, in *Bond*, at syllabus, the Court expressly defined “actively participated”:

For purposes of establishing liability to the injured employee of an independent subcontractor, “actively participated” means that the general contractor directed the activity which resulted in the injury and/or gave or denied permission for the critical acts that led to the employee’s injury, rather than merely exercising a general supervisory role over the project.

Subsequent cases have confirmed that active participation may exist where the party hiring a contractor retains and exercises control over a critical aspect of the work. See, for example, *Sopkovich v. Ohio Edison Company* (1998), 81 Ohio St.3d 628, 643-44.

In the present case, Appellees only cite general supervisory provisions in the Contract and disregard the unrefuted evidence that no field specialist or other employee of Ohio Edison ever had contact with or knowledge of this tree, participated in Asplundh’s work at this site, or prohibited any work on this specific tree. Moreover, there is a total absence of evidence that even Asplundh had knowledge of the defect in this rural tree. In *Heckert v. Patrick* (1984), 15 Ohio St.3d 402, syllabus, this Court confirmed that even homeowners have no duty to inspect rural trees for defects and that a claim of liability can only be supported where there is “actual or constructive knowledge of a patently defective condition of a tree which may result in injury to a traveler.” “Problems discernable only upon inspection are not patently obvious.” *Ankeny v. Vodrey* (Sept. 23, 1999), Seventh Dist. Case No. 96-CO-00047.

Even the Court of Appeals, itself, App. B at ¶20, expressly acknowledged that “there is no evidence indicating the subject tree was pruned or otherwise inspected [when Asplundh did work on this circuit in 2001].” Moreover, this tree was on private property where even the homeowner, who was responsible for its maintenance, had no knowledge of the internal defects.

Further, in Ohio Edison’s Summary Judgment Motion, (T. 21), its forestry manager, Doug Shaffer, testified that Ohio Edison did not perform a tree-by-tree inspection, that vegetation inspection was performed by Asplundh, that this rural tree was not brought to Ohio Edison’s attention to be inspected or removed, and that there was no indication that Ohio Edison had any knowledge of this specific tree (T.d. 21, Shaffer Aff., ¶3).

... Affiant states that, in May 2001, the actual work of inspecting the trees and vegetation along the Hartford W220 circuit would have been performed by an independent contractor, the Asplundh Expert Tree Company (“Asplundh”). Affiant states that Ohio Edison would not have had any of its own employees inspecting individual trees at that time. Absent a specific issue being brought to Ohio Edison’s attention, the decision as to what trees to address and how to address them are made by the independent contractor. As to the Hartford W220 circuit in May 2001, those decisions would have been made by Asplundh. Affiant states that he has no recollection and has found no record which indicates that any concern regarding any trees at 6717 King Graves Road, let alone the specific tree involved in [Lisa Huff’s] accident, were brought to Ohio Edison’s attention. Affiant states that on this circuit, as was generally Ohio Edison’s practice, Ohio Edison would have simply performed an overview inspection of the electrical circuit to see if any vegetation was growing into the electrical wires and equipment. Affiant states that a tree-by-tree inspection, or even observation would not have been done by Ohio Edison.

In its Opinion, ¶62, the Court of Appeals first raised consideration that Ohio Edison could be liable under Contract through its field specialist. The Court of Appeals reversed the Trial Court as to Ohio Edison because it claimed to “not know the precise extent of this oversight and direction [by Ohio Edison’s field specialist]” (App. B, ¶62). Notably, despite relying upon the Contract as the basis to recapture Ohio Edison into this case, the Court of Appeals did not

identify any duty of the field specialist either in the Contract or otherwise in the record, let alone a duty that was breached. Moreover, while, in their Briefs, Appellees attempt to stretch the evidence to suggest that Ohio Edison's field specialists were actually on this property and aware of this tree, the record clearly demonstrated no one from Ohio Edison was ever aware of this rural tree, let alone aware of any defect within it. The Trial Court expressly found that "Ohio Edison . . . did not have actual or constructive notice of any defects in this tree located on someone else's property." (App. A, p. 4.) The Court of Appeals did not disturb that finding. Douglas Shaffer confirmed the very limited review performed by a field specialist (T. 92, pp. 97-98):

Q: Could you explain to me what you meant by what a field specialist would be by reviewing or inspecting the work?

