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## APPELLEES' STATEMENT OF THE FACTS

### **Introduction**

The controversy accepted by this Court involves real property law -- the interpretation and application of a provision contained in an easement ("Easement") granted to Appellant Cleveland Electric Illuminating Company ("CEI") over property owned by Appellees Mary-Martha and Dennis Corrigan ("Corrigans"). The courts below determined that the Easement did not provide CEI with the absolute and unbridled right to destroy the Corrigans' majestic silver maple (and their only) tree, thus enjoined CEI, preserving the Corrigans' tree from imminent destruction.

### **The Corrigans, Their Home, and Their Silver Maple Tree**

In 1975, Mary-Martha and Dennis Corrigan became the owners of real property located at 4520 Outlook Drive, Brooklyn, Ohio ("Property"). (7/14/04, Tr. 25).<sup>1</sup> The Property has and continues to be the Corrigans' home. (7/14/04, Tr. 25). The Property measures 50 feet by 150 feet, and in the back of the house stands a majestic 50-year old, mature silver maple tree. (7/14/04, Tr. 26-27).

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<sup>1</sup> There were two proceedings before the trial court: the July 14, 2004, hearing on the Corrigans' Motion for Preliminary Injunction and the August 30, 2004, trial for a Permanent Injunction. Reference to the testimony will reflect the respective hearing date and transcript page.

## **The Easement**

When the Corrigan's acquired the Property, the land was subject to a 75-foot easement<sup>2</sup> in favor of CEI. As is relevant to these proceedings, the Easement contained the following provision:

Said right and easement shall include the right of [CEI], its successors and assigns at all times to enter upon the right-of-way occupied by said transmission lines for the purpose of constructing, inspecting, protecting, repairing or removing said towers, poles, wires, fixtures and appliances, together with full authority to cut and remove any trees, shrubs, or other obstructions upon the above described property which may interfere or threaten to interfere with the construction, operation and maintenance of said transmission lines.

### **Decades of CEI's Tree Maintenance Fostered The Peaceful Coexistence Of The Corrigan's Silver Maple Tree And CEI's Transmission Lines – Neither Interfered Nor Threatened To Interfere With The Other**

The silver maple tree stands just inside the beginning of CEI's Easement. (8/30/04, Tr. 65-66). For as long as the Corrigan's have called 4520 Outlook Drive their home, CEI maintained, i.e., trimmed, the Corrigan's silver maple tree. (7/14/04, Tr. 28). Not only did the Corrigan's and CEI have a good relationship over the years, (7/14/04, Tr. 28), but, according to Gerald Western, CEI's utility forester for 32 years, CEI's transmission lines and the Corrigan's silver maple tree enjoyed a compatible, harmonious relationship, peacefully coexisting together in a manner in which neither interfered nor threatened to interfere with the other. (7/14/04, Tr. 70-73).

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<sup>2</sup> There are three separate easement instruments, the first dated January 13, 1926, recorded January 16, 1926; the second dated August 6, 1930, recorded August 11, 1930; and the third dated July 28, 1945, recorded December 12, 1945; each conveying the same easement to CEI involving the Corrigan's property, with each containing the specific language at issue herein. The three easements will be referred to collectively as the "Easement." The easement begins near the rear of the Corrigan's home proceeding to their back property line.

- Q. So for the entire time [the transmission lines have] been there, [the Corrigan's silver maple] tree and those lines have coexisted, correct? \* \* \*
- A. No. The lines were there long before the tree was.
- Q. Those lines watched that tree grow?
- A. Yes.
- Q. And CEI watched that tree grow?
- A. Yes.
- Q. And CEI trimmed that tree to make sure that it was grow[ing] properly. Not you, but CEI or its predecessors or whoever was involved in this care and maintenance of that tree. \* \* \*.
- A. It was trimmed by CEI. I do not know if they took care of it. They did have it pruned.
- Q. All the time they trimmed this [tree], this was done in complete compliance with CEI rules, regulations, proceedings, manuals, industr[y] customs, practices, standards and what you think would be a good thing to do?
- A. I cannot answer that question.
- Q. CEI would not deliberately mistreat a tree or keep a tree that would not be properly positioned vis-a-vis its transmission lines would it?
- A. Not that I am aware of.
- Q. [Until 2003], there was never a problem in the way that [the Corrigan's] tree coexisted with whatever transmission lines were in its proximity, correct?
- A. Not that I am aware of.

(7/14/04, Tr. 72-73).

Further confirming the mutual compatibility of the Corrigan's tree and CEI's transmission lines, Richard O'Callaghan, Director of Transmission and Distribution Engineering for FirstEnergy,<sup>3</sup> (8/30/04, Tr. 92), testified:

- Q. From your observations it looks like [the Corrigan's tree is] a mature tree?
- A. Yes.
- Q. Been there. Hasn't been recently moved, correct?
- A. Correct.
- Q. Those lines, the transmission corridor lines, they have been there for many years, correct?
- A. Yes.

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<sup>3</sup> FirstEnergy (sometimes also referred to as First Energy) is a registered public utility holding company with CEI as one of its operating electric utility companies. Appellant's Merit Brief, p. 1, fn 1.

- Q. And the people who designed these lines, after they are designed, then they would send people out to help maintain them, correct?
- A. Correct.
- Q. They would follow the guidelines, whatever administrative agency, whatever industry regulations, whatever it is. When the people came out to maintain the lines, they were aware of what the industry regulations - - what the industry practice would be in connection with the transmission lines and the tree that was off to the side, correct?
- A. I would say having not known the people at the time you are talking about, I would have to say yes, they would have been qualified.
- Q. You are not going to send incompetents out there. You are going to send competents, correct?
- A. Correct.
- Q. So are you aware this tree has been taken care of for at least three decades by CEI, its predecessor, to First Energy?
- A. Yes.
- Q. You are aware that CEI actually sent people into that area where the transmission lines are where you may have a sag and where, in the worst case scenario, the lines may touch the ground or go horizontal 90 degrees, they sent these people out to maintain the silver maple tree, correct?
- A. Correct.
- Q. This would be done knowing and consistent with whatever industry standards were in existence at the time, correct?
- A. Yes.
- Q. Whether they be OSHA, Triple I, whatever they are, okay? They did this consistent with those standards, correct?
- A. I can't say that they did them with those standards. I would have said they would have known those standards exist, correct.
- Q. I'll ask you for your expert opinion. You would presume, given all you know about the company you've been with for the 24 years, that if they send people out there, those people know their job?
- A. Correct.
- Q. They know the rules?
- A. Correct.
- Q. They know the regulations?
- A. Correct.
- Q. Tell me, what part of OSHA changed in the last year as relates to the power lines?
- A. Nothing.
- Q. Tell me what part of the Triple I's, or what - -
- A. I Triple E. Has not changed.
- Q. Tell me what PUCO regulations changed in the last year that would affect the tree?

