

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2010-0857

On Appeal from the Eleventh Appellate District  
Trumbull County, Ohio

Court of Appeals Case No. 2009-T-00808

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LISA G. HUFF, et al.

*Plaintiffs-Appellees*

vs.

FIRST ENERGY CORPORATION, et al.

*Defendants-Appellants*

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**REPLY BRIEF OF APPELLANT  
ASPLUNDH TREE EXPERT COMPANY**

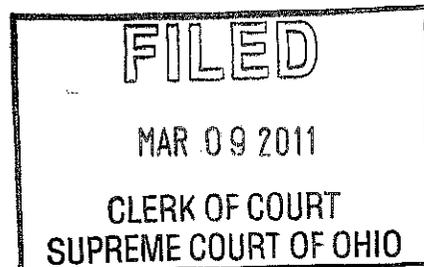
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## **I. RESPONSE TO APPELLEES' STATEMENT OF FACTS**

In the statement of facts and at various sections of the argument, appellees misrepresent or inaccurately describe the following relevant facts presented in this case. Despite these misrepresentations, the fact remains that Asplundh, as a matter of law, is not liable to appellees for Ms. Huff's injuries.

### **A. Appellees' Characterization of the Storm as a "Moderate Rain Storm."**

Appellees characterize the storm which occurred when the subject tree broke as a "moderate rain storm." The record of this case reflects that the National Weather Service designated this storm as a "severe thunderstorm," capable of producing large hail, damaging winds, and heavy rainfall. This warning was broadcast over the area Emergency Broadcast System prior to the event in issue. (T.d. 36, Affidavit of John Papp, Asplundh's motion for summary judgment, Exhibit A-1, pgs. 5-7).

### **B. Appellees' Representation that the Subject Tree Posed a Hazard to the Utility Line.**

At various points in the merit brief, appellees represent that the subject tree posed a threat to Ohio Edison's utility power line at the time Asplundh conducted its scheduled work in the area in May of 2001. (Appellees' Merit Brief, pgs. 5, 11 and 15). Appellees cite to the deposition testimony elicited from their arborist expert, Dr. Steiner, as the basis of this representation. The cited testimony from Dr. Steiner was actually elicited in response to a line of questions posed by appellees' counsel in an attempt to rehabilitate Dr. Steiner's prior affirmation that he did not believe that the subject tree posed a threat to the utility lines. In response to appellees' counsel's questions, Dr. Steiner actually testified:

- Q. Also, I believe this was under, I can't remember whose Cross Examination. You were asked whether the subject tree was a hazard to the utility lines. I believe your answer was that it was not?
- A. Yeah.
- Q. In the context of what we just discussed here today about a hazard, is your statement that that tree in no way could've fallen on the power line?
- A. Oh, no. Of course, it could have fallen on the power line. No. I was thinking - - - in fact, when I answered that question, I wasn't thinking about the tree breaking off at all. I was thinking about what - - - about the branches that might've interfered and fallen off.
- Q. So you're saying as it stood in the yard it was not a hazard, because none of the branches of the tree were touching the power lines?
- A. Yeah, but I suppose it was equally a hazard - - - in that sense, it was equally a hazard to the utility lines as it was to anything else, *except that it was leaning away and would've tended to fall toward the road.*

(Emphasis added). (T.d. Deposition of Kim C. Steiner, pgs. 214-215).

In response to follow up, Dr. Steiner reaffirmed that the subject tree would be inclined to fall away from the utility lines, stating:

- Q. As of today, based on everything you know, you don't know if there were any branches above that power line on the north side prior to the tree falling?
- A. That's correct.
- Q. So, with that in mind, you can't state today with a degree of probability whether or not any of those branches, if they existed, would have represented a hazard to those power lines.
- A. No. But my answer just now was based on the fact that the tree itself, if it fell, could have fallen into the power line, depending upon the direction of the wind.
- Q. And I think we have made this clear on numerous occasions. Recognizing that we've got a 10 degree lean towards the road, that's going to create a likelihood, if you will, that if the tree failed, it's going to fall towards the road; is that correct?

A. That's correct.

(Steiner Deposition, pgs. 217-218).

