

ORIGINAL

IN THE SUPREME COURT OF OHIO
CASE No. 2009 - 2278

ON APPEAL FROM THE COURT OF APPEALS
FOURTH APPELLATE DISTRICT
HOCKING COUNTY, OHIO
CASE No. 09 CA1/09AP1

Ohio Power Company
PLAINTIFF-APPELLEE,

v.

Charles R. Ogle, et al.
DEFENDANTS-APPELLANTS.

**MEMORANDUM OF PLAINTIFF-APPELLEE, OHIO POWER COMPANY,
IN OPPOSITION TO JURISDICTION**

Brian L. Buzby (0023124)
COUNSEL OF RECORD
Daniel B. Miller (0080767)
PORTER WRIGHT MORRIS & ARTHUR, LLP
41 South High Street
Columbus, Ohio 43215
Telephone: (614) 227-1995
Facsimile: (614) 227-2100
bbuzby@porterwright.com

Counsel for Plaintiff-Appellee,
Ohio Power Company

Ray. R. Michalski (0015793)
COUNSEL OF RECORD
D. Joe Griffith (0055499)
Dagger, Johnston, Miller, Ogilvie
& Hampson, LLP
144 East Main Street
Lancaster, Ohio 43130
Telephone: (740) 653-6464
Facsimile: (740) 653-8522

Counsel for Defendants-Appellants,
Charles and Melanie Ogle

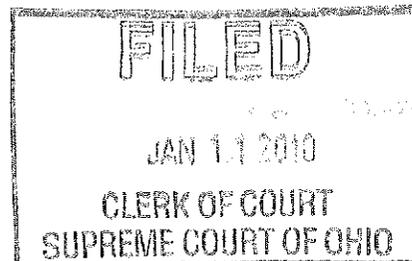


TABLE OF CONTENTS

STATEMENT WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS4

ARGUMENT IN RESPONSE TO APPELLANTS’ PROPOSITIONS OF LAW5

PROPOSITION OF LAW NO. 1: Where a condemnee offers no evidence to meet its burden of proof to rebut the presumption of public necessity created by a public agency’s good faith adoption of a resolution declaring the necessity of the appropriation, Ohio law provides pursuant to §163.09(B), ORC, that the matter of necessity is established and the agency may proceed with the appropriation5

PROPOSITION OF LAW NO. 2: The Defendants-Appellants’ purported arguments about alleged “environmental harm” constituting “abuse of discretion” were not raised in the courts below and have been waived11

CONCLUSION.....12

PROOF OF SERVICE.....13

**STATEMENT OF WHY THIS CASE IS NOT OF PUBLIC
OR GREAT GENERAL INTEREST**

This case is one of the many cases percolating through the Ohio courts for the appropriation of property to serve the greater public interest under Chapter 163, Ohio Revised Code (“ORC”). It is in all respects a routine case under explicit, well understood Ohio statutes applied by well-settled law. It poses no question of any public and great general interest.

The only interest to be served by this appeal is to give Defendants-Appellants, Mr. and Mrs. Charles Ogle, yet another opportunity to air their objections to the project that required an easement across their property, objections that have now been heard by two courts, four judges, and all properly resolved against Defendants.

Defendants-Appellants are essentially asking this Court to revise Chapter 163 ORC, creating new elements of proof and inserting new burdens and requirements on condemning authorities, ignoring that the holdings of the appellate and trial courts turn on the fact that the Defendants offered no evidence at all to support their claims.

This case comes down to one simple issue – burden of proof. Defendants failed in that burden and nothing in this appeal changes that fact.

To compensate for their failure to introduce evidence to support their claims, Defendants argue that Plaintiff, Ohio Power Company, should have had the burden of proof, instead of them, and that Ohio Power should now be held to some higher burden and should be called upon to meet some nebulous standard, known only to Defendants, that appears nowhere in Ohio law.

