

ORIGINAL

IN THE SUPREME COURT OF OHIO

MARY MARTHA CORRIGAN, et al.,) Case No. 08-0708
)
Appellees,) On Appeal from the
) Cuyahoga County Court of Appeals,
v.) Eighth Appellate District
)
THE ILLUMINATING COMPANY,) Court of Appeals
) Case No.: CA-07-089402
Appellant.)

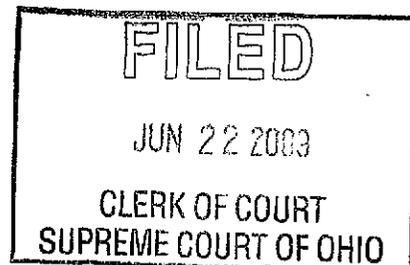
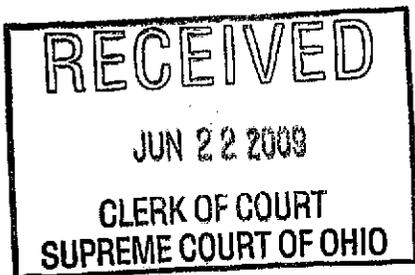
**APPELLANT, THE ILLUMINATING COMPANY'S, MEMORANDUM IN
OPPOSITION TO APPELLEES' MOTION FOR RECONSIDERATION**

Denise M. Hasbrook (0004798)
(COUNSEL OF RECORD)
Donald S. Scherzer (0022315)
Emily Ciecka Wilcheck (0077895)
One SeaGate, Suite 1700
Toledo, Ohio 43604
Telephone: (419) 242-7985
Facsimile: (419) 242-0316
E-mail: dhasbrook@ralaw.com
dscherzer@ralaw.com
ewilcheck@ralaw.com

*Counsel for Appellant,
The Illuminating Company*

Lester S. Potash
55 Public Square, Ste. 1717
Cleveland, OH 44113
Telephone: (216) 771-8400

*Counsel for Appellees,
Mary Martha Corrigan, et al.*



Now comes Appellant, by and through counsel, who file this Opposition to the Motion for Reconsideration of the Court's Decision and Judgment Entry in this case.

Essentially, Appellees beg for reconsideration on the misguided notion that the Court's decision works to deprive them of any viable remedy. However, Appellees make this argument while conveniently withholding the fact that they have already filed a complaint with the Public Utilities Commission of Ohio (hereinafter "PUCO") challenging the reasonableness of the Company's decision to cut down their tree in furtherance of its vegetation management policies. Thus, the underlying premise of the instant motion that the Appellees will not have a right to be heard is disingenuous.¹

Beyond this fundamental flaw, however, is a motion riddled with inaccuracies disguised as righteous indignation and wrapped in the cloak of high-minded constitutional principles about a loss of due process and the denigration of fundamental real property rights when the reality is that no such things are even implicated. In that vein, it is worth revisiting exactly what this Court did and did not hold to properly frame the incredible overreaching by the Appellees.

First, the Court did not vest the Public Utilities Commission of Ohio with exclusive jurisdiction over easement disputes. This was never an argument advanced by any party nor an issue before the Court. Indeed, as this Court correctly noted, Appellees are not contesting that Appellant holds an easement that grants it the right to cut the tree in question.² Stated differently, if the issue in this case was whether Appellant held a valid easement, or whether the

¹ Nothing in the majority's decision prevents a customer or homeowner from seeking injunctive relief from the state courts to preserve the status quo while the issue relating to the utilities' practice awaits decision by the PUCO. Under this scenario, the state court's jurisdiction to grant or deny injunctive relief is founded upon the due process and the taking clauses of the Ohio Constitution and not the underlying question of whether the disconnection was appropriate. Thus, Appellees' assertion that there is no adequate remedy at law is fundamentally inaccurate.

² "Despite the Corrigans' argument that we are presented with a pure contract matter, this case is not about an easement. There is no question that the company has a valid easement and that the tree is within the easement. Furthermore, the language of the easement is unambiguous..." *Corrigan v. Illum. Co.*, Slip Opinion No. 2009 Ohio 2524, ¶17.

tree in question fell within the easement, then the common pleas court indisputably has jurisdiction. That is just not the issue that was presented.

Second, what the Court did hold, rather unremarkably given its prior precedent, is that when a party is complaining about how a utility is discharging its statutory duties to maintain adequate service, that complaint is best resolved by the administrative agency vested with the exclusive jurisdiction and expertise to review such matters, the PUCO. *Corrigan v. Illum. Co.*, Slip Opinion No. 2009 Ohio 2524, ¶20. In this case, the complaint is about the utility's vegetation management practices. In another case, it could be about some other service-related issue. In such cases, those decisions are best reviewed by the PUCO and not held to what are likely to be the vague and changing standards of this state's 88 counties. In this context, Appellees' argument falls like so many dominos.³

Appellees, basically citing themselves, bracket the issue as one dealing with the "sacrosanct nature of [one's] 'inalienable' property rights." While they make an impassioned plea for the preservation of their so-called "retained rights as owners in fee of their land and all that is upon it" they completely ignore the retained rights that Appellant has with respect to that same piece of land. No one, including Appellees, disputes that Appellant has a very broad easement right on this piece of land to cut trees that may interfere with its facilities. No one disputes that the Appellees' tree is within that easement. As a simple property case, which this may be, Appellees still lose.

