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

LISA G. HUFF, et al.

Plaintiffs-Appellees

vs.

FIRST ENERGY CORPORATION, et al.

Defendants-Appellants

APPELLANT ASPLUNDH TREE EXPERT COMPANY'S BRIEF IN OPPOSITION TO APPELLEES' MOTIONS FOR RECONSIDERATION

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I. THIS COURT PROPERLY DETERMINED THAT APPELLEES FAILED TO PRESENT A *PRIMA FACIA* CLAIM UNDER TRADITIONAL PRINCIPLES OF TORT LAW.

A. The Court Addressed the Issue of Tort Liability.

In the motions for reconsideration, appellees first argue that this Court failed to consider whether the appellants could be liable to Lisa Huff under traditional principles of tort law. This argument is based on the false premise. A review of this court's decision reflects that the Court did consider this issue:

> It 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. Indeed, during oral argument, the Huffs' counsel proposed that either Ohio Edison or Asplundh had caused damage, at some unspecified time, to the tree that struck Lisa Huff and thus that appellants had a duty to make the tree safe for the general public. Counsel admitted, however, that the Huffs had no direct evidence to support this theory. In fact, 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. *Id.* at ¶ 21.

As this Court noted in the slip opinion, appellees' counsel conceded during oral argument that the Huffs had no proof that appellants did any work on the subject tree when performing work in the area in 2001. As a consequence, appellees cannot present a viable claim under traditional tort law as they cannot establish that appellants did anything to the tree in 2001 which may have had a casual effect on the events that subsequently transpired during the storm in 2004. See *Grone v. Lake Seneca Property Owners Assoc.* (April 18, 1987), Williams Cty. App. No. WM-96-002; *Good v. Ohio Edison Co., et al.* (6th Cir. 1998), 144 F.3d 413, 421.

Appellees' discussion of Ohio Edison's easement for the maintenance and protection of the utility equipment was never presented in her merit brief. Nevertheless, these arguments, even if properly presented, would not remedy appellees' inability to present a viable tort claim for want of evidence that appellants ever worked on the subject tree in 2001. The law in Ohio is

well settled that the mere status of an easement holder does not impose a duty to protect the general public on public roadways from a tree hazard. See *Estate of Durham v. Amherst* (1988), 52 Ohio App. 301, 106; *Walker v. Hudson* (May 6, 1966), Claremont Cty. App. No. CA 95-01-071; *Masser v. Dayton Power & Light Co.* (Sept. 21, 1992), Fayette Cty. App. No. 41-10-25.

B. Appellees did not Properly Present the Issue of Tort Liability to this Court.

Separate and apart from the foregoing, appellees failed to properly present before this court any argument to establish a claim against appellants under traditional tort liability. A review of the propositions of law set forth in appellees' merit brief reflects the following arguments:

1. Where *a contract* for necessary tree removal between a utility company and the tree removal company include 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 trees 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.

2. The utility company and a tree removal company's *construction of a contract* that serves to restrict its duty to power lines, not people, and limit 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 law and contrary to the best interest and safety of the public. (Emphasis added).

In sum, the arguments set forth by appellees under propositions of law (1) and (2) relate to principles of contract construction. These contract construction arguments sought to support the underlying appellate court's decision based on the applied intended beneficiary analysis. Appellees never raised an argument premised upon traditional principles of tort law either through a cross-appeal or as a cross-assignment of error as permitted under R.C. 2502.22.

II. THIS COURT APPLIED THE CORRECT STANDARD OF REVIEW.

In the final argument in appellees' motions for reconsideration, appellees contend that this Court not apply a *de novo* standard of review. Appellees seek to support this allegation by accusing this Court of engaging in "outright fact finding" by adopting various factual determinations found by both the trial court and reviewing court of appeals. Among the listed "findings" discussed in the reconsideration motion are: (1) the fact that the trial court had found that the Huffs had failed to show that appellants were on notice of any decay in the tree in 2001; (2) that the subject tree did not present a hazard to the power lines owned by the utility; (3) that the thunderstorm which occurred at the time of the incident in issue was described as a "heavy thunderstorm;" (4) that the subject tree was located outside of the utility's easement; and (5) that the Huffs had no direct evidence demonstrating that Ohio Edison or Asplundh had caused any damage to the subject tree prior to the incident in issue.

Asplundh has already addressed the fact that appellees' counsel conceded that they have no evidence that appellants did anything to the subject tree when working in the area in 2001. With respect to the other matters outlined in the motion for reconsideration, the designated "findings" have no relevancy on this Court's determination that Lisa Huff was not an intended third-party beneficiary to the Asplundh/Ohio Edison contract. Nor would these matters be relevant to appellees' proposed tort claim in light of the conceded fact that appellees had no evidence that appellants ever touched the subject tree when performing work in the area in 2001.

Relevancy aside, a review of the record of this case supports each of the alleged "findings" in dispute. This Court correctly noted that the trial court found that appellees had failed to establish that the moving defendants had "actual or constructive" notice of any defect in

the subject tree. While appellees did argue that the appellants should have discovered the alleged defect, they presented no evidence to establish "actual or constructive notice."

Similarly, this Court's description of the weather event occurring at the time of the incident as a "heavy thunderstorm" was entirely consistent with the repeated broadcasts of the National Weather Service describing the weather event occurring at the time of the incident as a "severe thunderstorm." T.D., Affidavit of John Papp, Asplundh's motion for summary judgment, Exhibit A-1, pgs. 5-7.

The issue of whether the subject tree was within or outside of the utility's easement was never raised by appellees in the merit brief. Nevertheless, the only evidence presented before the trial court on this issue was that the tree was outside of the utility's easement. (See Affidavit of Douglas Shaffer, attached to motion for summary judgment filed by Ohio Edison).

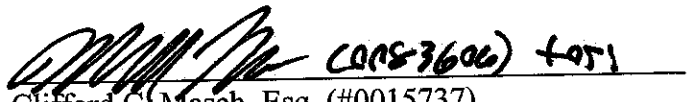
Finally, the fact that the subject tree did not constitute a hazard to the utility lines was duly noted in the underlying appellate decision. (See Appellate Court Decision, pg. 6). This finding was supported by all testimony in the case, including appellees' own arborist expert who acknowledged that if the subject tree was going to fall, it was going to fall towards the road. (Steiner Depo., pgs. 217-219).

In sum, appellees' cited instances of "outright factual findings" are both supported by the record in this case and irrelevant to the basis of this Court's ruling.

III. CONCLUSION

For all the reasons set forth herein, appellees' motions for reconsideration are without basis in law or in fact and should be summarily denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing document was sent by regular U.S. mail this 27 day of October, 2011 to:

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