[Cite as *Huff v. First Energy Corp.*, 2010-Ohio-1456.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

LISA G. HUFF, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2009-T-0080**
- vs -	:	
FIRST ENERGY CORPORATION, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2008 CV 1641.

Judgment: Affirmed in part, reversed in part, and remanded.

Michael D. Harlan, *Susan G. Maruca*, and *David J. Betras*, Betras, Maruca, Kopp, Harshman & Bernard, L.L.C., 6630 Seville Drive, #1, P.O. Box 129, Canfield, OH 44406-0129 (For Plaintiffs-Appellants).

John T. Dellick, Harrington, Hoppe & Mitchell, LTD., 1200 Sky Bank Building, 26 Market Street, Youngstown, OH 44503 (For Appellees, First Energy Corporation and Ohio Edison).

Clifford C. Masch and *Brian D. Sullivan*, Reminger & Reminger CO., L.P.A., 1400 Midland Building, 101 Prospect Avenue, West, Cleveland, OH 44115-1093 (For Appellee, Asplundh Tree Expert Company).

CYNTHIA WESTCOTT RICE, J.

{¶1} This appeal comes to us from a summary judgment issued by the Trumbull County Court of Common Pleas in favor of appellees FirstEnergy Corporation ("FirstEnergy"), Ohio Edison Company ("Ohio Edison"), and Asplundh Tree Expert Company ("Asplundh"). Appellants Lisa, Reggie, Samantha, and Faith Huff allege

material issues of fact remain to be litigated and therefore the trial court erred in awarding summary judgment in appellees' favor. For the reasons discussed below, the trial court's judgment is affirmed in part, reversed in part, and remanded.

{¶2} On June 14, 2004, at approximately 7:00 p.m., appellant Lisa Huff, and her friend, Wendy Kowalski, took an evening walk on the roadway of King Graves Road, a rural road in Fowler Township, Trumbull County, Ohio. The women began from Wendy's home and traveled west on the roadway. Wendy testified that, even though the weather was beautiful prior to beginning the walk, she was aware that a severe thunderstorm watch had been issued for the area.

{¶3} After walking for a period of time, the skies became cloudy and it began to sprinkle. The women decided to turn around when the wind became "very strong." Wendy testified:

{¶4} "*** the wind got fierce enough for us to look at one another because it was - - it was loud, and actually it was, I should say just like a quick, loud wind. It wasn't like it was just a little bit windy. And [Lisa] looked at me and she said, you want to start jogging? And I said, yes."

{¶5} While jogging, Wendy and Lisa approached the property of Gerald and Michelina Braho. The property was located on the north side of King Graves Road. Near the southwest corner of the Brahos' property stood a large, old, sugar maple tree. As the women passed the Braho property, the maple snapped and struck Lisa rendering her unconscious. Somehow, Wendy escaped unharmed and left the scene to get help. Emergency crews arrived and Lisa was eventually hospitalized with multiple severe injuries.

{¶6} On June 5, 2008, appellants filed a complaint sounding in negligence in the Trumbull County Court of Common Pleas. The complaint asserted claims against the appellees FirstEnergy, Ohio Edison, and Asplundh. Appellants also asserted claims against Gerald and Micheline Braho as well as Hartford Township. In the course of the underlying litigation, Hartford Township was dismissed. Further, appellants subsequently reached a settlement with the Brahos and dismissed them from the action. The remaining defendants filed motions for summary judgment which appellants duly opposed.

{¶7} A summary of the salient evidence is as follows. Ohio Edison owns the electrical distribution lines which travel in an east/west direction along King Graves Road. FirstEnergy, a holding company and primary shareholder of Ohio Edison, developed a series of specifications controlling the manner in which its subsidiary companies would manage vegetation (a term encompassing both trees and brush) for purposes of electrical line clearance. Ohio Edison utilized the specifications promulgated by FirstEnergy in its control of vegetation surrounding its electrical lines.