A: It's a – it's a visual. It's – a lot of times it's a drive-by. If we can get on a road and see for 10 spans and there is no vegetation in or around the conductor, and the clearance that we needed is met, you know, they move on. They don't get out, and they don't check each tree, by any means, because we do thousands of trees every year . . .

Appellees' argument regarding alleged active participation by Ohio Edison must fail because it is unsupported by law and unsupported by fact.

3. Hazardous Condition

The Court of Appeals concluded that, if Ohio Edison could have any liability in this action, it could only be as a result of unspecified actions of Ohio Edison's field specialists in furthering the Contract's on-the-job accident prevention provision. At ¶¶60-61 of its Opinion, the Court of Appeals discussed the two possible interpretations it could give to the on-the-job accident prevention provision. Under the first interpretation, the Court of Appeals found that "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 of the work is occurring while that work is occurring.” If, as Appellants assert, that is the proper interpretation, as a matter of law, Ohio Edison bears no liability because (1) there is no evidence that Ohio Edison was present or participated in the actual work at this location in 2001, and (2) Lisa Huff was not injured “while that work [was] occurring.”

In the Court of Appeals’ alternative interpretation (App. B, ¶61), the Court of Appeals effectively concluded that a failure to remove this tree, consistent with the Vegetation Management Guidelines, could create liability. Again, the record is unrefuted that neither Ohio Edison’s field representatives or any other Ohio Edison employees were ever at this property or that this tree was ever brought to Ohio Edison’s attention to consider being removed.

Apparently realizing the *Catch 22* in applying either of the Court of Appeals’ interpretations to Ohio Edison, contrary to the evidence, Appellees assert that Ohio Edison created a hazardous condition. This alleged hazardous condition argument was not a basis of the Court of Appeals’ Opinion and was contrary to its finding that the accident was unforeseeable. As importantly, it is contrary to the actual testimony of even Plaintiffs’ own experts.

Specifically, Appellees assert that Ohio Edison’s vegetation management practices created a crown in the tree that was biased away from the utility lines and caused the tree to lean. Appellees summarily equate a biased crown and a leaning tree with negligence and the creation of a hazardous condition. Their experts do not. Specifically, Appellees’ own utility expert, Ralph Sheriff, confirmed that no evidence was presented that Ohio Edison had knowledge of any defect in this tree and that, not only was the biased crown not evidence of negligence, it

evidenced the commonly-accepted utility vegetation management practice (T 79-A, p. 144, l. 8 – p. 146, l. 12).

Plaintiffs' other expert, a forestry professor, Kim Steiner, had no knowledge or expertise in utility vegetation management practices (T. 19, p. 122, l. 18-25) and confirmed that the lean which he perceived in this tree did not constitute a hazardous condition, but only affected the direction in which the tree would fall if it otherwise failed (T. 19, p. 88, l. 19 – p. 89, l. 12).

The unrefuted evidence was that, *if* the lean of the tree was related to utility practices, that would have been consistent with accepted utility vegetation management standards and was not a reason that the tree failed. Appellants' utility vegetation management expert could not confirm that the asymmetry in this tree's crown or the lean perceived by Steiner was even related to utility practices. However, he did confirm that it is "a well-established utility arboricultural practice" to "re-direct [the re-growth response of trees] away from the distribution line." He found no instability related to the alleged lean. See T. 36, Ex. B(1), p. 20. Moreover, even Appellees' own utility vegetation management expert confirmed that utilities "try to do your side trimming and you leave the crown of the tree away from the line." (T. 79-A, p. 99, l. 5-7.) Appellees' utility vegetation management expert further confirmed that he saw nothing improper in the vegetation management guidelines (T. 79-A, p. 132, l. 9-12).

Appellees' assertion that this tree was a hazard to the power lines is contrary to the Court of Appeals' findings and should not be properly considered by this Court. Moreover, the lean which was perceived only by one of Plaintiffs' experts was even acknowledged by him not to be equivalent to "a hazardous condition." All vegetation management utility experts confirm that

the techniques for vegetation management used at and near this site were consistent with acceptable practices.

