IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Jose Luis Guzman, a disabled person by Benjamin Guzman,	)	
Plaintiff,	)	
v.	)	
	)	No. 11 L 13583
Commonwealth Edison Company, an Illinois corporation, Joel Strauss and Barbara Strauss, and Asplundh Tree Expert Company,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This court's decision is guided by three principles of Illinois law. First, property owners, including utility providers, owe no duty of care to persons who are expected to appreciate an open-and-obvious danger and avoid it. Second, a breach of internal corporate guidelines may be evidence of negligence, but does not establish negligence. Third, an open-and-obvious danger cannot be a proximate cause of an injury if the danger is merely a condition that existed at the time of the plaintiff's injury. Based on the law and the evidence in the record, this court has reached three conclusions. First, Commonwealth Edison Company and Asplundh Tree Expert Company owed Jose Luis Guzman no duty because the danger of electrocution by using tree-trimming equipment near electrical wires is open and obvious. Second, even if Asplundh owed Guzman a duty, Asplundh did not breach its duty based on a failure to follow ComEd's vegetation-management guidelines. Third, as to both remaining defendants, the proximity of branches to the electrical wires was a condition that did not cause Guzman to climb a tree and remove branches with a chain saw. For those reasons, the defendants' summary judgment motion must be granted and the case dismissed with prejudice.

FACTS

ComEd and Asplundh entered into a services and materials agreement that became effective January 1, 2009. The agreement required Asplundh to trim and remove vegetation near ComEd electrical wires according to vegetation-management guidelines prepared by Exelon, ComEd's parent company. The contract required Asplundh to survey and trim vegetation near ComEd's wires approximately every four years. Asplundh's subcontractor, Davey Resources, would later make an inspection to verify that Asplundh's work conformed with the guidelines.

ComEd attached to its motion the company's vegetation-management guidelines that became effective on October 23, 2009.[1] The procedures call for trees to be trimmed to provide clearance sufficient to last four years, but do not establish minimum requirements. Asplundh was also expected to consider the type of tree being trimmed to account for a fast-growing one, such as a mulberry. John Wolters, ComEd's senior project manager for vegetation management testified that the clearance necessary for a 1,200-volt power line depends on the line, construction, voltage, tree seepage, type of tree, and vegetation placement, including overhanding branches.

Asplundh records indicate that on February 6, 2009, a crew went to Joel and Barbara Strausses' property located at 218 Kilpatrick in Wilmette. Joel Strauss testified, however, that he did not recall anyone trimming the tree during the previous decade. Five wires extended from a utility pole at the rear of the property, over the backyard, and connected to the house. The wires extended from approximately 13 to 25 feet off the ground, the top one being ComEd's high-voltage electrical wire. The wires' course took them through a 30-foot mulberry tree. Over the years,

[1] While the guidelines ComEd attached to its motion became effective after Jose Luis's injury, ComEd stated in court that identical guidelines were previously in effect.

the tree had been trimmed into a "V" shape to accommodate the wires running through the middle.

Zack Kron, a Davey Resources' employee, averred that his documents indicate that on April 29, 2009 he inspected Asplundh's work at the Strausses' property. Kron also testified, however, that he had no recollection of conducting an inspection and that he typically does not enter backyards unless he has spoken with the property owner. He also averred that Asplundh's work complied with ComEd's vegetation-management guidelines since he made no notation to the contrary.

In May 2009, the Strausses decided to remove the mulberry tree because it was unsightly, its berries were messy, and the shade it cast killed the grass. The tree's removal had nothing to do with the wires running across the backyard or improper tree trimming. The Strausses hired Iris Landscaping, a company they had previously used for landscaping services, to remove the tree.

On June 30, 2009, Jose Luis Guzman, his brother, Benjamin, several other Iris employees, and their supervisor Albert Szczepanik arrived at the Strausses' property to remove the tree. Jose Luis had worked for Iris for six or seven years conducting landscaping work, including tree trimming, but he had not previously removed trees. Jose Luis had been to the Strausses' property before. Jose Luis and Szczepanik would typically converse a little in English and a little in Spanish. Jose Luis never indicated that he had difficulty understanding Szczepanik's instructions.

Szczepanik testified that he told the crew before beginning their work that cutting the tree was very dangerous and that it had to be done from the ground. He also told the crew to cut down the tree to a stump. The crew started by removing branches that encroached on a neighbor's property. Szczepanik then wanted the largest branch roped so it could be guided down after cutting. Szczepanik testified that approximately 25 minutes after beginning work, Jose Luis used a seven-foot ladder to climb into

the tree to cut down branches using a 10-foot-long extended chain saw. Szczepanik stated that he repeatedly told Jose Luis to get down from the tree, but that he began using the chain saw to cut a branch near the treetop.