{¶8} Ohio Edison possessed a prescriptive easement over the property surrounding the poles and lines which traveled parallel to King Graves Road. The easement allowed Ohio Edison to control the vegetation near the electrical lines. To meet its maintenance obligations in this area, Ohio Edison entered into a contract with appellee Asplundh. The contract was effective between January 1, 2001 and December 31, 2004. The contract incorporated the specifications established by FirstEnergy and the agreement expressly required Asplundh to adhere to the

specifications in its management and maintenance of the vegetation surrounding Ohio Edison's electrical distribution lines.

{¶9} In addition to the guidelines set forth in the specifications, Douglas Shaffer, manager for forestry services for Ohio Edison, testified Ohio Edison oversaw Asplundh's work through employees designated as "field specialists." Shaffer stated that field specialists "work with *** the tree contractors that we have on the property to *** ensure that we're staying on cycle, we're getting the adequate clearance that we need *** around the electrical lines ***." According to Shaffer, field specialists will occasionally work on site with the contractor and other times they review the work subsequent to the contractor's completion.

{¶10} Further, Michael Carrier, Asplundh's supervisor of crews in northeastern Ohio, testified that Asplundh workers were required to clear vegetation in the area and manner prescribed by the specifications; however, he indicated that Asplundh workers had the discretion to determine whether general brush (non-tree vegetation) was a threat pursuant to the specifications. With respect to trees, Carrier testified Asplundh workers had the discretion to remove any tree under 30 inches in diameter at four and one-half feet from the ground if it presented a threat. Any tree over 30 inches in diameter at four and one-half feet from the ground, however, required consultation and approval from a forestry technician employed by either FirstEnergy or Ohio Edison. The subject tree in this case was 46 inches in diameter at four and one-half feet from the ground; however, nothing in the record indicates it was considered for removal.

{¶11} Although the specification manual covers a wide array of policies and procedures to which a contractor must adhere, the following specific provisions are

relevant to this case. With respect to safety precautions, the manual establishes a broad standard of care that a contractor must meet. Aside from "utilizing proper safety appliances" in completing work orders, Asplundh was required to "*** plan and conduct the work to adequately safeguard all persons and property from injury."

{¶12} With respect to work detail, the specifications establish what is designated as a "distribution clearing zone." In non-maintained lawns, the distribution clearing zone is "*** 15' (fifteen feet) on either side of the pole line." The manual states that "[e]mphasis is to be placed on controlling all incompatible vegetation within this clearing zone." Also under the rubric of "distribution clearing zone," the manual defines an "inspection zone" as "the area between 15' (fifteen feet) and 20' (twenty feet) from the pole line ***." According to Douglas Shaffer, an inspection zone is "the area *** that [Ohio Edison] would like to keep *** clear of vegetation as [much as] we possibly can." The tree in this case was approximately 20 feet from the pole line and therefore fell within the designated inspection zone.

{¶13} With respect to problematic vegetation, "priority trees" are those "located adjacent to the clearing zone corridor that are either dead, diseased, declining, severely leaning or significantly encroaching the clearing zone." "Incompatible vegetation" is defined as "all vegetation that will grow tall enough to interfere with overhead electric facilities." Furthermore, under the heading, "[t]rees that are expected to be removed ***," the specifications provide:

{¶14} "Dead or defective which constitute a hazard to the conductor.

{¶15} "Trees that have fast growth rates or trees that cannot be pruned for effective conductor clearance.

{¶16} "Immature trees, generally classified as brush.

{¶17} "Trees that are overhanging the primary conductors and are unhealthy or structurally weak.

{¶18} "All priority trees located adjacent to the subtransmission and transmission clearing zone corridor that are leaning towards the conductors, are diseased, or are significantly encroaching the clearing zone corridor.

{¶19} "All incompatible trees that are located within the clearing zone corridor."

{¶20} With these provisions in mind, Asplundh performed work on the King Graves Road corridor in the area of the Braho residence on May 3, 2001. On that date, two trees were removed from the area encompassing the Braho property. However, there was no evidence indicating the subject tree was pruned or otherwise inspected on that date. On the day the tree fell, it broke approximately 28 feet up from the ground. As indicated above, it was within the inspection zone as defined by the specifications; however, the tree had a 10 degree lean in the direction of King Graves Road. Due to this lean, it is undisputed that the tree was not a hazard to the power lines. However, according to Dr. Kim Steiner, a certified forester and appellants' expert witness, the previous removal of branches on the north side of the tree (the side facing the lines) created a crown that was unbalanced toward the road which likely caused the trunk to lean.