Simply stated, this case comes down to a straightforward, consistent, and unanimous ruling on burden of proof. It presents no novel issue of law of any great or public interest. To counter their failures, the Defendants-Appellants propose that this Court change the law and add elements and burdens to Chapter 163, ORC, that do not presently exist. In addition, even if the

law imposed these requirements on Ohio Power, which it does not, the Defendants-Appellants offered no evidence in the trial court that would sustain their position.

A further appeal is not warranted under Ohio law and should not be permitted. The invitation to radically amend Chapter 163 should be spurned. This Court, accordingly, should decline jurisdiction over this appeal.

STATEMENT OF THE CASE

Plaintiff-Appellee, Ohio Power Company, commenced this action in June 2007 to appropriate an easement for an electric power distribution line across Defendants-Appellants' property. The new line serves an Ohio Power communications tower located on nearby property which facilitates Ohio Power's communications with its workers and service to the public. The burden to Defendants is a row of power poles on their property adjacent to a public road.

In their Answer, Mr. and Mrs. Ogle admitted essentially every issue except the necessity for the appropriation. They admitted that Ohio Power is a public utility with the right to appropriate property and that the parties were unable to agree on the compensation for the easement Ohio Power sought. Mr. and Mrs. Ogle denied only the issue of necessity.

At the hearing on the issue of necessity, Mr. and Mrs. Ogle had every opportunity to present whatever evidence they felt was pertinent on the issue of the public necessity of the appropriation.

After hearing the evidence presented at the necessity hearing, the trial court concluded that Ohio Power met its burden of proof by demonstrating that it duly and properly considered and adopted a Resolution of Necessity for this project. This shifted the burden of proving that Ohio Power acted arbitrarily and capriciously to Defendants-Appellants under §163.09(B), ORC,

which the Defendants failed to meet. The trial court, accordingly, properly found that the appropriation was a public necessity.

After the amount of the compensation due for the easement was determined by a jury trial and a final judgment was entered, Defendants appealed to the Court of Appeals on only one issue: “The Trial Court Erred, as a Matter of Fact and Law, in Determining that the Appellees’ Appropriation of an Electric Line Easement Over and Across the Real Estate of the Appellants is Necessary for a Public Use.” (Defendants-Appellants’ Court of Appeals Brief, pg. 1.)¹

The Court of Appeals unanimously agreed that the Defendants had simply failed in their burden of proof:

“As previously stated, Ohio Power adopted a resolution that the easement was necessary. Under R.C. 163.09(B), after adopting such a resolution, the burden of proof shifts. As such, Appellant was presumed to have acted regularly and in a lawful manner until the contrary was shown. Thus, the Ogles needed to offer proof that Ohio Power abused its discretion in determining the taking was necessary. However, at the necessity hearing, the Ogles put forth no evidence suggesting Ohio Power did not make a reasoned decision. In their brief, the Ogles state that Ohio Power did not introduce any evidence showing that a number of factors, such as anticipated load increases, aesthetics, and environmental impact, were taken into consideration before it passed the resolution of necessity. However, this argument mistakes the burden of proof. Ohio Power had no duty to rebut the claim unless the Ogles presented evidence that Ohio Power failed to consider such factors. The Ogles simply failed to do so.”

(Court of Appeals, Decision and Judgment Entry, pg. 7.)

Defendants now attempt this further appeal.

¹ Ohio Power cross-appealed in the Court of Appeals claiming that the compensation awarded by the jury was excessive, unproven, and should not have been permitted. Consistent with Ohio Power’s position that a further appeal presents no novel issue or issue of great or public interest, Ohio Power has not cross-appealed to this Court.

STATEMENT OF FACTS

Mr. and Mrs. Ogles' Statement of Facts offered to this Court is merely a recitation of their interactions with Ohio Power on this project and their opposition to the project and has nothing to do with the issue of their failing to show that the project was not a public necessity.