For his part, Benjamin admits that before the crew began working he could see from the ground various lines running through the tree branches. He assumed that one of the top two wires was the power line. He understood that touching a power line could result in serious injury or death. He also indicated that, in prior instances, if there had been a risk of coming into contact with electrical wires, the power would have been turned off.

Benjamin understood that the tree was to be cut down from the ground, but he testified that Szczepanik did not discuss with the crew what procedure to use. Szczepanik had previously told the crew that he wanted the branches cut into small pieces, but he did not say that this time. Jose Luis did the cutting while other crewmembers took the branches to the truck for removal. After Jose Luis had cut the branches at ground level, he handed Benjamin the saw and climbed into the tree without using a ladder. Benjamin then handed the saw back to Jose Luis. He was in the tree for approximately 10-15 minutes.

Benjamin did not think Jose Luis was in any danger because he was in a part of the tree away from the wires; as a result, Benjamin did not feel it necessary to warn Jose Luis. Benjamin did not hear anyone tell Jose Luis not to climb the tree. Benjamin testified that he did not hear Szczepanik tell Jose Luis to get out of the tree even though Szczepanik saw Benjamin hand Jose Luis the extended chain saw after he had climbed into the tree.

There is no testimony as to whether the extended chain saw came into direct contact with the ComEd high-voltage wire or whether the saw was close enough to cause an electrical arc. Regardless, Szczepanik heard a "spark noise" and then saw Jose Luis collapsed in the tree. Benjamin did not witness the incident

because he was hauling branches to the truck. Jose Luis has remained in a reduced state of consciousness since the incident.

An investigation conducted after the incident concluded that, on one side of the "V," the nearest branches were five feet, eight inches away from the wire, while on the other side of the "V," the nearest branches were eight feet away. Yet a Wilmette police commander and two officers who investigated Jose Luis's electrocution reported that some of the wires touched branches and that it was difficult to see some of them from the ground. It is contested whether the 28 photographs taken after the incident accurately depict the tree and wires given the angles from which the officers took the photographs. It is also unclear if the wires the officers described included the ComEd wire.

Benjamin filed a second amended complaint on Jose Luis's behalf against ComEd, Asplundh, and the Strausses. Count one is against ComEd under a negligence theory while count two is brought under the Public Utilities Act. Together, the counts claim that ComEd breached its common-law and statutory duties to maintain, control, supervise, inspect, and operate its overhead, energized power lines for Jose Luis's safety. Count four is against Asplundh for breaching its duties to maintain the clearance between the ComEd wire and the tree, failing to warn of the power line's danger, to inspect, and to notify ComEd of the damaged and deteriorated wire.[2]

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[2] Count three claimed that the Strausses were negligent by failing to tell Iris of the proximity of the branches to the power line and to notify ComEd to request a service interruption. On August 22, 2014, this court granted the Strausses' summary judgment motion as to count three and dismissed them from the case with prejudice. On September 16, 2014, this court entered an order pursuant to Illinois Supreme Court Rule 304(a) making the earlier order final and appealable.

ANALYSIS

Summary judgment is appropriate if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c). A plaintiff need not prove the case at the summary judgment stage, but must present facts that would arguably entitle the plaintiff to a judgment. *See Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). In a negligence action such as this, a plaintiff must plead and prove that the defendant owed the plaintiff a duty, breached that duty, and that the breach proximately caused the plaintiff's injury. *See Choate v. Indiana Harbor Belt R.R.*, 2012 IL 112948, ¶ 22.

Between the two remaining defendants, they raise one duty argument, a second based on breach, and a third concerning proximate cause. Each will be addressed seriatim.

I. Duty – Open-and-Obvious Condition

The question of whether a duty exists is one of law for the court to decide. *See Burns v. City of Centralia*, 2014 IL 116998, ¶ 13. To determine if a duty exists, a court is to analyze whether a relationship existed between the plaintiff and the defendant for which the law would impose a duty on the defendant for the plaintiff's benefit. *See Doe-3 v. McLean Cty. Unit Dist. No. 5 Bd. of Directors*, 2012 IL 112479, ¶ 22, *quoting Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 436 (2006). The "relationship" is "a shorthand description for the analysis of four factors: (1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing the burden on the defendant." *Id.*, *citing Simpkins v. CSX Transp., Inc.*, 2012 IL 110662, ¶ 18. A court's analysis of the duty element focuses on the policy considerations inherent in these four factors and the weight accorded to each based on the case's particular circumstances. *Id.*