{¶21} In relation to the subject tree's condition, Dr. Steiner testified, on the date the tree fell, it suffered from extensive internal trunk decay, particularly at the point of failure. In his analysis, the decay extended vertically through the trunk from at least 30 feet above ground to as low as 8 feet above ground creating a "decay pillar" of

approximately 22 feet. Due to the decay, Dr. Steiner asserted that trunk had an estimated strength loss of 65% at the point of fracture in 2004.

{¶22} Dr. Steiner opined that this decay was a function of several "wounds" the tree suffered over multiple decades. The wounds were a result of branches either breaking off from the main trunk or human removal due to trimming. Regardless of the manner in which the wounds originated, he testified all injuries likely existed prior to May of 2001 and would have been readily observable through visual inspection. In particular, in his final report, Dr. Steiner cited the following external signs of decay:

{¶23} "a small, mostly callused-over knot (from Branch 1) on the north or northwest side of the tree and at the point of failure on June 14, 2004,

{¶24} "a hollow, 10-inch branch cavity on the south side of the tree at a height of 30 feet, where Branch 2, was removed some years ago,

{¶25} "a hollow, 34-by 26-inch branch cavity on the southeast side of the tree at a height 15 feet, where Branch 3 broke off some years ago (but before 2004), and

{¶26} "two dead branch scars, one (Branch 4) that is 7 inches in diameter and located about 4 feet directly above Branch 3, and one (Branch 5) that is 10 inches in diameter and 8 feet above ground on the south side of the tree. Neither of these is hollow but both exhibit signs of advanced decay and suggest the presence of decay within the trunk."[1]

1. Gerald Braho, the owner of the property on which the subject tree stood, testified that "a few years prior to June of 2004" a large limb fell from the tree. That limb was approximately 15 feet from the ground and left a noticeable "socket" in the trunk. He did not specifically state that limb was the cause of the cavity identified by Dr. Steiner. Nor did Braho specifically testify the limb fell after May of 2001.

{¶27} According to Dr. Steiner, the extensive internal decay, in conjunction with the 10 degree lean and the lopsided crown caused the subject tree to fail and fall on Lisa.

{¶28} Notwithstanding Dr. Steiner's testimony, appellees mutually argued they did not owe Lisa, as a member of the general public, a duty of care. They argued that the existence of any duty under such circumstances is based upon the foreseeability of an injury. Because appellants were unable to demonstrate that appellees had notice of a patent defect in the tree, they could not have foreseen the injury suffered by Lisa. Appellees additionally argued that the contract between Ohio Edison and Asplundh did not give Lisa, as a member of the public, any enforceable rights. Rather, the contract merely contemplated the pruning and removal of vegetation so it would not encroach upon or compromise Ohio Edison's power lines. Because the subject tree was leaning away from and thus represented no threat to the power lines, they were under no obligation to inspect, let alone remove, the tree. Finally, FirstEnergy and Ohio Edison asserted that imposing a duty in this case would require utility companies to ensure that no trees exist, healthy or not, within contact range of electrical lines. Appellees argued such a burden would be overly time consuming and cost-prohibitive.

{¶29} On July 15, 2008, the trial court granted summary judgment in favor of each appellee. In support, the court observed FirstEnergy and Ohio Edison:

{¶30} "*** did not have actual or constructive notice of any defects in this tree located on someone else's property. The Court further finds as a matter of law that a ten degree lean standard for automatic removal of trees, especially in rural areas like

this one, would create an unrealistic and impossible duty upon this and all utility companies. ***