- A. None.
- Q. Tell me what governmental - - I don't care if it's statute, I don't care if it's municipal ordinance, I don't care if it's PUCO, fed, county, state, municipal. Tell me what has changed in the last year affecting these trees that would affect this tree?
- A. Within the last year? Nothing that I'm aware of.
- Q. Are you aware within the last year First Energy sent somebody to trim - - are you aware that within the last year First Energy sent tree people out to trim the tree? I'm talking about the Corrigan tree.
- A. 2003?
- Q. 2003.
- A. Correct.
- Q. You are aware of that?
- A. Yes.
- Q. Again, this would be consistent with industry regulation, administrative regulation, PUCO regulation so that tree and power line exist together?
- A. Correct. At the time it was trimmed, correct.

(8/30/04, Tr. 124-128).

Mr. O'Callaghan further testified that CEI's removal of a tree is a judgment call, (8/30/04, Tr. 129), that CEI does not have a clear-cut [clearing, rather than pruning] policy.<sup>4</sup> (8/30/04, Tr. 129).

Not once in the three decades that the Corrigan's resided at their Outlook Drive home, had CEI, after pruning the silver maple tree, warned the Corrigan's that the tree constituted a hazard to CEI's transmission lines, that the tree interfered or threatened to interfere with CEI's transmission lines, or that the tree constituted incompatible vegetation in accordance with CEI's vegetation management policy. (8/30/04, Tr. 34-35). Likewise, in those three decades, not once had CEI put the Corrigan's on notice about the growth of the silver maple tree, or that the tree was getting too big, or had CEI expressed any concern about the tree in relation to its (CEI's) transmission lines or towers. (7/14/04, Tr. 28-29; 8/30/04, Tr. 35-36).

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<sup>4</sup> Except when they have a clear-cut policy. *Infra*, at p. 6.

### **CEI's New "Clearing Rather Than Pruning" Vegetation Management Policy.**

CEI adopted a new vegetation management policy. FirstEnergy, through its Forestry Services, and on behalf of CEI, published a pamphlet captioned "Maintaining Safe and Reliable Service" (Def. Ex. C). The pamphlet explained CEI's new philosophy of vegetation management for established trees – clearing, rather than pruning. Mr. Western, CEI's forester, explained that CEI's policy was "[to remove] all trees within its right of way that are ten feet or taller," (7/14/04, Tr. 81), with the exception that not all trees ten feet or taller will be removed. (7/14/04, Tr. 82). And, consistent with Mr. O'Callaghan's testimony, tree removal was a judgment call. (7/14/04, Tr. 82).

### **"Because We Can," CEI Threatens to Cut Down the Corrigan's Tree**

In 2003, CEI first notified the Corrigan's that their tree constituted incompatible vegetation and of its (CEI's) intention to remove the Corrigan's silver maple tree located within the Easement. (7/14/04, Tr. 30). At no time had the Easement been altered, modified, amended, or otherwise changed, the effect of which enlarged or expanded CEI's rights at the expense of the Corrigan's and their Property.

The Corrigan's registered their objection to CEI's plan to destroy their (the Corrigan's) tree. (7/14/04, Tr. 31). On July 1, 2004, CEI notified the Corrigan's of the imminent removal of the tree. (7/14/04, Tr. 32, identifying Exhibit 1 to the Complaint).

Other than CEI's statement that the Corrigan's silver maple tree must be felled, CEI never provided the Corrigan's with any information, study, or report to support any conclusion that the Corrigan's silver maple tree interfered or threatened to interfere with CEI's transmission lines. At no time prior to issuing its "intent to destroy" notice had CEI, independently studied or

evaluated the Corrigan's tree nor did it have prepared on its behalf any document, study, or report evaluating the Corrigan's tree and its (in)compatibility with the transmission tower and lines, as Mr. Western affirmed:

Q. All you know is that CEI contracted with somebody to cut down trees ten feet or taller, somebody [i.e., the Corrigan's] objected, you came out there, took a look at it, and now we're here in court today. Nothing has been prepared, nothing has been written, nobody (sic) has been analyzed or evaluated or otherwise documented?

A. Correct.

(7/14/04, Tr. 85).

### **CEI Has Never Been Cited Or Sanctioned For Its Management Of The Corrigan's Tree**

In its Merit Brief, CEI devotes much of its Statement of the Facts to the duties and responsibilities involved in vegetation management consistent with statutory mandates, administrative regulations, and industry policies and practices,<sup>5</sup> without a word of its 30+ years in managing the Corrigan's tree, complying with statutory mandates, administrative regulations, and industry policies and practices. CEI received no citations, fines, penalties, or other sanction as a result of its maintenance or the location of the Corrigan's tree vis-a-vis CEI's transmission lines. (8/30/04, Tr. 140-141). After CEI stopped tree maintenance, the Corrigan's, retaining their rights as owners of the Property which included the tree growing thereon, secured the services of a tree maintenance company to prune their tree and at no time had CEI or the community serviced by CEI's transmission lines experienced any service interruption.<sup>6</sup>

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<sup>5</sup> Appellant's Merit Brief, p. 2-5.

<sup>6</sup> *Corrigan v. Illuminating Co.* (8<sup>th</sup> Dist.), 175 Ohio App.3d 360, 2008-Ohio-684, ¶24.