4. Public Policy

Appellees also assert that the Contract between Ohio Edison and Asplundh should provide broader protection to the public. This action has found its way to the Supreme Court not upon any belief by the courts below that Ohio Edison was negligent, but that there may be some basis in contract for liability. “Unlike tort law, which is guided largely by public policy considerations, contract law looks primarily to the intention of the contracting parties.” See *Welco Industries, Inc. v. Applied Cos.* (1993), 67 Ohio St.3d 344, 348, 1993 Ohio 191.

In *Otte v. Dayton Power & Light Co.* (1988), 37 Ohio St.3d 33, 40-41, this Court noted that it is doubtful that public policy considerations “are viable in an action against a highly regulated public utility” as “the risk allocation policy is applicable only when the industry affected may pass on its costs to the general public [and a] public utility in Ohio is highly regulated and price increases may only be established after administrative approval.” Recently, in *Corrigan v. Illuminating Co.*, 122 Ohio St.3d 265, 2009 Ohio 2524, this Court discussed the extensive framework established by the Public Utilities Commission of Ohio for overseeing the vegetation management programs of electrical utilities. As this Court has confirmed in *Hull v. Columbia Gas of Ohio* (2006), 110 Ohio St.3d 96, 99, “The General Assembly has by statute pronounced the public policy of the state with the broad and complete control of public utilities shall be within the administrative agency, the Public Utilities Commission.”

Other than a general incantation that more should be done to protect the public, neither below nor in their Brief here, have Appellees articulated any public policy beyond a general

assertion that Lisa Huff should have her day in court. The modification of a contract for public policy reasons “is limited to situations where the contract as interpreted would violate some explicit public policy that is well defined and dominant, to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest.” *Southwest Ohio Regional Transit Authority v. Amalgamated Transit Union, Local 627* (1998), 131 Ohio App.3d 751, 759, citing *W.R. Grace & Co. v. Internatl. Union of United Rubber* (1983), 461 U.S. 757, 766.

That Appellees wish that the Vegetation Management Guidelines would have resulted in the prior removal of this tree and avoided this unforeseeable accident does not constitute a proper basis for a public policy argument, particularly one not raised in the courts below.

CONCLUSION

Among the many tenets of both contract and tort law violated by the Court of Appeals below and highlighted in Appellants’ Briefs, possibly the most perplexing is the Court of Appeals’ handling of foreseeability. This tree on private property fell during a fierce windstorm. The Court of Appeals’ analysis envisions that an unforeseeable accident cannot directly be the basis for negligence but, through the working of contract law, can indirectly support a claim of liability. That analysis is not supported by contract law or tort law and violates the essence of both.

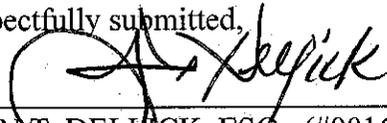
“A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract.” *Minster Farmers Cooperative Exchange Co., Inc. v. Meyer*, 117 Ohio St.3d 459, 464, 2008 Ohio 1259, ¶28. This fundamental premise of contract law highlights the

absurdity of the analysis below. Certainly contracting parties cannot have a meeting of the minds as to a potentiality that no one, let alone either of them, are expected to foresee.

Further, in *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St.3d 36, 37-39, this Court confirmed that, in order to evaluate the potential of a tort duty arising out of contract, first the contract must be examined and then foreseeability evaluated. "The existence of a duty depends on the foreseeability of the injury." *Hill, supra* at 39, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77. Further, citing *Norfolk & Western Co. v. United States*, (C.A. 6, 1980), 641 F.2d 1201, this Court, in *Hill*, 36 Ohio St.3d at p. 40, confirmed that "The performance of [the contractual] promise must also satisfy a duty owed by the promisee to the beneficiary."

Regardless whether a claimed duty arises from general tort principles or from a provision in a contract, it cannot be viable unless the claimed injury was foreseeable. The Court of Appeals' effort to dispense with foreseeability creates a watershed precedent that unravels the foundation of tort law and confuses the limited availability of contract as a basis for establishing tort duty. The potential damage created by the unsound Opinion below must be promptly negated to avoid perpetuation of its flawed analysis.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **Reply Brief of Appellant Ohio Edison Company** has been served via ordinary U.S. Mail this 8th day of March, 2011 to:

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