

IN THE SUPREME COURT OF OHIO

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

MOTION OF APPELLEES, LISA G. HUFF, ET AL., FOR RECONSIDERATION

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MOTION FOR RECONSIDERATION

Now come the Appellees, Lisa G. Huff, et al., by and through the undersigned counsel and pursuant to S.Ct. Prac. R. 11.2, and respectfully move this Ohio Supreme Court to reconsider its October 5, 2011 decision reversing the judgment of the 11th District Court of Appeals and holding that the trial court properly granted summary judgment to Appellants Ohio Edison and Asplundh. As more fully described in the attached brief in support, it appears that this Court did not consider several legal and factual points which would have led this Court to affirm the 11th District Court of Appeals' decision below and hold in favor of Appellees.

BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

I. The issue of whether Appellants owed Appellees a duty under traditional principles of tort law was properly before this Court.

In her opinion for this Court, Justice Lanzinger wrote, “[i]t should be noted that while there is no contractual duty on behalf of Ohio Edison or Asplundh toward the Huffs, this fact did not preclude the Huffs from showing that appellants owed them a duty under traditional principles of tort law.” Huff v. First Energy Corp., Slip Opinion No. 2011-Ohio-5083, ¶21. Yet, based on the belief that “the Huffs failed to preserve this issue on appeal,” this Court chose not to even consider whether or not Appellants owed Appellees such a duty. Id. However, Appellees argued that Appellants owed them a duty of care under traditional principles of tort law from the very beginning of this case. This argument was made by Appellees at the trial court level in response to Appellants’ motions to dismiss, it was made a second time by Appellees when this case was before the 11th District Court of Appeals, and it was made a third time in the merit brief that Appellees submitted to this Court. As such, there was absolutely nothing more that Appellees could have done to “preserve” this issue on appeal.

Appellees were not required to file a cross-appeal with this Court in order to preserve on appeal the issue of whether Appellants owed them a duty under traditional principles of tort law. Though the Ohio Rules of Appellate Procedure do not necessarily apply to appeals to this Court, they do provide excellent insight when it comes to the issue of the necessity of cross-appeals. App. R. 3(C)(1) “requires a cross-appeal when ‘a person who intends to defend a judgment or order against an appeal taken by an appellant...**also seeks to change the judgment or order.**” In re Orecchio, Slip Copy, 2010 WL 2501203, ¶36 (Ohio App. 7th Dist. 2010), 2010-Ohio-2849 (quoting App.R. 3(C)(1)) (emphasis in original). “However, a cross-appeal is not required when an appellee intends to defend the judgment on grounds other than those relied on by the trial court but does not seek to change the judgment.” Id. (citing App.R. 3(C)(2)); *accord* State ex rel. Davila v. E. Liverpool, Slip Copy, 2011 WL 1005455, ¶32 (Ohio App. 7th Dist. 2011), 2011-Ohio-1347, Murray v. State, 2002 WL 337732, FN2 (Ohio App. 8th Dist. 2002), 2002-Ohio-664. Additionally, the U.S. Supreme Court has stated that “it is...settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.” United States v. American Ry. Exp. Co., 265 U.S. 425, 435 (1924) (citations omitted).

In Couchot v. State Lottery Comm., this Court weighed in on the issue of the necessity of cross-appeals, stating that since the “appellees received the judgment they sought in the court of appeals...there was nothing for them to appeal.” Couchot v. State Lottery Comm., 74 Ohio St.3d 417, 423 (1996). Thus, this Court found the appellees in Couchot did not have to file a cross-appeal in order to defend an appeals court judgment in their favor, even if the appellees were doing so on grounds other than those adopted by the court of appeals. Id. After all, [a]ppeals are

from judgments, not the opinions explaining them. Id. (citing R.C. 2505.03).

In the case at bar, were Appellees to have filed a cross-appeal with this Court in which they argued that Appellants owed them a duty under traditional principles of tort law, they would have been doing so in order to defend the 11th District Court of Appeals judgment on grounds other than those that the court of appeals relied upon. However, Appellees would not have been seeking to change the court of appeals' judgment, as that judgment was in their favor. As such, Appellees were not required to file a cross-appeal with this Court in order to preserve on appeal the issue of whether Appellants owed them a duty under traditional principles of tort law.