{¶31} "As to Asplundh, the Court agrees that Asplundh's duty arose by virtue of contract only with Ohio Edison. Under said contract, the Court finds that Asplundh performed its obligations. The Court also agrees that the Plaintiffs are not third party beneficiaries under Asplundh's contract with Ohio Edison. However, assuming that the Court did not find in favor of Asplundh, the Court would still obviate [sic] FirstEnergy and Ohio Edison of liability in this case because of the independent contractor status of Asplundh, and the complete lack of evidence that either FirstEnergy or Ohio Edison had any notice whatsoever that the interior of one tree on a rural township road was decaying. ***"

{¶32} The trial court also cited this court's holding in *Parke v. Ohio Edison*, *Inc.*, 11th Dist. No. 2004-T-0144, 2005-Ohio-6153, for the proposition that imposing a duty on Ohio Edison to ensure that all trees within its inspection zone were sound would be unreasonable and too onerous a burden for a utility company to reasonably shoulder. In the trial court's view, a utility company merely has a duty to prune trees growing into distribution lines and a duty to remove those trees that pose a danger to those lines. Because neither of these conditions were present in this case, the trial court concluded Ohio Edison did not breach its standard of care.

{¶33} In light of these conclusions, the trial court ruled the defendants owed no duty of care to Lisa. Rather, in the trial court's analysis, each defendant met its obligations under the law. Therefore, the court determined there were no genuine

issues of material fact to be litigated and, as a result, each defendant was entitled to judgment as a matter of law on appellants' claims.

{¶34} On August 12, 2009, appellants filed a timely appeal of the foregoing judgment and have assigned two errors for our consideration. Before addressing the arguments, a brief review of the law relating to summary judgment is appropriate.

{¶35} Summary judgment is a procedural tool that terminates litigation and therefore should be awarded with great caution. *Davis v. Loopco Industries, Inc.* (1993), 66 Ohio St. 3d 64, 66, 1993-Ohio-195. Keeping this in mind, an award of summary judgment is proper where (1) there is no genuine issue of material fact remaining to be litigated; (2) the movant 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 viewing the evidence in favor of the non-movant, that conclusion favors the moving party. Civ.R. 56(C); see, also, *Temple v. Wean United, Inc*. (1977), 50 Ohio St.2d 317, 327.

{¶36} Upon filing a motion pursuant to Civ.R. 56, the movant has the initial burden of providing the trial court a basis for the motion and is required to identify portions of the record demonstrating the absence of genuine issues of material fact pertaining to the non-movant's cause of action. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. If the movant meets its prima facie burden, the burden then shifts to the non-movant to set forth specific facts that would establish a genuine issue for trial. Id. With respect to evidential quality, the movant cannot discharge its initial burden under Civ.R. 56 simply by making a blank assertion that the non-movant has no evidence to prove its case, but must be able to specifically point to some evidence of

the type listed in Civ.R. 56(C). *Dresher*, supra. Similarly, the non-movant may not rest on conclusory allegations or denials contained in the pleadings; rather, he or she must submit evidentiary material sufficient to create a genuine dispute over material facts at issue. Civ.R. 56(E); see, also, *Dresher*, supra.

{¶37} In ruling on a motion for summary judgment, a trial court may not weigh the proof or choose among reasonable inferences. *Dupler v. Mansfield Journal Co.* (1980), 64 Ohio St. 2d 116, 121. To the contrary, all "[d]oubts must be resolved in favor of the non-moving party." *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 359, 1992-Ohio-95. Moreover, arguments pertaining to evidential credibility and persuasiveness are not fodder for consideration in the summary judgment exercise. In effect, a trial court is bound to overrule a motion where conflicting evidence exists and alternative reasonable inferences can be drawn therefrom. See *Pierson v. Norfolk Southern Corp.*, 11th Dist. No. 2002-A-0061, 2003-Ohio-6682.

{¶38} A reviewing court must adhere to the same standard employed by the trial court. In the argot of appellate law, we review an award of summary judgment de novo. See, e.g., *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105, 1996-Ohio-336. That is, an appellate court considers the entire record anew and accords the trial court's determination on summary judgment no deference. *Brown v. Cty. Commrs.* (1993), 87 Ohio App.3d 704, 711. If, upon review, there is a sufficient disagreement on a material issue of fact such that the case cannot be resolved as a matter of law, an award of summary judgment must be reversed and the cause submitted to a jury. "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly

preclude the entry of summary judgment." *Anderson v. Liberty Lobby*, *Inc*. (1986), 477 U.S. 242, 248.

