

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)	

**BRIEF OF OHIO EDISON COMPANY IN OPPOSITION TO APPELLEES'
MOTION FOR RECONSIDERATION**

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**BRIEF OF OHIO EDISON COMPANY IN OPPOSITION
TO APPELLEES' MOTION FOR RECONSIDERATION**

Neither the proceedings to date nor Appellees' Motion for Reconsideration support any request to revisit the Decision rendered in this action on October 5, 2011. Appellees did not preserve for appeal the negligence arguments which they now ask the Court to consider under the guise of "reconsideration." Regardless, after more than five years of litigation and two filings of Appellees' claims, the record is totally devoid of any evidence that Ohio Edison had *any* knowledge of this tree or owed or breached any tort duty to Appellees. Any reconsideration of this case would only involve an improper and needless reargument of negligence issues which have been dispatched as unsupportable by all courts that have heard them.

I. Appellees' Argument not preserved for appeal.

In its Judgment Entry, the Trial Court expressly found that Appellants were not liable to Appellees under a negligence theory. The Court of Appeals agreed with the Trial Court that Appellants were not liable in negligence and, if Appellees had any hope of establishing liability, it would have to be under a third party beneficiary contract theory. At that point, the unavailability to Appellees of a negligence theory, as a matter of law, remained the law of the case.

Appellees did not file a cross-appeal to this Ohio Supreme Court nor did they assert cross-assignments of error or alternative propositions of law related to negligence, as opposed to contractual theories. Any claimed error by the courts below in regard to their handling of Appellees' negligence claims was not preserved for appeal to this Court.

A. A cross-appeal was necessary to preserve the issues asserted by Appellees in their Motion for Reconsideration.

Although the Rules of Practice of the Supreme Court provide for a cross-appeal, they do not appear to specifically describe the circumstances wherein a cross-appeal is needed. However, Ohio Rule of Appellate Procedure 3(C) is instructive:

(C) Cross appeal.

(1) Cross appeal required. A person who intends to defend a judgment or order against an appeal taken by an appellant and who also seeks to change the judgment or order **or, in the event the judgment or order may be reversed or modified, an interlocutory ruling merged into the judgment or order**, shall file a notice of cross appeal within the time allowed by App. R. 4.

(2) Cross appeal not required. A person who intends to defend a judgment or order appealed by an appellant on a ground other than that relied on by the trial court but who does not seek to change the judgment or order is not required to file a notice of cross appeal. (Emphasis added)

The question is whether Appellees' argument constitutes an attempt "to change the judgment or order" or "an interlocutory ruling merged into the judgment or order."¹ Appellees' attack on the conclusions of the Court of Appeals and Trial Court that negligence theories are not viable is an attempt to change the rulings of the courts below and required a cross appeal.

Read in their entirety, cases cited by Appellees support Ohio Edison's position. For example, in *United States and Interstate Commerce Comm. v. American Railway Express Co.* (1924), 265 U.S. 425, 435, 44 S. Ct. 560, 564, the U.S. Supreme Court noted that an appellee who has not filed an appeal "may not attack the decree with a view either to enlarging his own

¹ The requirement for a cross appeal is not as narrow as asserted by Appellees; that is, it is not limited to a "judgment."

rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.” Likewise, in *In re: Orecchio v. Colantoni*, 2010 Ohio 2849 (Ohio App. 7 Dist.) ¶¶35-37, the court noted that a cross-appeal is required where an appellee “intends to defend a judgment or order against an appeal taken by an appellant and **who also seeks to change the judgment or order.**” (Emphasis original.) In *Orecchio*, the court found that appellee’s arguments sought to modify the lower court’s decision and, in the absence of a cross-appeal, the court refused to consider 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.” It rejected the negligence “standard of care and duty that [Appellees asked the Trial Court to impose as it] would require Ohio Edison and other like utilities to inspect all trees that they do not own within range of their power lines, whether interfering with said lines or not.” The Trial Court found no negligence and the Court of Appeals agreed (Court of Appeals Opinion, ¶52) (“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.”

Appellees’ attempt at reconsideration seeks to change those rulings of both the Trial Court and Court of Appeals. As noted in *United States and Interstate Commerce Comm., supra*, that is an improper request by a party who has not filed a cross-appeal as they “may not attack the decree with a view either to enlarging [their] own rights thereunder or of lessening the rights of [their] adversary.”