Illinois courts have concluded that there exists a common-law duty of ordinary care to maintain property in a reasonably safe condition. *See Ward v. K mart Corp.*, 136 Ill. 2d 132, 150-51 (1990) (adopting Restatement (Second) of Torts § 343). Illinois courts have also recognized an exception to that duty for known dangers presenting open-and-obvious conditions. *See id.* at 149-51 (adopting Restatement (Second) § 343A). A known danger exists if the possessor of land knows of the condition or activity and appreciates its danger. *See Deibert v. Bauer Bros. Constr. Co.*, 141 Ill. 2d 430, 435 (1990), *quoting* Restatement (Second) § 343A cmt. *b* at 219. An open-and-obvious condition is one that presents an inherent danger that the common law assumes a person encountering the condition would appreciate and avoid. *See Bucheleres v. Chicago Pk. Dist.*, 171 Ill. 2d 435, 448 (1996). The open-and-obvious exception to the duty of ordinary care has been extended to conditions running above the land, for example, electrical wires. *See American Nat'l Bk. & Trust Co. v. National Advertising Co.*, 149 Ill. 2d 14, 17, 25 (1992); *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 469 (1976) (common knowledge that any wire carrying electricity is dangerous). As a result, "[a] business invitee has a responsibility for his own safety and must be held to be equally aware of all the obvious and normal hazards incident to the premises as the possessor of the land." *Genaust*, 62 Ill. 2d at 469.

The open-and-obvious exception to the duty of ordinary care may appear to be in tension with the summary judgment principle that a court is to view all evidence in a light most favorable to the non-moving party. *See Illini Envtl., Inc. v. E.P.A.*, 2014 IL App (5th) 130244, ¶ 34. That principle applies, however, only if disputed facts exist. *See id.* Conversely, it must be true that if there are no disputed facts, a court need not indulge any inference to the non-moving party. These principles are particularly important here because Jose Luis's post-incident condition prevented him from testifying about what he knew or assumed, if anything, about the dangers of working around charged electrical wires.

The evidentiary record that does exist establishes that there are no disputed facts on the issue of Jose Luis's knowledge or appreciation of the dangers of working near charged electrical wires. First, Jose Luis had worked for Iris for six or seven years, and while he had not previously removed trees, according to Benjamin, Jose Luis had trimmed them. The only inference that may be drawn from this fact is that Jose Luis would have appreciated the dangers of charged electrical wires because the same risk of electrocution would have existed regardless of whether he had trimmed or removed trees. Second, Benjamin testified that he did not feel the need to warn Jose Luis since he was not working close to the wires. From this fact, the inference is either that Benjamin is a poor judge of distance or that had Jose Luis been working close to the charged wire, Benjamin's warning would have put Jose Luis on notice of the danger, making the condition open and obvious. Third, Benjamin testified that, in the past, if there were a risk of contacting electrical wires, the electricity would have been turned off. This fact leads only to the inference that Jose Luis knew of the danger of electrocution particularly in this instance since there is no testimony that he or anyone else had been informed that ComEd had cut off the power. This inference is also fair because a worker in the landscaping business who had previously trimmed trees would be acutely sensitive, at least in comparison to the general public, to the dangers of working around charged electrical power lines.

In sum, the record supports the conclusion that removing the mulberry tree in the proximity of charged electrical power lines as it occurred in this case was an open-and-obvious danger. This conclusion is particularly appropriate since Jose Luis had previously worked around such dangers. Given that the danger was open-and-obvious, the defendants did not owe Jose Luis a duty of ordinary care because he should have recognized, appreciated, and avoided the danger. Since neither defendant owed Jose Luis a duty of ordinary care, summary judgment for both defendants must be granted and the case dismissed with prejudice.

II. Breach – Vegetation-Management Guidelines

The court previously asked the defendants, if they were to file a renewed summary judgment motion, to include in the record the vegetation-management guidelines. This court made the request in the abundance of caution. While a violation of internal policies does not establish negligence, such a violation may constitute evidence to establish negligence. *See Hudson v. City of Chicago*, 378 Ill. App. 3d 373, 405 (1st Dist. 2007); *Morton v. City of Chicago*, 286 Ill. App. 3d 444, 454 (1st Dist. 1997).