## **The Corrigan's Seek Injunctive Relief To Prevent CEI's Destruction Of The Silver Maple Tree**

Prior to 2003 and with CEI's on-going care and attention in pruning and trimming of the Corrigan's tree, there never was a thought questioning whether the tree was "compatible" vegetation and whether it interfered or threatened to interfere with the operation and maintenance of CEI's transmission lines. Between 2003 and 2004, the silver maple tree did nothing to alter this status or its harmonious coexistence with CEI's transmission lines and towers.

Receiving from CEI only "Because We Can" responses and with notice from CEI of the imminent destruction of their only tree, the Corrigan's initiated an action in the Cuyahoga County Common Pleas Court, seeking injunctive relief, challenging CEI's claimed authority under the Easement to cut and remove their tree. The common pleas court issued a temporary restraining order preserving the status quo, setting the matter for hearing upon the Corrigan's Motion for Preliminary Injunction.

Upon hearing, the trial court declared that the Easement granted CEI the authority to remove trees and vegetation which interfered or threatened to interfere with CEI's transmission lines and towers, but the evidence failed to support the conclusion that the Corrigan's silver maple tree interfered or threatened to interfere with CEI's transmission wires or towers.<sup>7</sup> The trial court issued a preliminary injunction enjoining CEI from removing the Corrigan's silver maple tree pending trial for a Permanent Injunction.<sup>8</sup>

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<sup>7</sup> July 29, 2004, Entry, Appellant's Merit Brief, Appx. 19-20.

<sup>8</sup> Id, Appx. 20.

**Evidence Of The On-Going Compatibility Of The Corrigan's Silver Maple Tree And CEI's Transmission Lines Confirmed That The Tree Did Not Interfere Or Threaten To Interfere With CEI's Transmission Lines**

Above all other factual statements, beyond any of the opinions rendered, and overlooking the rhetoric presented to the trial court, was CEI's practice and policy for the past 30 years recognizing that the Corrigan's tree was compatible vegetation and that when properly maintained, the tree did not interfere nor threaten to interfere with CEI's power transmission lines. That CEI initiated a new policy did not instantaneously convert a non-offending tree into an offending tree scheduled for destruction. Nor did it prevent the Corrigan's from maintaining their tree.

The trial court considered:

- Mary-Martha Corrigan – Upon receiving information that CEI planned to cut and remove the silver maple tree, Ms. Corrigan asked CEI's representative “why they were not pruning the upper part of the tree as all pruners had done in the past.” (7/14/04, Tr. 28). Ms. Corrigan affirmed that CEI “would come in, they would hire a company such as Davey Tree to come in and properly prune the tree approximately every five years,” Id, complimenting that the “companies that came in to prune the tree were very careful with our property, and we had a very good relationship with them.” Id.
- Gerald Western, CEI's manager of forestry services, confirmed that for many years, consistent with Mary-Martha Corrigan's testimony, CEI's power transmission lines and the Corrigan's silver maple tree co-existed, (7/14/04, Tr. 72), noting that CEI “would not deliberately mistreat a tree or keep a tree that would not be properly positioned vis-a-vis its transmission line.” (7/14/04, Tr. 73).
- Lauren Lanphear, an arborist and the Corrigan's expert witness, discussed in general, pruning techniques and growth regulators, (7/14/04, Tr. 107-109), and, in relation to the Corrigan's tree, (7/14/04, Tr. 111) concluding that were the Corrigan's tree “closer to [defendant's] power lines, or if it had a different configuration to it, I would say the tree is incompatible. \* \* \*

Based upon the tree as it stands where it is located, I don't feel there is an issue of incompatibility." (7/14/04, Tr. 113-114).

- James G. Kooser, a senior ecologist at URS Corporation and CEI's expert witness, (Transcript of Deposition for Trial of James G. Kooser ("Kooser Depo.") at 5, admitted that the Corrigan's silver maple tree did not attain its present height overnight and for more than 20 years, the silver maple tree "has been roughly that same height, give or take prunings." (Kooser Depo. at 32). In a somewhat non-definitive answer Kooser acknowledged that the CEI's "transmission lines and the silver maple tree can co-exist," id, but he was without knowledge of the history of the tree over the past 50 years and of CEI's maintenance. (Kooser Depo. at 47). Kooser leaves matters of pruning to the arborists. (Kooser Depo. at 48, 50).
- Richard O' Callaghan, as previously noted, testified that no rules, regulations, etc., nothing, changed transforming the Corrigan's tree from compatible to incompatible.

**From The Evidence, The Trial Court Determined That The Easement Does Not Grant CEI The Authority To Remove The Corrigan's Tree**

At the outset, CEI claimed that the PUCO, to the exclusion of the common pleas court, acquired exclusive jurisdiction to hear and determine the issues raised by the Corrigan's. The trial court rejected CEI's Motion to Dismiss for want of subject matter jurisdiction.

Distilling and weighing the evidence submitted, the trial court determined that the Corrigan's silver maple tree did not and does not interfere or threaten to interfere with CEI's power transmission line operation or maintenance, thus the easement does not allow CEI to remove the Corrigan's tree. The trial court issued an order enjoining CEI from doing so.<sup>9</sup>

CEI appeals to the Court of Appeals for Cuyahoga County.

**The Court Of Appeals Affirms The Trial Court's Subject Matter Jurisdiction, The Standard Applied By The Trial Court, and The Evidence As Sufficient To Support The Trial Court's Decision**

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<sup>9</sup> Jan. 10, 2007, Entry, Appellant's Merit Brief, Appx. 17.

The majority of the Court of Appeals affirmed the trial court's Order. In its Opinion, the court below noted: As to jurisdiction, "[CEI] relies on similar cases in which the jurisdiction of the common pleas court was never even raised by the parties or questioned by the common pleas court."<sup>10</sup> As to the Easement, the court below found the language of the Easement "plain and unambiguous" and that the word "may" in the Easement meant that CEI does not have the right to remove any and/or all trees within the Easement, only those which constitute a threat to CEI's transmission lines.<sup>11</sup> And as to the facts, "in reviewing the entire record, weighing the evidence, and reviewing the credibility of the witnesses, the trial court's judgment in the instant case is supported by competent credible evidence. The Corrigan's tree does not pose a possible threat to the transmission lines at issue."<sup>12</sup>

CEI files its Notice of Appeal to this Court, and this Court certified this matter for review.