{¶39} With the foregoing in mind, appellants' assigned errors are related and shall be addressed together for convenience. They provide:

{¶40} "[1.] It was an error of law and an abuse of the trial court's discretion to weigh the evidence and find that the tree's hazardous condition was undetectable and appellees did not have reasonable apprehension of its danger.

{¶41} "[2] The trial court committed an error of law and abused its discretion in finding that appellees had no duty, when the evidence presented in a light most favorable to appellant's clearly demonstrates that the hazardous condition of the tree and resulting grave injury to Lisa Huff were reasonably apprehended."

{¶42} Initially, as pointed out above, we review an award of summary judgment using non-deferential de novo standard, not the more restrictive standard of an abuse of discretion. That said, we shall first discuss the legal issue of whether appellees, individually or collectively, owed Lisa a duty of care.

{¶43} A complaint sounding in negligence must allege facts sufficient to show the existence of a duty; a breach of that duty by the defendant, and injury to the plaintiff which was proximately caused by the defendant's breach. See, e.g., *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 142. In negligence cases, the threshhold question toward establishing a "genuine issue for trial," and surviving summary judgment is whether a defendant owed the plaintiff a duty of care. *Baker v. Fowlers Mill Inn & Tavern*, 11th Dist. No. 2007-G-2753, 2007-Ohio-4958, at ¶13. Generally, the existence of a duty is dependent upon the foreseeability of the injury sustained. See, e.g., *Menifee v. Ohio*

Welding Products, Inc. (1984), 15 Ohio St.3d 75, 77. The court in *Menifee* set forth the following test for foreseeability: "whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act." Id. at 77.

{¶44} First, we shall address the award of summary judgment as it pertains to FirstEnergy. The evidence indicates that FirstEnergy is a holding company that is the primary shareholder of Ohio Edison. Both companies exist independent of one another and conduct business separately from each another. It is undisputed that FirstEnergy created the specifications used by Ohio Edison in its vegetation clearance practices. However, there is nothing in the record that indicates FirstEnergy, as merely a holding company which owns Ohio Edison, exercised any control over the day-to-day vegetation clearance practices of Ohio Edison or supervised such activities in any way.

{¶45} In *North v. Higbee Co.* (1936), 131 Ohio St. 507, the Supreme Court of Ohio observed:

{¶46} "'It is familiar law in all jurisdictions in this country that ownership of stock alone will not render the parent corporation liable. This is but a statement of the fundamental rule that stockholders are not liable for the corporate obligations. The result is the same whether the parent company owns all the stock, or all except directors' qualifying shares or a small amount in outside hands.'" Id. at 512, "Parent and Subsidiary Corporations," (1931), Powell, p. 10.

{¶47} Further, where all the legal requirements of the subsidiary as a separate corporation are scrupulously observed and the parent corporation's control of the subsidiary is limited to its ownership of stock, the parent corporation will not be held

liable for the subsidiary's obligations. *North,* supra. Rather, "*** the corporate entity will be disregarded and the individual shareholder or parent corporation held liable only where there is proof that the corporation 'was formed for the purpose of perpetuating a fraud, and that domination by the parent corporation [shareholder] over its subsidiary [corporation] was exercised in such manner as to defraud [a] complainant.'" *LeRoux's Billyle Supper Club v. Ma* (1991), 77 Ohio App.3d 417, 420-421, quoting *North*, supra, at syllabus.

{¶48} Here, Ohio Edison was not created or formed by FirstEnergy. Moreover, there is no indication FirstEnergy obtained its controlling interest in Ohio Edison to defraud or engage in any other malfeasances. Even though FirstEnergy promulgated the specifications used by Ohio Edison, there is nothing in the record indicating FirstEnergy supervised Ohio Edison's implementation of the specifications or had any say in who Ohio Edison contracted with to conduct its vegetation-maintenance work. In light of these considerations, we hold FirstEnergy owed no duty of care to Lisa. Thus, the trial court properly granted summary judgment in its favor.

