

ORIGINAL

IN THE SUPREME COURT OF OHIO

MARY-MARTHA CORRIGAN, et al.)	CASE NO. 2008-0708
)	
Appellees,)	On Appeal from the
)	Court of Appeals For Cuyahoga County
vs.)	Eighth Appellate District Case No. 89402
)	
THE ILLUMINATING COMPANY,)	
)	
Appellant.)	

APPELLEES MARY-MARTHA AND DENNIS CORRIGANS'
MOTION FOR RECONSIDERATION

RECEIVED
JUN 12 2009
CLERK OF COURT
SUPREME COURT OF OHIO

Lester S. Potash (#0011009)
55 Public Square, Suite 1717
Cleveland, Ohio 44113-1901
Tel: (216) 771-8400
Fax: (216) 771-8404
E-mail: lsp@potash-law.com

Counsel for Appellees

Denise M. Hasbrook (#0004798)
COUNSEL OF RECORD
Donald S. Scherzer (#0022315)
Emily Ciecka Wilcheck (#0077895)
Roetzel & Andress, LPA
One SeaGate, Suite 999
Toledo, OH 43604
Tel.: (410) 242-7985
Fax: (410) 242-0316
E-mail: dhasbrook@ralaw.com
dscherzer@ralaw.com
EWilcheck@ralaw.com

Counsel for Appellant

FILED
JUN 12 2009
CLERK OF COURT
SUPREME COURT OF OHIO

MEMORANDUM IN SUPPORT OF REQUEST FOR RECONSIDERATION

The majority's determination that the fate of the Corrigan's tree exclusively rests with the Public Utilities Commission of Ohio ("PUCO") failed to mention, thus overlooked, the fundamental constitutional issue presented by this appeal – the guarantee of a remedy by due course of law for an injury done (or in this instance to be done) to the Corrigan's land.¹ Both lower courts found the utility's imminent act would result in a circumstance for which there exists no adequate remedy at law. The majority opinion did not challenge the lower courts' conclusions, thus, by implication, agreed that were the Corrigan's to prevail upon their interpretation of the easement, injunctive relief is not only the appropriate, but the sole remedy available.

Putting aside the qualifications of the PUCO to hear and determine a complaint brought by the Corrigan's on the interpretation of the easement,² the absence of any reference in the majority opinion as to the PUCO's power to grant equitable, i.e., injunctive, relief might otherwise infer that PUCO possesses such authority. This presumption is incorrect as argued by the Corrigan's:

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. 4905.60. ("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

¹ Section 16, Art. I, Ohio Const., see Appellees' Merit Brief, p. 12.

² Slip Opinion, ¶24, 29 (O'Donnell, J., dissenting).

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.”)³

By the utility’s failure, in writing or in oral argument before this Court, to present authority in support of PUCO’s equitable jurisdiction and power or in challenging the Corrigans’ claim that the PUCO lacks such authority, this Court should (justly) infer the utility’s recognition of the PUCO’s limitations which do not include equitable jurisdiction and that it cannot grant and enforce injunctive relief.

The majority’s decision requires every property owner, faced with the threat of injury to her lands, to petition the PUCO and engage in a vain act given that the PUCO is not a court of law and does not have the power to judicially ascertain and determine legal rights and liabilities.⁴ Applying the majority’s opinion, a property owner who receives notice from a utility of the imminent destruction or damage to her land for which there is no adequate remedy at law, which conduct is claimed under the guise of permission contained in an easement, must petition the PUCO seeking relief the PUCO cannot provide. Lacking any equitable authority to maintain the status quo pending a hearing on the matter, nothing would prevent the utility from engaging in the conduct causing the irreparable harm to the land. Were the PUCO to ultimately find in favor of the property owner, the irreparable harm has taken place and the PUCO is otherwise powerless

³ Appellees’ Merit Brief, p. 25, fn. 57.

⁴ *Allstate Insurance Co. v. Cleveland Electric Illuminating Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, ¶6. In *Allstate*, six members of this Court noted that even if Allstate had taken its complaint to the PUCO, it lacked the authority to determine legal rights and liabilities between the parties, concluding that such would have been wasteful and futile. *Allstate*, ¶16.

to grant any relief to the property owner. This hollow victory does not comport with the constitutional guarantee of “a remedy by due course of law” for injury done to the owner’s land.

The issue before this Court has always been about the “sacrosanct nature of [one’s] ‘inalienable’ property rights” incorporated into the Ohio Constitution, held forever “inviolable”⁵ – the utility’s claimed use under the easement⁶ versus the Corrigan’s retained rights as owners in fee of their land and all that is upon it. There is no question that the instant controversy concerns vegetation management – the utility’s “clear cut” method versus “preserve and maintain” practiced by the Corrigan’s. Only a court of law can determine the respective rights of the parties by interpreting and giving legal effect to the terms of the easement.

Two courts below have followed this constitutional command, first by recognizing that the subject raised by the Corrigan’s in their complaint concerned a question of real estate law vesting a court of law with subject matter jurisdiction. Upon assuming jurisdiction, both of the courts below determined from the facts presented that the Corrigan’s retained certain legal rights to their property, including the right to maintain their tree which, from the reliable, probative, and substantial evidence, neither interfered nor threatened to interfere with any utility operation. Finally, the two courts below concluded that the utility did not acquire the right, notwithstanding its easement, to cause irreparable harm to the Corrigan’s land and were the utility to proceed with

⁵ *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, ¶37, see also ¶34 (“The rights related to property, i.e., to acquire, use, enjoy, and dispose of property, (citation omitted) are among the most revered in our law and traditions. Indeed, property rights are integral aspects of our theory of democracy and notions of liberty.”).

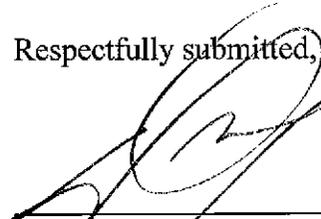
⁶ An easement is expressed not in terms of possession or occupancy but of use, thus the owner of the land which is subject to an easement retains the right to use the land in any manner not inconsistent with the easement. *Rueckel v. Texas Eastern Transmission Corp.* (5th Dist.) 3 Ohio App.3d 153, 160, m/c/o (3/17/1982).

its planned destruction of the Corrigan's tree, the Corrigan's possessed no adequate remedy at law.⁷

The majority opinion never got beyond "vegetation management," somewhat overlooking the forest for this single tree. This Court accepted the utility's appeal as presenting an issue of great public importance and of constitutional significance. The significant constitutional questions remains unanswered, properly the subject for this Court's reconsideration.

WHEREFORE, for the reasons stated herein, Appellees Mary-Martha and Dennis Corrigan respectfully pray that this Court grant reconsideration of this matter, and if deemed appropriate, permit further briefing and/or argument before this Court.

Respectfully submitted,

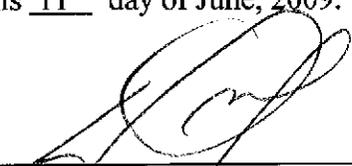


Lester S. Potash
Counsel for Appellees
Mary-Martha and Dennis Corrigan

⁷ Given the nature of the opinion, the majority did not touch upon the lower courts' interpretation and enforcement of the easement.

CERTIFICATE OF SERVICE

A true copy of the foregoing Appellees' Motion for Reconsideration 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 11th day of June, 2009.



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