Finally, appellees' representation was rejected by the reviewing appellate court which held:

"On the day the tree fell, it broke approximately twenty feet up the ground. As indicated above, it was within the inspection zone as defined in the specification; however, the tree had a ten degree lean in the direction of Kings Grave Road. Due to this lean, it is undisputed that the tree was not a hazard to the power lines" (see appellate decision, pg. 6).<sup>1</sup>

**C. Appellees' Representation that the Pruning Method Mandated in Ohio Edison's Vegetation Management Specifications Directing the Removal of only those Tree Branches which face the Utility Power Lines Create an "Altered Hazardous Condition."**

At various points in the merit brief, appellees make the representation that the pruning method of only removing tree branches which face the utility power lines create an "altered hazardous condition." (Appellees' Merit Brief, pgs. 5, 11 and 14). There is no basis in the record to support this claim. In point of fact, this claim is refuted by appellees' own expert, Ralph E. Sherriff, who testified in deposition that the written Vegetation Management Specifications governing Asplundh's pruning technique were consistent with the Vegetation Management practices he oversaw as a division operating manager of Pennsylvania Power & Light Company. (Sherriff Depo., pgs. 24-25). Mr. Sherriff described the First Energy Vegetation Management Specifications as "pretty much industry standards." (Sherriff Depo., pg. 25). More to the point, when questioned if an unbalanced tree crown created by industry pruning practices created a hazardous condition to the tree, Mr. Sherriff testified:

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<sup>1</sup> Appellees have not filed a cross appeal with respect to the appellate court's finding on this fact. Nor has appellees challenged this finding in a manner consistent with the protocol set forth in R.C. 2502.22. As a consequence, any argument against his finding must be deemed as waived. *The Austin Township Bd. of Trustees v. Tracy, Tax Commr.* (1996), 76 Ohio St.3d 353 and *Seringehi Construction Co. v. City of Cincinnati* (1988), 51 Ohio App.3d 1, 2.

Q. The bias crown that you discussed with Mr. Sullivan as a result of Utility Vegetation Management, would you agree that this is a common result of vegetation practices by electrical utilities in the industry?

A. Yes.

Q. That, in and of itself, does not evidence any deviation from the accepted practices of the utility or its contractor; correct?

A. I would say yes.

Q. In fact, in your experience with PPL, I would assume that the vegetation management used by, or practices used by PPL's contractor, resulted in a bias crown; correct?

A. That's correct.

(Sherriff Depo., pgs. 145-146).

This opinion was reiterated by appellees' arborist expert, Dr. Steiner, who likewise testified that an unbalanced tree crown is not, in and of itself, indicative of a hazardous condition (Steiner Depo., pg. 91). Dr. Steiner also acknowledged that he was not aware of any studies which would support such a claim (Steiner Depo., pg. 91).

In sum, the evidence presented to the trial court reflects that the pruning techniques set forth in Ohio Edison's Vegetation Management Specifications were consistent with industry standards and that the practice of only pruning tree branches which face utility power lines did not create a hazardous condition to the tree.

**D. Appellees' Representation that Asplundh "Caused, Exacerbated and Maintained" the Allegedly Hazardous Condition of the Subject Tree.**

Appellees repeatedly suggest or infer that Asplundh did something to the subject tree to cause or increase the likelihood of the tree's failure. (Appellees' Merit Brief, pgs. 8, 11, and 14). As was duly noted by the trial court, there was no evidence in the record that any personnel from Asplundh actually worked on the subject tree when performing vegetation management services

in that area in May of 2001 or at any other times (Trial Court Decision, pg. 3). This finding was supported by appellees' arborist expert, Dr. Steiner, who acknowledged that he could not tell if any of the branches on the subject tree had been removed by Asplundh personnel in May of 2001 (Steiner Depo., pgs. 90-91). In fact, Dr. Steiner could not even say if anyone did anything to the subject tree after May 1, 2001 which would have increased the risk that the tree may fail at a later point in time. (Steiner Depo., pg. 112).

**E. Appellees' Representation that the Subject Tree Fell Towards the Utility Lines.**

In the merit brief, appellees inaccurately describe the fall path of the subject tree to give the impression that it fell in the direction of the utility power lines. Specifically, appellees represent that "the tree collapsed toward the power lines" (Appellees' Merit Brief, pg. 5). This description is misleading when compared to the deposition testimony of Reggie Huff. Mr. Huff describes the fall path of the broken tree as parallel to the road, testifying: "the trunk of the tree fell - - let's see, would be north - - it fell easterly. It actually fell slightly northeast. Since King Graves Road runs, runs east and west, almost exactly according to the map, then that would have actually fallen slightly northeast" (Reggie Huff Depo., pg. 105).