{¶49} Appellants' assignments of error are therefore overruled as they pertain to FirstEnergy.

{¶50} We shall next address the trial court's decision concluding neither Ohio Edison nor Asplundh owed Lisa a duty of care. In its decision, the trial court determined these appellees met their obligations under their contract and, in any event, no defendant could have been expected to apprehend the danger the tree posed. In their respective appellate briefs, Ohio Edison and Asplundh echo these points, arguing they cannot be held "*** liable to one injured as the result of some unusual occurrence that

cannot fairly be anticipated or foreseen and is not within the range of reasonable probability." *Hetrick v. Marion--Reserve Power Co.* (1943), 141 Ohio St. 347, paragraph three of the syllabus. They submit that their mission, as set forth in their contract, was to keep troublesome vegetation from interfering with electrical distribution lines. In light of this objective, they argue, their legal obligation was limited to pruning trees that are growing into electrical lines and removing trees that posed a danger of falling into the lines. See *Parke*, supra, at ¶17. Because it is undisputed that the subject tree was not a hazard to these lines, Ohio Edison and Asplundh maintain they had no obligation to inspect, prune, or remove the tree and therefore owed Lisa no duty of care. Given the evidence submitted during the motion exercise, we believe Ohio Edison's and Asplundh's construction of their legal obligations is far too narrow.

{¶51} We shall begin by pointing out that this matter is distinguishable from our holding in *Parke.* In that case, a homeowner hired the decedent to cut down a dying tree. In the process, a branch hit an electrical wire which caused the decedent's electrocution. This court held that summary judgment was properly granted because the appellants failed to establish a duty on the part of the utility company toward the decedent. Without notice or apprehension of a danger, this court reasoned the utility company was under no duty to guard against it. Id. at ¶17. The evidence indicated that the tree appeared healthy and the utility company regularly inspected the lines. Quoting the Supreme Court in *Hetrick,* supra, at 359, this court underscored: "'There is no duty to guard when there is no danger reasonably to be apprehended.'" *Parke,* supra, at ¶14.

{¶52} In *Parke*, this court determined the utility company had no notice that the tree was dying nor was it in danger of contacting its power lines. Without some notice or apprehension of the danger, this court held the utility company had no duty to guard against it. Id. at ¶17. 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.

{¶53} In *Hill v. Sonitrol of Southwestern Ohio*, *Inc.* (1988), 36 Ohio St.3d 36, the Supreme Court of Ohio adopted Section 302 of the Restatement of the Law 2d, Contracts regarding third-party beneficiaries to a contract. In particular, that section distinguishes between an "incidental" and an "intended" beneficiary to a contract. If a party is an intended beneficiary to a contract, the promisor and promisee owe that party a duty pursuant to the contract into which they entered. To determine whether an individual is an intended or merely an incidental beneficiary to a contract, the Court adopted the "intent to benefit test," which provides:

{¶54} "'Under this analysis, if the promisee *** intends that a third party should benefit from the contract, then that third party is an "intended beneficiary" who has enforceable rights under the contract. If the promisee has no intent to benefit a third party, then any third-party beneficiary to the contract is merely an "incidental beneficiary," who has no enforceable rights under the contract.

{¶55} "'*** [T]he mere conferring of some benefit on the supposed beneficiary by the performance of a particular promise in a contract [is] insufficient; rather, the performance of that promise must also satisfy a duty owed by the promisee to the

beneficiary.'" *Hill*, supra, 40, quoting *Norfolk & Western Co. v. United States* (C.A. 6, 1980), 641 F.2d 1201, 1208.