## **APPELLEES' RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW**

### **Introduction and Summary of the Argument**

This controversy calls upon the interplay of two fundamental and bedrock constitutional considerations: The rights related to property, i.e., to acquire, use, enjoy, and dispose of property,<sup>13</sup> and the mandate that "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall

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<sup>10</sup> *Corrigan*, ¶11.

<sup>11</sup> *Id.*, ¶19-20.

<sup>12</sup> *Id.*, ¶31.

<sup>13</sup> Such rights are among the most revered in our law and traditions and are integral aspects of our theory of democracy and notions of liberty. *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, ¶34.

have justice administered without denial or delay.”<sup>14</sup> Put into the perspective of this case: The Corrigans retained and retain the unfettered right to use and enjoy their Property, including the enjoyment and care of their silver maple tree, unimpeded and unaffected by the Easement, save and except where CEI can demonstrate that the silver maple tree interferes or threatens to interfere with CEI’s transmission lines. And, the only authority that can provide a remedy to the Corrigans’ as such affects their use, enjoyment, and protection of the Property, resides with the judiciary.

Section 16 directs to the common pleas court the duty of construing the Easement and determining its legal significance. The courts below correctly applied the legal standard of reasonableness in construing the Easement, which, upon the facts presented, supported the Order for injunctive relief, preserving the Corrigans’ tree.

**Appellees’ Response to Appellant’s Proposition of Law No. 1:  
A Court Considers All Relevant Evidence When Interpreting  
The Terms And Restrictions Contained In An Easement.**

The evidence a court considers in arriving at its decision depends upon the nature of the matter before it. This case involves CEI’s efforts to materially effect the Corrigans’ property and their enjoyment thereof. CEI claimed the Easement bestowed upon it the right to effectuate change to the Property as CEI so chooses. Thus, the task facing the common pleas court required that it determine (1) what rights or privileges the Easement granted to CEI and (2) whether the evidence heard by the trial court demonstrated that the Corrigans’ tree constituted a hazard to CEI’s transmission lines warranting the tree’s destruction.

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<sup>14</sup> Section 16, Art. I, Ohio Const. (“Section 16”).

The trial court's evaluation does not take place in a vacuum, i.e., the realm of abstract possibilities.<sup>15</sup> The trial court applies the test of reasonableness which considers all relevant evidence, including, in this instance, past and present tree maintenance, to arrive at a conclusion whether there is a reasonable possibility that the Corrigan's tree, **in its current condition**, may interfere or threaten to interfere with the construction, operation and maintenance of CEI's transmission lines.

### **Easements and Rights of Way – What Was Authorized, What Remained**

The Easement granted CEI both a "right of way" and an "easement" while reserving to the Corrigan's all other rights to the use and enjoyment of their property not inconsistent with the Easement.

A right of way is the mere right to pass over another's land for a definite or indefinite period,<sup>16</sup> whereas an easement grants a non-possessory interest in land that entitles the owner of the dominant estate (easement grantee) the limited use of the servient estate (easement grantor).<sup>17</sup> The owner of the dominant estate may not increase the burden nor materially enlarge its right over the servient estate.<sup>18</sup> The owner of an easement has less control of the land than is normally

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<sup>15</sup> Everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. See, e.g., R.C. 2901.05(D).

<sup>16</sup> *Cydrus v. Horton*, 4<sup>th</sup> Dist. No. 98CA2406, 1998 Ohio App. LEXIS 5967, \*6-7, *Smead v. Graves*, 9<sup>th</sup> Dist. No. 23770, 2008-Ohio-115, ¶11.

<sup>17</sup> *Gans v. Andrulis* (May 18, 2001), 11<sup>th</sup> Dist. No. 99-P-0118, 2001 Ohio App. LEXIS 2242, \*8.

<sup>18</sup> *Hliener v. Kelley* (July 23, 1999), 4<sup>th</sup> Dist. No. 98CA7, 1999 Ohio App. LEXIS 3570, \*33, discretionary appeal not allowed (1999), 87 Ohio St.3d 1441.

had by persons who have a possessory interest in the land.<sup>19</sup> The scope of an enforceable easement will generally be defined by the language of the granting instrument.<sup>20</sup> A clearly expressed limitation upon the grant of an easement will be enforced.<sup>21</sup>

As relevant herein, the Easement to CEI included the **unrestricted right** to enter upon the right-of-way occupied by said transmission lines for the purpose of constructing, inspecting, protecting, repairing or removing said towers, poles, wires, fixtures and appliances and the **restricted right** to cut and remove any trees, shrubs, or other obstructions upon the Property only where such vegetation may interfere or threaten to interfere with the construction, operation and maintenance of said transmission lines.

Nothing within the Easement limited the Corrigan's right to the enjoyment or use of their property within the area covered by the Easement provided such did not conflict with CEI's unrestricted and restricted grants. The rights the Corrigan's retained included the care and maintenance of their silver maple tree, regardless of whether CEI chose to do so.

As expressed by the majority of the court below,<sup>22</sup> (1) the right to cut and remove any tree within the Easement did not empower CEI the right to cut and remove any and/or all trees (albeit

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<sup>19</sup> *Cleveland v. Clifford* (9<sup>th</sup> Dist. 1997), 121 Ohio App.3d 59, 62.

<sup>20</sup> *Devoe v. Lavelle*, 5<sup>th</sup> Dist. No. 03 CA 94, 2004-Ohio-3300, ¶7.

<sup>21</sup> *Id.*, ¶9.