This Court reiterated less than a year ago that it ““will not reverse a correct judgment simply because some or all of a lower court’s reasons are erroneous.”” State ex rel. Dehler v. Kelly, 127 Ohio St.3d 309, 310 (2010) (quoting State ex rel. Galloway v. Cook, 126 Ohio St.3d 332, 333 (2010), quoting State ex rel. Swain v. Bartleson, 123 Ohio St.3d 125, 125 (2009)). Thus, in the case at bar, even if Appellees had filed a cross-appeal with this Court in which they argued that Appellants owed them a duty under traditional principles of tort law, this Court would have most certainly refused to hear said cross-appeal. This is due to the fact that such a cross-appeal would be asking this Court to reverse what Appellees believed to be ““a correct judgment simply because some or all of the lower court’s reasons are erroneous,”” which is something this Court will not do. Id. (quoting State ex rel. Galloway v. Cook, 126 Ohio St.3d 332, 333(2010), quoting State ex rel. Swain v. Bartleson, 123 Ohio St.3d 125, 125 (2009)). Accordingly, there was absolutely nothing more that Appellees could have done to “preserve” this issue on appeal. Therefore, the issue of whether Appellants owed Appellees a duty under traditional principles of tort law was properly before this Court.

II. This Court should have engaged in a de novo review and applied the standards outlined in Civ.R. 56(C) to the case at bar.

In the case at bar, this Court held that “the trial court properly granted summary judgment to Ohio Edison and Asplundh.” Huff v. First Energy Corp., Slip Opinion No. 2011-Ohio-5083, ¶22. However, in her opinion for the Court, Justice Lanzinger did not use the de novo review standard that applies when a reviewing court evaluates a lower court’s decision to grant summary judgment, nor did Justice Lanzinger engage in the analysis called for by Civ.R. 56(C). Had this Court used the de novo review standard and applied the standards outline in Civ.R. 56(C) to the case at bar, this Court would have ultimately affirmed the 11th District Court of Appeals’ decision and held in favor of Appellees.

According to Civ.R. 56(C), summary judgment is proper in Ohio when (1) the evidence shows “that there is no genuine issue as to any material fact” to be litigated, (2) “the moving party 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 that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence ... construed most strongly in the party’s favor.” Civ.R. 56(C). It was recently reaffirmed that this Court’s “determination whether summary judgment was appropriate is made upon a de novo review.” Smith v. McBride, 2011 WL 4424268, ¶12 (Ohio 2011) 2011-Ohio-4674 (citing Corner v. Risko, 106 Ohio St.3d 185, 186 (2005)). De novo review means that a reviewing court “uses the same standard that the trial court should have used in examining the evidence to determine if genuine issues of material fact exist for trial.” Thompson v. Eroglu, 2006 WL 3849286, ¶10 (Ohio App. 7th Dist. 2006), 2006-Ohio-7060 (citing Brewer v. Cleveland Bd. of Edn., 122 Ohio App.3d 378, 383 (8th Dist. 1997)). In order to conduct a de novo review, a reviewing court must “review the trial court’s decision independently and without

deference to it.” Brewer v. Cleveland Bd. of Edn., 122 Ohio App.3d 378, 383 (8th Dist. 1997).

When it comes to the case at bar, it cannot be said that a de novo review was conducted by this Court. Referring to the tree at issue in this case, this Court stated that “the trial court found that the Huffs failed to show that either Ohio Edison or Asplundh was on notice of any decay in the tree when Asplundh was on the site in 2001.” Huff v. First Energy Corp., Slip Opinion No. 2011-Ohio-5083, ¶21. However, this Court’s opinion does not go on to consider the evidence supporting and refuting this disputed fact anew. Furthermore, in footnote 4 of her opinion, Justice Lanzinger stated:

[B]ecause the court of appeals limited its analysis to whether the Huffs are intended third-part beneficiaries under the contract, we also decline to address Asplundh’s first proposition of law, which addresses whether a utility or its contractor has a general duty to protect the public from trees that are not located on utility property or within a utility easement and do not pose a threat to utility equipment.

Id. at footnote 4. This Court should not have giving such deference to the trial court and court of appeals, as a reviewing court that is supposed to be engaged in a de novo review is to give no deference whatsoever to a lower court’s decision. Brewer v. Cleveland Bd. of Edn., 122 Ohio App.3d 378, 383 (8th Dist. 1997). Instead, this Court should have continued on and made an independent determination of whether Appellants owed Appellees a duty under traditional principles of tort law. This would have been an appropriate determination for this Court to make while engaging in a de novo review and, for the reasons outlined in Section I above, this issue was properly before this Court.