B. Even if a cross appeal was not necessary, at a minimum, cross-assignments of error were.

R.C. §2305.03(C) states that an “appeal of a final order, judgment, or decree of a court shall be governed by the Rules of Appellate Procedure or by the Rules of Practice of the Supreme Court, whichever are applicable, and, to the extent not in conflict with those rules, this chapter.” R.C. §2505.22 expressly provides that, where an appellee does not appeal, that appellee may preserve certain arguments for consideration by filing assignments of error:

§2505.22 Assignments of error filed on behalf of appellee

In connection with an appeal of a final order, judgment, or decree of a court, assignments of error may be filed by an appellee who does not appeal, which assignments shall be passed upon by a reviewing court before the final order, judgment, or decree is reversed in whole or in part. The time within which assignments of error by an appellee may be filed shall be fixed by rule of court.

In *Pang v. Minch* (1990), 53 Ohio St.3d 186, the appellee presented this Court with a situation where he was satisfied with the trial court judgment but wanted to preserve error for appeal in the event that an appellate court sustained the appellant’s assignments of error. In *Pang, supra* at fn 6, this Court explained that cross-assignments of error were necessary because they would only be considered after favorable consideration was given to appellant’s assignments of error and would allow appellee to confirm the applicable law upon remand:

Utilization of R.C. 2505.22 would have allowed the appellate court to consider appellees’ assignments of error only if the judgment was reversed, see *Parton v. Weilnau* (1959), 169 Ohio St. 145, 8 O.O. 2d 134, 158 N.E. 2d 719, paragraph seven of the syllabus, and would have had the salutary effect of clarifying the applicable law on remand had reversal and retrial been necessary. See *Duracote Corp. v. Goodyear Tire & Rubber Co.* (1983), 2 Ohio St. 3d 160, 165, 2 OBR 704, 708, 443 N.E. 2d 184 (C. Brown, J., dissenting).

All propositions of law asserted by Appellees in their Merit Brief were directed toward supporting the Court of Appeals' contract analysis and not attacking its negligence analysis.² Therefore, whether due to the absence of a cross-appeal or the absence of cross-assignments of error, as this Court found, Appellees' attack on the findings of the Court of Appeals and Trial Court regarding negligence were not preserved for appeal.

C. The law of the case doctrine corroborates that a cross appeal or assignments of error were necessary.

"The law of a case is a longstanding doctrine in Ohio jurisprudence." *State ex rel Cordray v. Marshall*, 123 Ohio St.3d 229, 235, 2009 Ohio 4986, ¶27. "[A]bsent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case." *Id.*

If this Supreme Court had not accepted Appellants' appeal, the Court of Appeals' March 31, 2010 Opinion and Judgment Entry would have been the law of the case. "Under the law-of-the-case doctrine, the denial of jurisdiction over a discretionary appeal by this court settles the issue of law appealed." *State ex rel Board of State Teachers Retirement System of Ohio v. Davis*, 113 Ohio St.3d 410, 417, 2007 Ohio 2205, ¶49. Likewise, if this Court affirmed the Court of

² Appellees' propositions of law, as asserted in their Merit Brief were:

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.

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.

Appeals' Opinion, the law as stated by the Eleventh District Court of Appeals would have remained the law of the case.

Under either scenario, the law of the case would have been that Appellees could return to the Trial Court to assert *only* that the contract between Ohio Edison and Asplundh created a duty to them. They could *not* argue that Ohio Edison or Asplundh breached a tort duty to them, as that theory was conclusively decided against Appellees. By their Motion for Reconsideration, Appellees are clearly attempting to change the law of the case and the rights created by the rulings below. Application of the law of the case doctrine confirms that a cross-appeal or cross-assignments of error were necessary.

II. Reconsideration would be a vain reargument of unsupportable issues.

Moreover, regardless whether the asserted negligence claims were preserved for appeal or not, the record, the findings of both the Trial Court and the Court of Appeals and the apparent and necessary findings of this Court confirm that the outcome would not change and there was no actionable negligence on the part of Ohio Edison.

Motions for Reconsideration are not a forum for rearguing the case and Ohio Edison does not wish to do so here. However, Ohio Edison does point out that none of the arguments asserted in Appellees' Motion for Reconsideration change the fact that Ohio Edison had no knowledge of this tree.