<sup>22</sup> As well as by the appellate court in *Beaumont v. FirstEnergy Corp.*, 11<sup>th</sup> Dist. No. 2004-G-2573, 2004-Ohio-5295, ¶22, 33, which construed an easement containing vegetation removal conditions virtually identical to this Easement.

there was only one) within the metes and bounds of the Easement,<sup>23</sup> and (2) the Easement requires proof of a condition precedent, i.e., that the tree may interfere or threaten to interfere with the construction, operation and maintenance of CEI's transmission lines, before CEI may affect the Corrigan's land.<sup>24</sup>

### **The Applicable Standard – Reasonableness v. “Because We Say So”**

CEI's argument before this Court repeats that which it presented to, but rejected by the two courts below – notwithstanding the decades that CEI maintained the Corrigan's tree assuring that the Corrigan's tree neither interfered nor threatened to interfere with its transmission lines, and notwithstanding that CEI's most recent maintenance of the tree continued this tree's status as compatible vegetation, CEI deemed the Corrigan's tree as incompatible vegetation and doomed although there had been no change in the law, regulations, industry standards or tree maintenance procedures. The standard CEI employed to arrive at this conclusion – “because we say so.” The rationale behind this standard – ????????

CEI claims that it does not have to be reasonable when deciding to remove the Corrigan's tree because “nothing within the easement language specifically required [this standard],”<sup>25</sup> and misleadingly refers this Court to *Shinaberry* where the language of the easement therein allowed Toledo Edison<sup>26</sup> “the right to trim or remove underbrush and trees and to keep free any

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<sup>23</sup> *Corrigan*, ¶20.

<sup>24</sup> *Id.*, ¶21.

<sup>25</sup> Appellant's Merit Brief, p. 11, citing *Shinaberry v. Toledo Edison Company* (July 17, 1998), 6<sup>th</sup> Dist. No. L-97-1389.

<sup>26</sup> Another FirstEnergy operating company.

obstruction from and along said line or lines, that *in the judgment of Grantee* (italics sic), will interfere with the construction and safe operation thereof.” As the easement in *Shinaberry* contained no restrictions to limit the utility’s removal of trees within the area of the easement, the utility could remove a tree for any or for no reason, i.e., “because we say so.”

CEI also calls attention to *Wimmer*,<sup>27</sup> referenced at page 12 of Appellant’s Merit Brief, which is currently on appeal and scheduled for oral argument.<sup>28</sup> *Wilson*,<sup>29</sup> also a common pleas court decision, cited at page 13 of Appellant’s Merit Brief, neither discussed whether the easement at issue therein (with language similar to the Easement) required any condition precedent or what, if any, standard is to be applied in determining whether vegetation interferes or threatens to interfere with CEI’s transmission lines. *Wilson* did not mention whether the easement at issue limited or restricted the utility in any manner. Without discussing the evidence presented, the *Wilson* court concluded that the utility has the right to cut trees and that the landowner failed to prove entitlement to the relief sought.<sup>30</sup>

One final note, with the Easement’s clear and unambiguous language limiting the right of CEI in cutting and removing the Corrigan’s tree, at no time has CEI provided any court with a means in determining any standard that may be applied. All that has come from CEI is the

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<sup>27</sup> *Wimmer Family Trust v. FirstEnergy*, Lorain CP Case No. 08 CV 155082, appeal pending, 11<sup>th</sup> Dist. No. 08CA009392.

<sup>28</sup> Counsel herein were/are the same counsel in the trial court and before the court of appeals in *Wimmer*.

<sup>29</sup> *Wilson v. Ohio Edison* (Jan. 9, 2008), Columbiana County CP Case No. 2007-cv-1209, Appellant’s Merit Brief, Appx. 138-141.

<sup>30</sup> Appellant’s Merit Brief, Appx. 138-140.

declaration that the Corrigans' tree constitutes incompatible vegetation and with that designation, such tree must be cut and removed. That is no standard, let alone one from which a court may review to determine if such complies with the Easement's limitation that no tree is to be cut or removed unless such interferes or threatens to interfere with CEI's transmission lines.

The appellate court below correctly read the Easement as rejecting "because we say so" as a standard, and limiting CEI's claimed right to cut and remove the Corrigans' tree upon their land within the area of the Easement as applying to a tree which interferes or may interfere with CEI's operation and/or equipment.

**Disagreement With The Evidence Does Not Meant A Lack Of Competent Credible Evidence**

CEI's first proposition of law also challenges the appellate's court decision that the trial court's Order was supported by some competent, credible evidence going to all essential elements of the case. CEI claims that the Corrigans "presented no (underlining sic) evidence to meet the 'clear and convincing burden or to rebut [CEI's] evidence that the removal of the tree was necessary to operate and maintain the transmission line."<sup>31</sup> The majority of court below found that the Easement limited CEI's authority to cut and remove vegetation which interfere or threaten to interfere with its transmission lines and cited testimony that the Corrigans produced sufficient supporting evidence for the trial court's Order.

**Easement Issues Are Properly the Subject for Injunctive Relief**

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<sup>31</sup> Id, p. 15.

A party to an easement may invoke the equitable jurisdiction of the common pleas court, by way of an injunction, to enforce rights pursuant to the easement.<sup>32</sup> Easement holders, including public utilities, invoke the court's equity jurisdiction to enjoin conduct where interference with the easement is claimed.<sup>33</sup> Once invoked, the trial court possesses discretionary authority to weigh the parties' competing interests and exact an equitable division of their property rights.<sup>34</sup> A court may define the scope of an easement by what is reasonably necessary and convenient to accomplish the purpose for which the easement was granted.<sup>35</sup>

When a dispute arises over the scope and extent of an easement, the primary purpose is to ascertain the intent of the parties.<sup>36</sup> Generally, this will be accomplished by looking at the text of the easement, and if the intent is plain on the face of the instrument, then it is not necessary or permissible to resort to rules of construction or parol evidence to determine the easement's effect.<sup>37</sup> If an easement is clear and unambiguous, then its interpretation is a matter of law, and

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<sup>32</sup> *Murray v. Lyon* (9<sup>th</sup> Dist. 1994), 95 Ohio App.3d 215, 221.

<sup>33</sup> E.g., *Columbia Gas Transmission Corp. v. Adams* (Fairfield CP 1994), 68 Ohio Misc.2d 29, 34 (easement owner secured a permanent injunction ordering the property owner to remove objects within the easement that unreasonably interfered with or obstructed the reasonable and proper enjoyment and use of the easement), *Ohio Power Co. v. Bauer* (5<sup>th</sup> Dist. 1989), 60 Ohio App.3d 57 (easement owner invoked the equitable jurisdiction of the common pleas court to enjoin defendants from interfering with its use and enjoyment of the easement and access).