³ It is important to note that a challenge such as the one asserted by the Corrigan to a public utility's practices under its vegetation management plan would fall within the exclusive jurisdiction of the PUCO even if no easement was present on the property. By analogy, if a customer disagrees with the utility's practice under its vegetation management plan of leaving clippings as opposed to cleaning up those clippings following its vegetation management removal, the customer must challenge that practice by filing a complaint with the PUCO. The presence or absence of an easement is immaterial because the crux of the dispute involves implementation of the vegetation management plan. Since the two part test pronounced in *Allstate Insurance Co. v. Cleveland Electric Illuminating Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917 is met, the PUCO's exclusive jurisdiction is invoked.

The problem with the lower courts' opinions, frankly, is that they did not respect Appellant's real property rights, which they were obligated to do. If any property rights were not held sacrosanct, it was Appellant's. Instead, by judicial fiat completely unrelated to law or fact, the Common Pleas Court, and the Court of Appeals rewrote the easement in a way that comported to their own brand of ecological justice. In doing so, these courts overstepped the limits of their inquiry and authority.

Appellees try to fit their square-peg of a case into the round hole of the standards necessary for granting an injunction by claiming that the lower courts essentially said that they would be irreparably harmed if the tree was cut. To be charitable, this is a very strained summation. In actuality, the lower courts simply erected new standards and barriers within the confines of the undisputed easement and then said Appellant could not overcome them. The Court of Appeals went so far as to hold that absent a citation by the Federal Aviation Administration or the Army Corps of Engineers (two bodies without any authority or jurisdiction related to any matter in dispute in this case), the Appellant's exercise of its rights pursuant to a valid easement in furtherance of the reliability of its system were secondary, despite the possible impact on a large swath of customers. But in the larger sense, the issue was never about irreparable harm. A tree can be replaced. A customer's electricity can be restored. Real property rights were granted to Appellant by a predecessor land owner and the lower courts refused to respect those rights. If the clear and unambiguous easement language had been upheld by the lower courts and Appellees had appealed instead, the issue likely would not have risen to the Supreme Court. However, when the lower courts decided to evaluate the relative merits of a customer's quixotic quest to preserve a tree that it never should have planted in the context of

whether or not Appellant's reliability concerns were valid, the jurisdictional line was crossed. This Court rightly snapped them back into place.

The real rub of Appellees' motion is that they found courts that were sympathetic to the plight of their silver maple tree and indifferent to the possibly less poetic interest of a utility in fulfilling its statutory obligations with respect to electric reliability consistent with its valid easement. Understandably Appellees would like to preserve that erroneous Appellate Court decision even though it conceivably was at the expense of their neighbors and the hundreds of customers whose electricity might be interrupted if or when that tree comes into contact with a power line. Their parochial concerns may be understandable on an emotional level, but they do not square with the law.

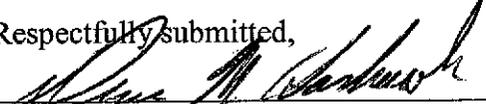
Bringing this back around to Appellees' theme—adequacy of a remedy—the crux of the problem with Appellees' position is the language of the easement and where this tree sits. It is not that the Appellees lack a remedy. It is that they know that, given the facts of this case and the easement Appellant holds, they are not able to prevail. This is a world of difference.

CONCLUSION

The majority properly observed that this particular case was never an easement dispute. Despite Appellees' emotional proclamations to the contrary in its Motion for Reconsideration, the gravaman of the Complaint is and always was an attack upon the company's decision to remove rather than trim this tree under its vegetation management plan. This practice is normally authorized by a public utility, and resolution of the dispute requires the special expertise of the PUCO. Accordingly, The Illuminating Company respectfully requests that this

Court deny Appellees' Motion for Reconsideration and affirm the finding of the majority that the PUCO has exclusive jurisdiction over this service-related claim.

Respectfully submitted,


Denise M. Hasbrook (0004798)
Donald S. Scherzer (0022315)
Emily Ciecka Wilcheck (0077895)
One SeaGate, Suite 1700
Toledo, Ohio 43604
Telephone: (419) 242-7985
Facsimile: (419) 242-0316
E-mail: dhasbrook@ralaw.com
dscherzer@ralaw.com
ewilcheck@ralaw.com

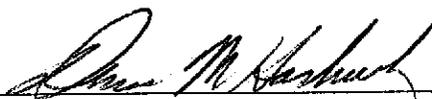
*Counsel for Appellant,
The Illuminating Company*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant, The Illuminating Company's Memorandum in Opposition to Appellees' Motion for Reconsideration was served by regular U.S. Mail, this 19~~th~~ day of June, 2009 upon the following parties:

Lester S. Potash, Esq.
55 Public Square, Ste. 1717
Cleveland, OH 44113
Attorney for Plaintiffs-Appellees

Respectfully submitted,



Denise M. Hasbrook (0004798)
Donald S. Scherzer (0022315)
Emily Ciecka Wilcheck (0077895)

*Counsel for Appellant,
The Illuminating Company*