There are only a few key facts in this matter, which facts are largely undisputed, beginning with the fact that Ohio Power is a public utility and is authorized to appropriate real property pursuant to Ohio law. The specific purpose for the appropriation here was to obtain an easement for a power line across the Ogles' property to provide power to a telecommunications tower that Ohio Power erected on nearby property to support Ohio Power's field communications.

The undisputed testimony in the hearing below from representatives for Ohio Power was that Ohio Power considered and selected "the best location for the tower," and that Ohio Power's engineering department would then consider and select the route to supply electricity to the tower site. Further, the testimony showed that the matter of an overhead versus underground power line was discussed and that overhead was selected because "overhead would be the easiest way to cross the terrain." (Trial Transcript, pgs. 72-73, 83-84, 87-88.)

On February 27, 2007, Ohio Power duly adopted a Resolution of Necessity declaring the necessity for this appropriation.

With the Resolution in hand, Ohio Power was fully authorized under Ohio law to acquire the appropriation sought in this action.

RESPONSE TO DEFENDANTS-APPELLANTS' PROPOSITION OF LAW

PROPOSITION OF LAW NO. 1: Where a condemnee offers no evidence to meet its burden of proof to rebut the presumption of public necessity created by a public agency's good faith adoption of a resolution declaring the necessity of the appropriation, Ohio law provides pursuant to §163.09(B), ORC, that the matter of necessity is established and the agency may proceed with the appropriation.

Notwithstanding the Defendants-Appellants' attempts here to twist Ohio law and create burdens and obstacles that do not exist, the Ohio law applicable to this case is statutory and well-settled.

There is no dispute that Ohio Power is a public utility entitled under Ohio law to appropriate property for a public purpose. Given that Ohio Power duly adopted a Resolution of Necessity in February 2007 for this appropriation, even Mr. and Mrs. Ogle concede that the burden of proof shifted to them to prove that there is no necessity for this project and that Ohio Power abused its discretion in declaring a public necessity. Defendants-Appellants' Court of Appeals Brief, pg. 7; §163.09(B), ORC.

Moreover, in reviewing the issue of necessity, it is not just a matter of disagreeing with Ohio Power or having questions or reservations about its decisions. Instead, the well-settled standard under Ohio law is that anyone challenging necessity must meet the very high and difficult threshold of showing an abuse of discretion. *Cleveland Elec. Illuminating v. Scapell* (1975), 44 Ohio App.2d 13, 336 N.E. 2d 637.

"An abuse of discretion is shown by evidence that the agency's decision to appropriate was unreasonable, arbitrary, or unconscionable." *City of Alliance v. Zellweger* (Mar. 12, 2001), Stark App. Nos. 2000CA00093 and 2000CA00094, 2001 Ohio App. LEXIS 1141, at *12 (citing *City of Huron v. Hanson* (July 28, 2000), Eric App. No. E-99-060, 2000 Ohio App. LEXIS 3358).

As the court explained in *Cleveland Electric Illuminating Co. v. Leshner* (1975),
Cuyahoga App. No. 33989, 1975 Ohio App. LEXIS 6458, at *9-10:

Without adopting an extreme definition of abuse of discretion, it seems to us enough to determine the issue if the evidence shows the Board of Directors made a reasoned and good faith effort to exercise the discretion given it by Ohio Revised Code. Whether the product of that action is the best conceivable decision or whether we, or the court below, agree with it, or would have made a different judgment on the same evidence, is beside the point.

In the case at hand, both the trial court and the unanimous Court of Appeals concluded that Mr. and Mrs. Ogle failed in this burden.

Moreover, the Court of Appeals here correctly noted that its review is now even further limited to determining whether the trial court's findings were supported by competent and credible evidence. *City of Toledo v. Kim's Auto & Truck Service, Inc.*, 6th Dist. No. L-02-1318, 2003-Ohio-5604, at ¶10; *Erie-Ottawa-Sandusky Regional Airport Authority v. Orris* (Sept. 13, 1991), 6th Dist. No. 90-OT-039, at *4, 1991 WL 254227.