<sup>34</sup> *Hiener*, 1999 Ohio App. LEXIS 3570 at \*35, *Murray*, at 221.

<sup>35</sup> *Hiener*, 1999 Ohio App. LEXIS 3570 at \*34-35.

<sup>36</sup> *Gans*, 2001 Ohio App. LEXIS 2242, at \*9.

<sup>37</sup> *Id.*

there are no issues of fact to be determined.<sup>38</sup> Where express terms of an easement are ambiguous, the trial court may consider the subsequent conduct of the parties in relation to the subject matter as acquiescence of a certain construction of the grant of the easement which estops the assertion of a different construction.<sup>39</sup>

Although CEI posits that the clear language of the Easement gives it the absolute, unquestioned right to remove the Corrigan's tree within the Easement, the court below, as did the court in *Beaumont*, found the Easement's "plain and unambiguous" language,<sup>40</sup> did not grant CEI any such right.<sup>41</sup> The "plain and unambiguous" language required evidence that the Corrigan's tree interfered or reasonably threaten to interfere with CEI's transmission lines, otherwise, the Corrigan's property rights, including dominion over their tree, remained in full force and effect.

#### **The Right to Equitable Relief – Permanent v. Preliminary Injunction**

The criteria necessary for the granting of a permanent injunction (which is before this Court) differs from that required for the issuance of a preliminary injunction (which is not before this Court). The primary goal of preliminary injunctive relief is to preserve the status quo pending final determination of the matter.<sup>42</sup> To obtain a permanent injunction, a party must show by clear and convincing evidence that immediate and irreparable injury, loss, or damage will

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<sup>38</sup> *Id.*

<sup>39</sup> *Roebuck v. Columbia Gas Transmission Corp.* (3<sup>rd</sup> Dist. 1977), 57 Ohio App.2d 217.

<sup>40</sup> *Corrigan*, ¶19.

<sup>41</sup> *Id.*, ¶20.

<sup>42</sup> *Arndt v. P & MLTD*, 11<sup>th</sup> Dist. Nos. 2007-P-0038 and 2007-P-0039, 2008-Ohio-231, ¶64.

result to the applicant and that there is no adequate remedy at law.<sup>43</sup> The court below correctly found that absent injunctive relief, the Corriganes would suffer immediate and irreparable injury, and that there was no adequate remedy at law.

**Sufficient Evidence Supported The Decision Of The Appellate Court That The Corriganes' Tree Posed No Hazard And All Testimony, Whether Through Direct Or Cross-Examination, Counts as Evidence.**

The standard of review is not whether a reviewing court would have arrived at the same conclusion as did the court below, but whether some competent credible evidence going to all essential elements of the case supports the judgment of the trial court.<sup>44</sup> Citing this standard, the court below proceeded to review the competent credible evidence supporting the judgment of the trial court.<sup>45</sup>

Trial courts engage in a balancing process designed to weigh the equities between the parties in determining whether injunctive relief is appropriate which involves considering and

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<sup>43</sup> E.g., *Hack v. Sand Beach Conservancy District* (6<sup>th</sup> Dist.), 176 Ohio App.3d 309, 2008-Ohio-1858, ¶23, *Tradesmen International, Inc. v. City of Massillon*, 7<sup>th</sup> Dist. No. 2002CA00251, 2003-Ohio-2490, ¶31, appeal not allowed, 100 Ohio St.3d 1410, 2003-Ohio-4948, *Smead v. Graves*, 9<sup>th</sup> Dist. No. 23770, 2008-Ohio-115, ¶9, *Ohio Hospital Association v. Ohio Bureau of Workers' Compensation*, 10<sup>th</sup> Dist. No. 06AP-471, 2007-Ohio-1499, ¶24, *Skinkiss v. Gleeson*, 12<sup>th</sup> Dist. Nos. CA2006-12-143, CA2006-12-147, 2008-Ohio-356, ¶12.

The Corriganes dispute the 4-part test Appellant posited in its Merit Brief at p. 8, which includes the requirement that the Corriganes prove that CEI committed a wrongful act. This cannot be correct given that injunctive relief is prospective, “[t]he purpose of an injunction is to prevent a future injury, not to redress past wrongs.” *Lemley v. Stevenson* (6<sup>th</sup> Dist. 1995), 104 Ohio App.3d 126, 136. Additionally, Appellant cites as its authority *Rite Aid v. Marc's Variety Store* (8<sup>th</sup> Dist. 1994), 93 Ohio App.3d 407, 413 (sic, 412). In *Rite Aid*, the Eighth District did not specifically adopt Appellant's claimed 4-part test, instead, the appellate court noted that the parties therein stipulated to that test as the applicable law.

<sup>44</sup> *Seasons Coal Co., inc. v. Cleveland* (1984), 10 Ohio St.3d 77.

<sup>45</sup> *Corrigan*, ¶30.

weighing the relative conveniences and comparative injuries to the parties which would result from the granting or refusal of injunctive relief.<sup>46</sup> CEI suggests that only its witnesses, testifying on direct examination should be given credence and that evidence adduced on cross-examination is of no consequence.<sup>47</sup> The appellate court considered all the testimony from all the witnesses.<sup>48</sup>

The grant or denial of an injunction is solely within the trial court's discretion, and a reviewing court should not disturb the judgment of the trial court absent a showing of a clear abuse of discretion.<sup>49</sup> The Corrigan's must prove their entitlement to injunctive relief by clear and convincing evidence,<sup>50</sup> however, their burden of proof as applies herein, does not require that the Corrigan's prove that their tree does not interfere or threaten to interfere with CEI's transmission lines. The condition for tree removal requires proof, not supposition, that the Corrigan's tree causes a hazard, which the "plain and unambiguous" language of the Easement places upon CEI the burden of proof.

The Corrigan's presented clear and convincing and essential uncontested evidence that they owned the Property, that CEI notified the Corrigan's that it (CEI) intended to cut down the

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<sup>46</sup> *Skinkiss v. Gleeson*, 12<sup>th</sup> Dist. Nos. CA2006-12-143, CA2006-12-147, 2008-Ohio-356, ¶12.