More importantly, there was no evidence that any portion of the fallen tree came into contact with or interfered with the utility lines at any point in time. Mr. Braho, the property owner, confirmed that there was no interruption of electrical power at his home as a result of the incident (Deposition of Gerald Braho, pg. 21).

**II. LAW AND ARGUMENT**

**A. The Appellate Court Ignored Well Established Rules Governing Contract Construction in Interpreting the on the Job Safety Clause as Potentially Imposing Obligations for Events Occurring Long After the Contracted Services were Concluded.**

Appellees concede, citing this court's decision in *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216, 219, that courts should examine the contract as a whole when seeking to discern the intent of the contracting parties. Nevertheless, appellees ignore all other language in the Ohio Edison/Asplundh contract other than the single sentence in the specification safety provision, providing "the contractor shall plan and conduct the work to adequately safeguard all persons and property from injury." Appellees overlook the fact that the "objective" of the contract is to "maintain reliable and economical electrical service" and/or the stated "scope of services" of the contract is to ensure that the right of way is "free of all vegetation obstructions that interfere with the construction, operation, maintenance and repair of the electric facilities." These contract provisions unequivocally describe the focus of the contract on the protection of utility equipment, not protection of the general public on roadways.

Appellees also ignore other language in the contract safety clause which describes the contractor's obligations while actual work was being performed (i.e. contract language obligating the contractor to "render the work secure in order to decrease the probability of accident and to avoid delay in completion of work" and to follow all applicable laws "with regard to the safe performance of the work.") Finally, the actual language cited by appellees obligates the contractor to "plan" and "conduct the work" to adequately safeguard persons or property. While this language unquestionably obligates Asplundh to protect persons and property while conducting work, it cannot be reasonably construed as imposing contractual responsibilities years after the contracted services are concluded.

The appellate court's interpretation of the contract safety provision is also inconsistent with the holdings articulated in *New York, Chicago & St. Louis Rd. v. Hefner Constr. Co.* (1967), 9 Ohio App. 201, 174; *Fitzpatrick v. Miller Bros. Constr.* (Sept. 4, 1986), Adams Cty. App. No.

428-424-430; and *Norfolk Western Co. v. United States of America* (C.A. 6, 1980), 64 F.2d 1201, when analyzing similarly worded “on the job” safety provisions..

The only authority cited by appellees in an effort to support the appellate court’s construction of the Ohio Edison/Asplundh safety provision is this court’s recent decision in *Fed. Ins. Co. v. Executive Coach Luxury Travel, Inc.* 2010-Ohio-6311. Appellees’ reliance on *Executive Coach* is disingenuous for a number of reasons. In the first place, the *Executive Coach* case involved an analysis of an insurance contract. The *Executive Coach* court noted that courts construe insurance policies liberally in favor of the insured. *Executive Coach* at ¶ 8, citing *Blue Cross and Blue Shield Mut. of Ohio v. Hrenko* (1995), 72 Ohio St.3d 120, 122. Secondly, the *Executive Coach* case involved the analysis of the undefined insurance policy terms “hire” and “permission” in the context of an omnibus insurance clause. This case involves a commercial contract between to corporate entities.

As an additional argument, appellees aver that under the construction argued by appellants, it would be perfectly acceptable for Asplundh to leave a tool in a tree which years later could fall and impact an innocent third party. This hypothetical overlooks the fact that a party performing services under a contract can be liable in tort to a third party even through that party cannot be deemed an intended beneficiary to the underlying contract. This Court’s decision in *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St.3d 36, illustrates this point by discussing the different analysis applied when examining the existence of a duty arising in tort based upon traditional concepts of foreseeability versus a duty arising out of contract to an intended beneficiary. The fact that a contract explicitly limits a contractor’s responsibilities to protecting utility equipment does not insulate that contractor from potential tort liability to third parties which may arise under traditional concepts of foreseeability and/or the law. Asplundh

has never claimed that the contract with Ohio Edison insulates Asplundh from any possible tort exposure to a third party. It is Asplundh's position that the contract does not create intended third party beneficiary rights on behalf of the general public with respect to a tree risk which poses no threat to utility equipment. It is likewise Asplundh's position that under the circumstances of this case, appellees have failed, as a matter of law, to establish that Asplundh owed a duty to Lisa Huff under tort.