While Ohio Power contends that Defendants-Appellants are making arguments to this Court that they did not make in the courts below, the essence of Mr. and Mrs. Ogles' argument now appears to be some complaint that "the underground installation of the electric line would cause much less environmental damage," and, hence, the courts below erred "in not finding that the selection of the least environmentally acceptable alternative for the installation of an improvement on appropriated property was evidence of "an abuse of discretion" . . . " (Defendants-Appellants' Memorandum in Support of Jurisdiction, pg. 5.) Defendants-Appellants urge this Court to take this appeal and use this case as an opportunity to radically amend and revise Chapter 163 to include proof concerning some subjective standard of alleged

“environmental damage” and then put that burden on the condemnor even in the face of a condemnor’s total failure to meet its burden of proof.

Defendants-Appellants’ arguments fail for, at least, two fundamental reasons. First, Mr. and Mrs. Ogle failed to offer even a scintilla of proof about any of this. The trial record below contains no record of any evidence offered by the Ogles that the installation selected by Ohio Power was not “the least environmentally acceptable alternative.”

All Mr. and Mrs. Ogle showed was what would seem to be patently obvious in almost any project of this nature – there were other ways considered to develop the project. But, from that obvious notion, the Ogles then attempt to jump without any basis, without any fact, without any evidence at all as to what method was somehow more environmentally sound.

As the Court of Appeals properly concluded, “However, at the necessity hearing, the Ogles put forth no evidence suggesting Ohio Power did not make a reasoned decision.” (Court of Appeals, Decision and Judgment Entry, pg. 7.) Indeed, the Court of Appeals commented further on the Ogles’ total failure in their burden of proof:

“It’s possible that Ohio Power determined aboveground installation was prohibitively expensive, or that underground installation was untenable because of complications specific to the property in question. Because no evidence was presented on the matter, we simply do not know the factors Ohio Power considered, or did not consider, in deciding to install the line aboveground instead of below.”

(Court of Appeals, Decision and Judgment entry, pg. 8.)

The real argument being made by Mr. and Mrs. Ogle is that they simply do not like the manner of installation. But, Mr. and Mrs. Ogles’ subjective likes and dislikes are not codified in Ohio law. And, contrary to the Ogles’ position here, Chapter 163, ORC should not be changed to bring these subjective views into play in every appropriation throughout Ohio.

The second fundamental flaw with Defendants-Appellants' argument is that there appears to be no case or statute, and certainly the Ogles cite to none, that supports the notion that appropriations in Ohio that are otherwise totally lawful and serve the public good must cause the least "environmental damage." Again, absent a substantial change in the law made in a case where there is no factual record to support it, Ohio Power's appropriation here was entirely proper under Chapter 163, ORC.

Ohio law is quite clear that necessity is a question of whether the project in question is a use that furthers a public purpose for which the appropriating agency has authority. As the Court explained in *Giesy v. Cincinnati, Wilmington & Zanesville R. Co.* (1854), 4 Ohio St. 308, 327, a project is a public necessity:

provided the work for which it is taken, is public in its nature and uses, and is open to the use of the public, under reasonable regulations, as a matter of right and not merely of favor; and that it is enough to establish a public necessity, when it appears that lands are necessary for such a work, without going further and showing that it would not be constructed without the use of the particular property sought to be appropriated.

Realizing that the public necessity for the project cannot be attacked, Mr. and Mrs. Ogle instead try to misdirect the Court by questioning issues about the manner of implementing the project. Not only does this miss the point entirely, but Ohio law is abundantly clear that mere questions about how a project might be implemented does not work to defeat the public necessity for the project.

It is well-settled, for example, that the availability of possible alternative routes for a project cannot be used to defeat the public necessity for the project itself.