<sup>47</sup> Appellant's Merit Brief, p. 14. After discussing the direct testimony of its witnesses, CEI states "This testimony was unrebutted by any competent expert evidence in the record." Yet, testimony on cross-examination, reviewing the history of this tree's maintenance and the absence of any change in law, regulation, practices, and procedures sufficiently "rebutted" the immediacy or necessity of cutting down the Corrigan's tree.

<sup>48</sup> *Corrigan*, ¶23, 27.

<sup>49</sup> *Meade v. Beverly Enterprises-Ohio, Inc.* (11<sup>th</sup> Dist), 154 Ohio App.3d 521, 2003-Ohio-5231, ¶11

<sup>50</sup> *Lemley v. Stevenson* (6<sup>th</sup> Dist. 1995), 104 Ohio App.3d 126, 136.

Corrigan's mature silver maple tree which is the only tree on the Property, that CEI's destruction of the Corrigan's tree was imminent, that the Corrigan's could not reasonably replace this tree, and there is no adequate remedy at law to prevent CEI from cutting and removing the Corrigan's silver maple tree. The Corrigan established their entitlement to injunctive relief.

In defense of the Corrigan's petition for a permanent injunction, CEI could have presented evidence that disputed the elements of the Corrigan's case as set forth above, or it could demonstrate that the Easement provided it with the right to cut and remove the Corrigan's tree, i.e., that such tree interfered or threatened to interfere with CEI's transmission lines.<sup>51</sup> CEI chose not to present a defense to the Corrigan's case, but relied upon its claim that the tree constituted an unacceptable hazard for which its destruction was permitted.

Having reviewed the testimony from all witnesses, the court below noted that the Corrigan undertook tree maintenance on their own (as they were/are entitled to do as owners of the tree and not otherwise prohibited by the Easement),<sup>52</sup> and despite repeated claims of statutory, administrative regulatory, and industry mandates, practices, and procedures, the court below

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<sup>51</sup> The court below seemed to place the burden upon the Corrigan to demonstrate that their tree did not pose a hazard to CEI's transmissions lines. *Corrigan*, ¶21. Even if this burden falls on the Corrigan, the appellate court correctly noted that "the Corrigan submitted sufficient evidence to demonstrate that the Illuminating Company's proposed removal of a single tree violated the terms of the [E]asement." *Corrigan*, ¶22.

<sup>52</sup> *Id.*, ¶25, 33.

recognized that CEI “has not received a single citation as a result of the tree’s placement,<sup>53</sup> nor has there been any interruption of electrical service in the community.”<sup>54</sup>

Neither the trial court nor the appellate court required a showing of actual harm before allowing CEI to cut down the Corrigan’s tree, or that actual harm was the sole standard before CEI can remove the Corrigan’s tree, as CEI suggests.<sup>55</sup> The Easement authorizes tree removal where the tree interferes or threatens to interfere, thus actual and reasonably anticipated harm are part of the trial court’s considerations when determining whether the standard has been met.

Finally, CEI, at pages 16-19 of its Merit Brief, put together its “fear list”<sup>56</sup> which can be responded to, in “lightening round” fashion as follows:

CEI has a non-delegable duty to deliver safe and reliable power

CEI has complied with its duty for the past 30 years and nothing prevents it from continuing to do so

CEI must monitor thousands of miles of transmission lines

CEI has done this for the past 30 years – it flies over all of its lines twice a year, (8/30/04, Tr. 153), and nothing prevents it from continuing to do so

Presenting evidence that a tree causes a hazard, thus must be removed, is onerous

Taking someone’s property without permission or legal privilege is illegal

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<sup>53</sup> Id, ¶24, 32.

<sup>54</sup> Id, ¶25, 32.

<sup>55</sup> Appellant’s Merit Brief, p. 15.

<sup>56</sup> “Nothing in life is to be feared, it is only to be understood. Now is the time to understand more, so that we may fear less.” Marie Curie.

A silver maple tree is a fast growing tree

The Corrigan's tree has been fast growing for the past 30 years; CEI was capable of maintaining this tree while delivering safe and reliable power and nothing has changed.

Court will become clogged with cases challenging CEI claimed right to remove trees.

If the easement grants CEI the unfettered right to remove vegetation, i.e., *Shinaberry*, this claim is illusory; if the easement does not grant such right, taking someone's property without permission or legal privilege still is illegal

Different courts will create different standards

The law will not change, but the facts may vary which warrants the retention or removal of the vegetation at issue

In any easement, such as applicable herein or as set forth in *Shinaberry*, the vegetation belongs to the property owner. The issue is the claimed right to remove such. Herein, CEI's claimed right is limited. CEI's disagreement with the appellate court's consideration of the absence of past harm does not render incorrect the appellate court's decision or the criteria it reviewed in arriving at its decision. The court below noted that the tree caused no "actual harm" and its current maintenance provided no reasonably anticipated harm, thus the appellate court correctly affirmed the trial court's Order, finding competent, credible evidence to support the permanent injunction.

**Appellees' Response to Proposition of Law No. 2:  
The Common Pleas Court Possesses Subject Matter  
Jurisdiction To Hear And Determine Issues Involving Real  
Property Such As The Interpretation and Application Of An  
Easement, Notwithstanding That One Of The Parties To The  
Controversy Is A Utility. *Allstate Insurance Company v.  
Cleveland Electric Illuminating Company*, Slip Op. 2008-Ohio-  
3917, followed.**

CEI's Second Proposition of Law, has been effectively resolved by this Court's recent decision in *Allstate Insurance Company v. Cleveland Electric Illuminating Company*, Slip Op. 2008-Ohio-3917. *Allstate* affirmed that the PUCO is not a court and has no power to judicially ascertain legal rights and liabilities.<sup>57</sup>

The question decided by *Allstate* was whether a common pleas court has subject matter jurisdiction to hear and determine a tort claim, i.e., negligence, brought against a utility, or whether such was considered "service related," falling within the exclusive jurisdiction of the PUCO. To answer this question, this Court adopted a two-part test, wherein both parts must be answered in the affirmative for exclusive PUCO jurisdiction: (1) Is PUCO's administrative