**B. The Appellate Court Misapplied the Law Governing the Recognition of an Intended Third Party Beneficiary to a Contract.**

The argument presented in Section I of appellees' merit brief is premised on the supposition that a Vegetation Management Specification in the Ohio Edison/Asplundh contract mandated the removal of the subject tree. Asplundh has already addressed the appellate court's improper consideration of a tree removal provision relating to "priority trees located adjacent to the subtransmission and transmission clearing zone corridor" as the utility lines at issue were distribution lines, not subtransmission or transmission lines. The only tree removal specification applicable to the subject tree provided:

Trees that are expected to be removed are those that are:

Dead or defective which constitute a hazard to the conductor.

There was no evidence presented to the trial court that the subject tree constituted a hazard to the utility distribution lines when Asplundh performed work in that area in May of 2001. The evidence presented to the trial court confirmed that if the tree were to ever fail, it was likely to fall away from the power lines. As such, appellees' supposition is without basis in fact.

Appellees also argue that Ohio Edison and Asplundh were "active participants" in determining whether the subject tree needed to be removed under the contract specification. Asplundh is unclear as to how this classification would impact the determination of whether the

subject tree needed to be removed under the Vegetation Management Specifications and/or whether Lisa Huff can be deemed an intended beneficiary to the Ohio Edison/Asplundh contract. Asplundh concedes it is an “active participant” under the Ohio Edison/Asplundh contract as it is the independent contractor which is responsible to perform the specified vegetation management duties. This designation, however, would not have a relevant impact on the germane issues before the court.

More importantly, appellees’ arguments in support of the appellate court majority panel ruling completely ignore the requisite criteria established in *Hill v. Sonitrol* and *Trinova Corp. v. Pilkington Brothers, P.L.C.* (1994), 70 Ohio St.3d 271, to substantiate a party’s status as an intended beneficiary to a contract:

- (1) The performance of the contracted promise must satisfy a duty owed by the promiser to the beneficiary. *Hill* at 41; and
- (2) The contract must have been entered into by the contracting parties for the “direct” or “primary” benefit of the third party beneficiary.

*Trinova Corp.* at 276.

Appellees cite to no evidence to demonstrate how this requisite criteria was satisfied.

**C. The Interpretation of the Ohio Edison/Asplundh Contract as Imposing Duties on Asplundh to Protect Utility Property is Consistent with Language of the Contract, Industry Practice and not in Contradiction to Ohio Public Policy.**

In the final proposition of law, appellees again confuse concepts of tort law with the law governing an intended beneficiary’s rights under a contract. As previously noted, the determination of whether a party is an intended beneficiary to contract is a separate and distinct issue from whether an injured party has a valid tort claim against a party performing services to another pursuant to a contract. As a consequence, appellees’ citation and discussion of *Parke v. Ohio Edison, Inc.*, 2005-Ohio-6153, *Brady-Fray v. Toledo Edison Co.*, 2003-Ohio-3422, and

*Hetrick v. Marion-Resort Co.* (1943), 141 Ohio St. 347 in the context of an analysis of Lisa Huff's status as an intended beneficiary to the Ohio Edison/Asplundh contract is improper. These cases only analyzed liability under traditional concepts of tort and foreseeability.

The underlying trial court separately concluded that Lisa Huff was not an intended beneficiary to the Ohio Edison/Asplundh contract and that appellees failed to establish the existence of a duty under tort law. The two judge majority panel of the appellate court reversed the trial court's decision solely on the intended beneficiary issue. The appellate court did not directly question the trial court's holding with respect to the lack of duty under tort law. Appellees have not challenged the trial court's determination of a lack of duty under tort law through a cross-appeal and/or raised this issue in a manner conversant under R.C. 2502.22. For this reason alone Appellees' discussion of tort liability is misplaced and waived.

However, even if this Court were to consider appellees' discussion of tort liability, this Court must conclude that the trial court ruled correctly. Appellant has already cited this Court to numerous decisions which hold that any easement holder such as Ohio Edison does not owe a duty under law to protect the general public on public roadways. In *Estate of Durham v. Amherst* (1988), 52 Ohio App. 301, 106; *Walker v. Dodson* (May 6, 1996), Claremont Cty. App. No. CA 95-10-071; *Massir v. Dayton Power & Light Co.* (Sept. 21, 1992), Fayette Cty. App. No. 41-10-25. Appellant has likewise confirmed that Asplundh's duty under the Vegetation Management Specifications was to protect utility equipment, not third parties from tree risk which posed no hazard to utility equipment.