Additionally, it simply cannot be said that this Court construed the evidence in this case most strongly in the favor of Appellees. In fact, Justice Lanzinger’s opinion on this matter is replete with examples of this Court actually construing the evidence in exactly the opposite

direction, if not engaging in outright fact finding.¹ For example, referring to the tree that led to Appellee Lisa G. Huff's paralysis, Justice Lanzinger's opinion for this Court stated that "[t]he tree did not present a hazard or threat to the power lines owned by the utility." Huff v. First Energy Corp., Slip Opinion No. 2011-Ohio-5083, ¶3. This assertion is not supported by the trial court's decision granting summary judgment in favor of Appellants.² In fact, Appellants first raised this assertion in the court of appeals. However, in the reply brief that Appellees filed with the court of appeals, evidence was presented that demonstrated that the tree at issue in this case did indeed present a hazard or threat to the power lines owned by Ohio Edison. Reply Brief of Appellants, Lisa G. Huff, et al. pgs. 2-3 (Ohio App. 11th Dist. Filed January 2, 2010). Appellees expert witness, Kim C. Steiner, Ph.D., was asked the following questions and gave the following answers while being deposed:

- Q. In the context of what we just discussed here today about a hazard, is it your statement that the 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 one 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.

Deposition of Kim C. Steiner Ph.D., pg. 215, lines 1-23 (emphasis added). This testimony was included in Appellees aforementioned reply brief that was filed with the court of appeals.

¹ While what follows is a discussion of only four instances where this Court construed the evidence in this case most strongly in favor of the Appellants, not the Appellees, or engaged in outright fact finding, Appellees maintain that these are not the only instances present in this Court's opinion on this matter.

² It should also be noted that this assertion was not essential to any of the decisions that have been rendered by any of the courts that have heard this case.

In her opinion for this Court, Justice Lanzinger's wrote, "[Appellee Lisa G. Huff] alleges that during a **heavy thunderstorm**, a large sugar maple tree split in two approximately 25 feet about the ground, and a large limb struck her, causing serious and permanent injuries." Huff v. First Energy Corp., Slip Opinion No. 2011-Ohio-5083, ¶2 (emphasis added). In actuality, the weather on the day of Ms. Huff's horrific injury was greatly disputed by the parties. In fact, in their brief that was filed with the 11th District Court of Appeals, Appellees presented evidence in the form of expert testimony that demonstrated that there was no "heavy" or "severe" storm at the time that Ms. Huff was gravely injured. Brief of Appellants, Lisa G. Huff, et al., pgs. 18-19 (Ohio App. 11th Dist. Filed November 2, 2009).

In this Court's opinion on this matter, it was stated that "Ohio Edison maintained an easement near the tree [at issue in this case], but the tree was outside the easement." Huff v. First Energy Corp., Slip Opinion No. 2011-Ohio-5083, ¶3. From this matter's inception, Appellees have presented evidence that demonstrates that Ohio Edison's easement included the tree at issue in this case. Moreover, the easement that Ohio Edison possessed was a prescriptive easement. Huff v. First Energy Corp., Slip Copy, 2010 WL 1253754 (Ohio App. 11th Dist. 2010), 2010-Ohio-1456. In Ohio, prescriptive easements are based on actual use, not some rigid geographic boundary that a tree sits "inside" or "outside" of. Fitzpatrick v. Palmer, 186 Ohio App.3d 80, 88 (4th Dist. 2009); *accord* Gulas v. Tirone, 184 Ohio App.3d 143, 152 (7th Dist. 2009), McCumbers v. Puckett, 183 Ohio App.3d 762, 766 (12th Dist. 2009), Katz v. Metro. Sewer Dist., 117 Ohio App.3d 584, 589 (1st Dist. 1997).

Furthermore, a prescriptive easement holder, like all easement holders, has a duty to maintain and repair the easement. Market Enterprises, Inc. v. Summerville, 2002 WL 1585922 (Ohio App. 5th Dist. 2002), 2002-Ohio-3692; *accord* Hoffman v. City of Akron, 1987 WL 9348

(Ohio App. 9th Dist. 1987). “[T]he duty to maintain an easement in a safe condition to prevent injuries to third parties generally rests on the owner of the dominant estate....” 25 AmJur.2d Easements and Licenses § 82 (citing *Collom v. Holton*, 449 So.2d 1003 (Fla. Dist. Ct. App. 2nd Dist. 1984)). In the case at bar, the owner of the dominant estate is Ohio Edison.