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<sup>57</sup> *Allstate*, ¶6. In addition thereto, the PUCO lacks the capacity to provide a "remedy by due course of law" given that it cannot issue injunctions. See, R.C. 4509.60. ("Whenever the public utilities commission is of the opinion that any public utility or railroad has failed or is about to fail to obey any order made with respect to it, or is permitting anything or about to permit anything contrary to or in violation of law, or of an order of the commission, authorized under Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4925. of the Revised Code, the attorney general, upon the request of the commission, shall commence and prosecute such action, or proceeding in mandamus, by injunction, or by other appropriate civil remedies in the name of the state, as is directed by the commission against such public utility or railroad, alleging the violation complained of and praying for proper relief. In such a case the court may make such order as is proper in the premises.")

expertise required to resolve the issue in dispute and (2) does the act complained of constitute a practice normally authorized by a utility.<sup>58</sup>

*Allstate* resolved after considering the first part of the test when this Court held that the expertise of the PUCO is not necessary to the resolution of the case, and that it was proper for a jury to determine the reasonableness of the delay between CEI's receipt of the emergency calls and arrival at the customer's residence.<sup>59</sup> Responding to CEI's argument about its guidelines (response time not tree maintenance) as being service related, this Court stated, "we are not persuaded that a guideline that allows an emergency call to go without response for over six hours can be relied upon to avoid the general jurisdiction of the court of common pleas."<sup>60</sup>

Herein, "no" is the answer to both parts of the test, and the court below correctly found the common pleas court to possess subject matter jurisdiction over this action.

In answer to the first part of the test – PUCO's administrative expertise is not required to resolve the issue in dispute. The issue in dispute is the interpretation of an easement and for injunctive relief. CEI failed to produce any evidence of any nature that the PUCO's expertise was essential (or even competent) to give a legal interpretation and issue injunctive relief concerning the easement.

Referring to the second prong – whether the act constitutes a "practice" normally authorized by the utility – tree trimming is not a "practice" normally authorized by or unique to CEI's operation any more so than the switching a light on/off is a "practice" normally authorized

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<sup>58</sup> Id., ¶11-13.

<sup>59</sup> Id., ¶14.

<sup>60</sup> Id., ¶15.

by or unique to this Court's operation. PUCO's exclusive jurisdiction depends upon whether the matter involves claims which are essentially rate- or service-oriented, not whether a claim involves a utility's common "practice."<sup>61</sup> That CEI trimmed trees is a common practice does not make tree trimming an act governed by or within the exclusive jurisdiction of the PUCO.

The issue before the common pleas court involved property law, not utility regulation. Whether an easement grants or denies the utility the right to cut a tree, is for a court of law to decide. That a court takes into consideration, in determining the nature and extent of the easement's grant, a company's practices and procedures, happens every day in every common pleas court of this state. Judges on all levels of our judicial system are trained in and capable of receiving information and making decisions, including whether a tree constitutes a hazard for which it must be destroyed.

Finally, CEI referred to *Beaumont* in distinguishing *Allstate's* application to this case.<sup>62</sup> CEI claims herein that the Corrigan's were disputing CEI's vegetation management policy, not the ambiguity of the Easement. This is incorrect. The Corrigan's disputed CEI's claimed right to remove their tree. As far as the Corrigan's knew, and as demonstrated at trial, CEI's new vegetation management policy is a fancy name for "because we say so." Given that the evidence from CEI's witnesses confirmed that the Corrigan's tree harmoniously coexisted for over 30 years with the transmission wires, consistent with statutes, regulations, and industry standards, it did not matter whether that CEI adopted a new name or went by the old one. The Corrigan's

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<sup>61</sup> *Pacific Indemnity Insurance Co. v. The Illuminating Co*, 8<sup>th</sup> Dist. No. 82074, 2003-Ohio-3954, ¶18.

<sup>62</sup> Appellant's Merit Brief, p. 21-22.

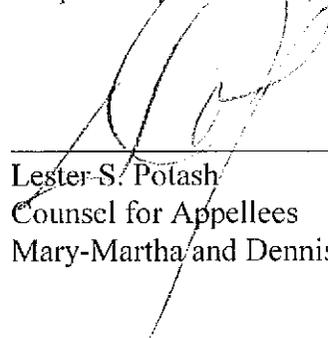
raised an issue of real estate law – whether CEI’s planned destruction of the Corrigan’s property was consistent with the authority granted in the Easement. The trial court had no difficulty in arriving at the conclusion that the Easement did not grant such authority to CEI. The appellate court did not feel that this question was “beyond its pay grade” in affirming the trial court, and clearly this Court is capable of resolving this legal issue, consistent with Section 16, without deference to or assistance from the PUCO.

The court below properly concluded that this case presented an issue involving real property rights, that the common pleas court possessed the requisite jurisdiction to hear and determine an issue involving property rights, and that the common pleas court arrived at the proper decision when doing so.

### **CONCLUSION**

**WHEREFORE**, for the reasons stated herein, Mary-Martha Corrigan and Dennis Corrigan respectfully submit that this Court affirm the decision of the Court of Appeals and maintain the injunction, at Appellant’s costs.

Respectfully submitted,

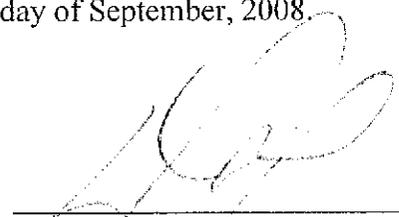


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Lester S. Potash  
Counsel for Appellees  
Mary-Martha and Dennis Corrigan

**CERTIFICATE OF SERVICE**

A true copy of the foregoing Appellees' Merit Brief has been deposited in the United States Mail, postage prepaid, for service upon Denise M. Hasbrook, Esq., Donald S. Scherzer, Esq., and Emily Ciecka Wilcheck, Esq. counsel for appellant, at Roetzel & Andress, LPA, One SeaGate, Suite 999, Toledo, OH 43604, this 23<sup>rd</sup> day of September, 2008.



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