The defendants did renew their motion and did include guidelines, as the court had requested. A review of those guidelines in light of the complete record establishes that they do not provide evidence of negligence because the rest of the record does not support the argument that Asplundh breached its duty, if any, to follow them. The guidelines do not provide for minimum clearances between vegetation and electrical wires, while the guidelines and the testimonial evidence indicate that tree trimmers must consider a variety of factors when deciding how much to trim a tree to meet the four-year cycle. Further, Kron testified that Asplundh's trimming of the Strausses' tree met the guidelines because he would have made a notation to the contrary. The investigating police officers' testimony is, at best, inconclusive since they were unable to identify specifically which branches impinged on which of the five wires.

In sum, the court is satisfied that the vegetation-management guidelines do not provide evidence of a breach of the duty of ordinary care. And even if this court is wrong in this conclusion, it would have no effect since, as noted above, the defendants did not owe Jose Luis a duty of ordinary care.

III. Proximate Causation

Even if the defendants owed Jose Luis a duty, and even if they breached that duty, there exists no proximate causation between the breach and his injury. Proximate cause contains two

elements: (1) cause in fact; and (2) legal cause. *See Krywin v. Chicago Trans. Auth.*, 238 Ill. 2d 215, 225-26 (2010). Cause in fact requires that the defendant's conduct be a material and substantial factor in bringing about the plaintiff's injury, or that, in the absence of the defendant's conduct, the injury would not have occurred. *See id.* at 226. If a plaintiff's injury results from a third person's independent conduct, the issue is whether that intervening cause is a type that a reasonable person would see as a likely result of the complained-of conduct. *See Young v. Bryco Arms*, 213 Ill. 2d 433, 449 (2004). In other words, if the plaintiff's injury results from conduct other than the defendant's negligence, including the plaintiff's conduct, then the defendant's negligence is only a condition and not a proximate cause of the injury. *See First Springfield Bk. & Trust v. Galman*, 188 Ill. 2d 252, 261 (1999); *Thompson v. County of Cook*, 154 Ill. 2d 374, 383 (1993); *In re Estate of Elfayer*, 325 Ill. App. 3d 1076, 1083-84 (1st Dist. 2001); *Ball v. Waldo Twnshp.*, 207 Ill. App. 3d 968, 973 (4th Dist. 1990). As to the second element, legal cause is present if the injury is of the type that a reasonable person would see as a likely result of his or her conduct. *First Springfield*, 188 Ill. 2d at 257-58; *Simmons v. Garces*, 198 Ill. 2d 541, 558 (2002); *Abrams v. City of Chicago*, 211 Ill. 2d 251, 258 (2004). Yet foreseeability constitutes only that which is "objectively reasonable to expect, not merely what might conceivably occur." *American Nat'l Bk.*, 149 Ill. 2d at 29.

The defendants' conduct in this case was neither the cause in fact nor the legal cause of Jose Luis's injury. As to the first element, even if the mulberry tree's branches impinged on the topmost wire, that condition did not cause Jose Luis's injury. In other words, but for his conduct causing the chain saw to touch the electrical wire or produce an electrical arc, Jose Luis would not have been injured. Quite simply, nothing the defendants did prior to or on June 30, 2009 caused Jose Luis to climb the tree and attempt to remove branches near the charged power line.

There is also no evidence that Szczepanik ordered Jose Luis to climb into the tree. That evidence could have established a

deliberate encounter, which is an exception to the open-and-obvious exception to duty of ordinary care, discussed in Part I. And even if such evidence existed, it would go to Iris's negligence, not the defendants', since neither was at the Strausses' property on June 30, 2009 and did not direct Iris in its tree removal.

As to legal cause, the record is devoid of evidence indicating that Jose Luis's decision to climb the tree and remove branches in the proximity of the electrical power line was in anyway foreseeable by the defendants. The record makes plain that the defendants did not know that Iris planned to remove the mulberry tree on June 30, 2009 let alone that Iris would permit Jose Luis to climb the tree to remove branches or that he would choose to do so on his own. That would still be true even if ComEd and Asplundh knew that the branches impinged on the charged electrical wire.

In sum, the defendants owed Jose Luis no duty because the danger of working near charged electrical wires is open and obvious. Additionally, Asplundh did not breach ComEd's vegetation-management guidelines. Finally, nothing the defendants did on or before June 30, 2009 proximately caused Jose Luis's injury. Rather, his decision to climb into the tree to remove branches was tragic, regrettable, and his own. Summary judgment is appropriate for all three reasons.

CONCLUSION

It is ordered that:

1. The defendants' supplemental summary motion is granted;
2. The case is dismissed with prejudice; and
3. The February 20, 2015 ruling at 11:00 a.m. is stricken.

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John H. Ehrlich, Circuit Court Judge