Additionally, in Market Enterprises, Inc. v. Summerville, the court stated “[t]he dominant estate is ... required to make repairs if ‘necessary to prevent the enjoyment of the right [from] becoming an annoyance and nuisance to the owner of the servient tenement....’” Market Enterprises, Inc. v. Summerville, 2002 WL 1585922 (Ohio App. 5th Dist. 2002), 2002-Ohio-3692 (citing National Exchange Bank v. Cunningham, 46 Ohio St. 575, 589 (1889)). In Market Enterprises, Inc., the appeals court asserted that it had been implicitly found by the trial court that a parking lot that was part of an easement had become an annoyance or nuisance after a woman who walked through the parking lot “fell into one of the many sinkholes which had developed on the lot.” Id. Therefore, the holding in Market Enterprises, Inc. recognized an easement holder’s duty to third parties. Id.

In her opinion for this Court, Justice Lanzinger stated that “the Huffs’ counsel proposed that either Ohio Edison or Asplundh had caused damage, at some unspecified time, to the tree that struck Lisa Huff.... Counsel admitted, however, that the Huffs had no **direct evidence** to support this theory.” Huff v. First Energy Corp., Slip Opinion No. 2011-Ohio-5083, ¶21 (emphasis added). The question of whether or not Appellees had “direct evidence” to support their theory was greatly discussed during oral arguments. Firstly, Appellees dispute the assertion that they have no “direct evidence” to support their theory. Secondly, this Court has stated that “[i]t is ... well-settled under Ohio law that a defendant may be convicted solely on the basis of circumstantial evidence.” State v. Nicely, 39 Ohio St.3d 147, 151 (1998) (citations omitted). This

Court continued on in Nicely to find that there is “no reason that the crime of murder should be treated any differently from other crimes when considering the use of circumstantial evidence to establish their commission.” Id. at 154. If a prosecutor in the State of Ohio can rely solely on circumstantial evidence in order to meet his burden of proving guilt beyond a reasonable doubt at trial, even when the crime alleged is the capital crime of murder, then a plaintiff in a civil case should unquestionably be able to rely solely on circumstantial evidence when opposing a defendant’s motion for summary judgment. After all, the burden of having to prove guilt beyond a reasonable doubt is exponentially higher than the burden that Civ.R. 56 places on a party against whom a motion for summary judgment is made.

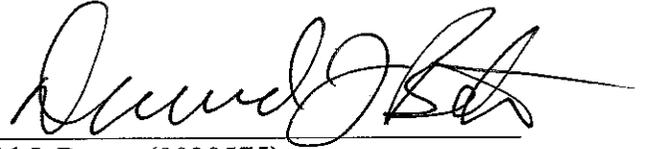
For all of the reasons discussed above, this Court should have engaged in a de novo review and applied the standards outlined in Civ.R. 56(C) to the case at bar. However, Justice Lanzinger’s opinion for this Court demonstrates that such an analysis was not conducted in this instance. Thus, this Court must grant Appellees Motion for Reconsideration.

III. Conclusion

Appellees respectfully request that this Court reconsider its decision on this matter. The issue of whether Appellants owed Appellees a duty under traditional principles of tort law was properly before this Court. As such, Appellees ask that this court take up that issue while engaging in a de novo review and applying the standards outlined in Civ.R. 56(C) to the case at bar. Performing such an analysis while reconsidering its decision on this matter will ultimately lead this Court to affirm the 11th District Court of Appeals’ decision below and hold in favor of Appellees.

Respectfully submitted,

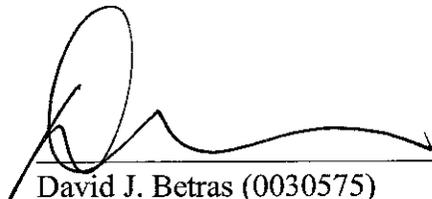
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion of Appellees, Lisa G. Huff, et al., for Reconsideration 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, and Attorneys Clifford C. Masch, Brian D. Sullivan, and Martin T. Galvin at 1400 Midland Building, 101 Prospect Avenue West, Cleveland, OH 44115-1093, by regular U.S. Mail, on this 17 day of October, 2011.



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