In their Motion for Reconsideration, Appellees take issue with four factual statements by this Court. They claim (1) contrary to the findings of courts at all levels, the tree was a hazard to the utility line because it *could have* fallen into the lines, (2) that there was not a heavy thunderstorm on the date of Lisa's accident, (3) that the tree was inside Ohio Edison's easement,

not outside of it, and (4) that they did not need to present direct evidence of Ohio Edison's knowledge of this tree or contact with it.

The Trial Court, the Court of Appeals, and this Court found that the tree was not a hazard to the utility lines. Appellees' latest attempt to avoid that finding *selectively* highlights the testimony of its own expert. Even within that excerpt, Kim C. Steiner, Ph.D. acknowledges that since the tree "was leaning away [from the utility lines, it] would have tended to fall toward the road." As all courts have properly found, there was no evidence whatsoever that the tree was leaning toward the power lines or growing into it or that Ohio Edison had any knowledge of any hazard associated with the tree whatsoever.

Further, since Ohio Edison had no knowledge of a defect in this tree, the fact that Appellees take issue with this Court's findings that there was a heavy thunderstorm and the tree was outside of the easement are immaterial. In *Laughlin v. Cleveland* (1959), 168 Ohio St. 576, syllabus 1, this Court confirmed that the "mere happening of an accident gives rise to no presumption of negligence . . ." "It is well settled in Ohio that where negligence revolves around the question of the existence of a hazard or defect, notice, either actual or constructive, is a prerequisite to the duty of reasonable care." *Ankeny v. Vodrey* (September 23, 1999), Seventh District Case No. 96-CO-00047 (Ohio App. 7 Dist.), citing *Heckert v. Patrick* (1984), 15 Ohio St.3d 402, 405.

Since Ohio Edison did not even know of this tree or any of the claimed problems with it, it logically could not owe a duty to Appellees. Further, in *Heckert, supra* at syllabus, this Court held that, absent knowledge of a patently defective condition, no duty exists as to trees on rural property:

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

Appellees' experts both confirmed that they had no knowledge of any improper tree pruning on the part of Ohio Edison's contractor and no knowledge that this tree was ever brought to Ohio Edison's attention as a concern. While Appellees now attempt to capitalize upon the Court's use of the term "direct evidence," there was *no* evidence presented, direct or indirect, to support Appellees' negligence claims. The Trial Court and the Court of Appeals properly acknowledged these facts and exonerated Ohio Edison on negligence theories, as a matter of law.

III. Conclusion

If this case had been returned to the Trial Court, either because this Court declined to accept jurisdiction or affirmed the Court of Appeals, the Court of Appeals' Opinion would have been the law of the case. Under that Opinion, Appellees would have been limited to proving a breach of duty by Ohio Edison or Asplundh related to the contract between them. In order to revive their negligence assertions, Appellees would have had to file a separate appeal or, at least, assert cross-assignments of error. They did neither.

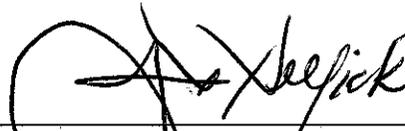
What Appellees attempt to do by their Motion for Reconsideration is to change the ruling of the Court of Appeals, expand their rights thereunder, and limit Appellants' rights. All of those efforts are directly contrary to even the case law upon which Appellees rely.

The courts below properly found that there was no basis whatsoever for a negligence claim in this action. How factually, legally, or logically could Ohio Edison be liable for a tree of which it had no knowledge whatsoever?

This Court properly and unanimously concluded that the Opinion of the Court of Appeals below had to be reversed. Appellees' Motion for Reconsideration presents no factually or legally appropriate justification for revisiting that.

Ohio Edison respectfully requests this Court to deny Appellees' Motion to Reconsider and conclusively bring this action to its proper conclusion.

Respectfully submitted,



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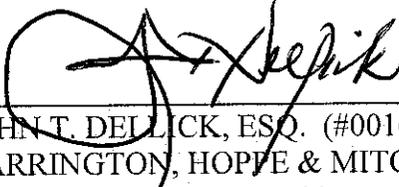
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **Brief of Ohio Edison Company in Opposition to Appellees' Motion for Reconsideration** has been served via ordinary U.S. Mail this 26th day of October, 2011 to:

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