{¶56} In applying the foregoing test, the Supreme Court in *Hill* determined that an employee for a commercial establishment was merely an incidental beneficiary to a contract between the establishment and a security alarm company. The facts and application of the law in *Hill* are helpful in guiding our analysis of the instant matter. In *Hill*, the plaintiffs, an employee of a bookstore and her husband, were accosted by an intruder in the store after the establishment was closed for the day. They filed a complaint for negligence against the alarm company for the physical and emotional injuries they allegedly suffered. In concluding the plaintiffs were not intended beneficiaries to the security contract between the bookstore and the company, the Court observed: "[t]he clear terms of the contract indicate that the contract was entered into for the protection of property, not people." Id. The court further underscored that the system in question was designed to become operative only after the establishment was vacated by employees. Therefore, the Court held that the employee was merely an incidental beneficiary to the contract between the bookstore and the security alarm company.

{¶57} With this in mind, the issue becomes whether Lisa was owed a duty of care as an intended third-party beneficiary pursuant to the contract signed by Ohio Edison and Asplundh. Upon careful consideration of the contract and application of the "intent to benefit" test delineated in *Hill*, there is a genuine issue of material fact as to whether Lisa was an intended beneficiary with enforceable rights or merely an incidental beneficiary to whom appellees owed no duty.

{¶58} As discussed above, the specifications established by FirstEnergy were utilized by Ohio Edison in its electrical maintenance practices. The specifications were expressly incorporated into the "Overhead Line Clearance" contract into which Ohio Edison entered with Asplundh. The specifications provide elaborate details and guidelines on how a contractor must execute its work orders. Moreover, and most significantly, under the rubric of "SAFETY PRECAUTIONS AND PROTECTION TO PROPERTY," the specifications provide:

{¶59} "The Contractor shall plan and conduct the work to adequately safeguard all persons and property from injury."

{¶60} On one hand, 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 the work is occurring while that work is occurring. Under this construction, Lisa would be a mere incidental beneficiary with no enforceable rights because, while the tree was within the inspection zone, her injury occurred three years after work was completed on the King Graves corridor.

{¶61} An equally plausible reading, however, would require a contractor, in meeting its obligations under the contract, to plan and conduct its work so that all persons, regardless of when the work was done, are adequately safeguarded from injury. Under this construction, Lisa would be an intended beneficiary entitled to a duty of care to have adequate assurance that this tree, located in the inspection zone, did not cause her injury due to a failure to meet specific obligations set forth under the contract. As pointed out above, under the category of "Tree Removal," the

specifications indicate that "[a]ll priority trees located adjacent to the subtransmission and transmission clearing zone corridor that are leaning towards the conductors, are diseased, or are significantly encroaching the clearing zone corridor." This directive, phrased in the disjunctive, indicates any diseased priority tree is expected to be removed. Thus, pursuant to the specifications, removing the tree would be expected regardless of where it leaned if, after inspection, it was deemed diseased.

{¶62} Because the contractor's safety obligations set forth under the contract are ambiguous, there is a genuine issue of material fact regarding whether Lisa has enforceable rights under the contract as an intended third-party beneficiary. If Lisa is an intended beneficiary under the contract, Asplundh owed her a duty of care. Further, even though Asplundh was the contractor, the evidence indicates Ohio Edison oversaw and directed Asplundh's work through its field specialists. However, we do not know the precise extent of this oversight and direction. Accordingly, if Lisa is an intended beneficiary, there is also a material issue of fact as to whether Ohio Edison owed her a duty of care under the contract pursuant to the control it exercised over Asplundh through its field specialists.

{¶63} Accordingly, as they relate to appellees Ohio Edison and Asplundh, appellant's assigned errors are sustained.

{¶64} Because there is no evidence indicating FirstEnergy owed Lisa a duty, appellants' two assignments of error are overruled as they pertain to FirstEnergy. However, because we hold there is a genuine issue of material fact as to whether Lisa was an intended third-party beneficiary and therefore owed a duty of care by appellees Ohio Edison and Asplundh, appellants' assigned errors are sustained as they relate to

these appellees. In light of these conclusions, it is the judgment and order of this court that the judgment entry of the Trumbull County Court of Common Pleas is affirmed in part, reversed in part, and remanded for further proceedings consistent with the analysis set forth in this opinion.

MARY JANE TRAPP, P.J.,

COLLEEN MARY O'TOOLE, J.,

concur.