Correspondingly, appellees did not identify a factual basis upon which a finder of fact could reasonably conclude that the unfortunate incident involving Lisa Huff was a foreseeable consequence of Asplundh's actions under the Ohio Edison/Asplundh contract. Again, appellees

could not establish that any Asplundh personnel touched the subject tree when performing services in that area in May of 2001. Under Section 324A of the Second Restatement of the Law, Torts, (1965), a party who undertakes for consideration to render services to another which he should recognize as necessary for the protection of a third person or his things is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if:

- a) his failure to exercise reasonable care increased the risk of such harm;
- b) he has undertaken to perform a duty owed by the other to the third person;  
or
- c) the harm is suffered because of reliance of the other or the third person upon the undertaking. Section 324A.<sup>2</sup>

Section 324A would be inapplicable to this case for largely the same reason why Lisa Huff cannot be deemed an intended beneficiary to the Ohio Edison/Asplundh contract. There is no basis under the contract for Asplundh to conclude that the services rendered thereunder were “necessary” for the protection of the general public on public roadways from tree risks which pose no threat to utility equipment. Furthermore, appellees presented no evidence that Lisa Huff “relied” on the tree services provided by Asplundh as required under Subsection (c). Nor have appellees proved that Asplundh had undertaken a duty owed by Ohio Edison to Lisa Huff as required under Subsection (b).

As to Subsection (a), the law in Ohio is well established that a party must show that the offending party somehow “increased” the risk to the party who sustained the injury. *Grone v. Lake Seneca Property Owners Assoc.* (April 18, 1987), Williams Cty. App. No. WM-96-002 (the

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<sup>2</sup> This court has not officially adopted this section of the Restatement of Torts in any case.

court, when reviewing identical requirement set forth in Section 323A(a) of the Restatement of Torts, held that the defendant's negligent performance must somehow put the plaintiff in a worse situation than if the defendant had never begun the performance). In sum, Section 324A(a) relates to acts of commission, not omission. See also, *Good v. Ohio Edison Co., et al.* (6<sup>th</sup> Cir. 1998), 149 F.3d 413, 421 (holding that in order to prevail under Section 324A, the plaintiff must establish that the defendant, through affirmative action, caused "some physical change to the environment or some material alteration of circumstances"). As appellees could not establish that Asplundh did anything to the subject tree in May of 2001, the trial court was correct in concluding that Asplundh owed no duty in tort to Lisa Huff with respect to the incident in issue.

Lastly, on the topic of public policy, appellees claim that Asplundh's position allows it to create a hazard "that extends" after the performance of the contracted work and avoid liability for later events.<sup>3</sup> Once again, appellees confuse principles of tort liability and principles governing an intended beneficiary to a contract. The determination of whether Lisa Huff is an intended beneficiary to the Ohio Edison/Asplundh contract will not, in and of itself, extinguish Asplundh's potential tort liability premised on traditional concepts of foreseeability. Appellees' tort liability claim fails for want of proof of a duty. Appellant would respectfully submit that the underlying ruling by the appellate court contravenes Ohio public policy by imposing duties and responsibilities not contained in contract and which would otherwise not arise under traditional concepts of foreseeability under tort law.

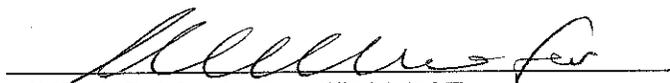
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<sup>3</sup> In support of this argument, appellees cite to the deposition testimony from Robert Cool. This testimony is irrelevant to the legal issues in this case. Moreover, the deposition transcript of Mr. Cool never placed in evidence before the trial court. Appellant has objected to appellees' improper citation to the deposition testimony before the trial court, the court of appeals, and now this Court.

### III. CONCLUSION

For all the foregoing reasons, this court should reverse the holding by the reviewing court of appeals and reinstate the judgment of the trial court. The appellate court decision, if left to stand, imposes unprecedented obligations on Ohio utilities and vegetation management providers rendering them potentially liable for tree hazards which pose no risk to the utility equipment.

Respectfully submitted,



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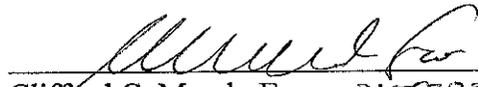
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**CERTIFICATE OF SERVICE**

A copy of the foregoing document was sent by regular U.S. mail this 9 day of

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