In *Cincinnati Gas & Electric Co. v. Davies* (June 30, 1975), Butler App. Nos. CA 74-10-0086, CA 74-10-0087, 1975 Ohio App. LEXIS 7474, the court of appeals held that the trial court

erred in finding that although a power line was necessary, there was no need to put it in the route chosen. The court held that there was no evidence in the record to justify finding that the agencies had abused their discretion in putting the lines where they had. The court held that the evidence supported a finding that the agencies had not acted in bad faith and that their decisions were reasonable. As the court explained:

Where two lines for an electric transmission line are possible it is discretionary with the appropriating agency to select the route it will follow, and in the absence of fraud, bad faith or gross abuse of discretion, such determinations will not be disturbed by the court.

Id. at *HN 4.

The landowner cannot raise the objection that there is no necessity for condemning his property because some other location might be made, or some other property obtained which would be more suitable.

Id. at *HN5.

The landowner's objection that some other site would serve just as well is not sustained by the courts for the reason that every other property owner could make the same objection, and if such objection has merit, then the project could never be built and the effect of the eminent domain statute becomes nugatory.

Id.

In *Ohio Edison Co. v. Gantz* (1958), 109 Ohio App. 127, the second paragraph of the court's syllabus explains:

In such case, where two routes for an electric transmission line are possible it is discretionary with the appropriating agency to select the route it will follow, and in the absence of fraud, bad faith or a gross abuse of discretion, such determination will not be disturbed by the court.

In sum, Mr. and Mrs. Ogle appear to suggest that they met their burden of proof simply by pointing out that there might be other possible routes for the power line or other ways to

build it, and that it then somehow became Ohio Power's burden to prove why it chose the route and manner it did. This misstates Chapter 163, ORC, and well-settled Ohio law. Mr. and Mrs. Ogle's burden was not to show other possible routes, but to affirmatively show that Ohio Power's conduct was so unconscionable and arbitrary that it reached the standard of an abuse of discretion. Merely pointing out that there may be other possible routes or ways to build the line does not meet this standard or fulfill their burden of proof.

In *Cleveland Electric Illuminating Co. v. McClain*, Cuyahoga App. No. 34188, 1975 Ohio App. LEXIS 6970, for example, the trial court found in favor of the landowner and held that the public utility had abused its discretion in choosing to proceed with a project in the manner it did. The court of appeals reversed. Among other things, the court of appeals noted that the trial court concluded that the agency had abused its discretion because it supposedly failed to consider the ecological impact of the installation of the project. The court of appeals, however, noted that the landowners had the burden of proof on this and that they "presented no evidence relative to the ecological impact of the installation." *Id.* at *8.

So, again, it is not sufficient to merely pose the question and then argue that the utility failed in its burden to respond with further evidence. Defendants-Appellants had the burden of proof on all of these issues. They failed in that burden.

This case comes down to a straightforward burden of proof issue under Ohio statutes and well-settled case law. The trial court and the Court of Appeals have both ruled unanimously and consistently that Mr. and Mrs. Ogle failed in their burden. A further review of this straightforward issue is not warranted.

PROPOSITION OF LAW NO. 2: The Defendants-Appellants’ purported arguments about alleged “environmental harm” constituting “abuse of discretion” were not raised in the courts below and have been waived.

It is universally recognized that arguments not made and preserved in the courts below are waived for further review. *Portage Cnty. Brd. of Comms. v. Akron* (2006), 109 Ohio St.3d 106; *State ex rel. Zollner v. Industrial Comm.* (1993), 66 Ohio St.3d 276.

Based on their Proposition of Law in this appeal, it appears that Defendants are now arguing that evidence of alleged “environmental harm” ought to be sufficient to constitute evidence of “abuse of discretion,” so as to meet the condemnee’s burden of proof and shift the burden back to the condemnor.

If that is the argument, Defendants-Appellants failed to make that argument in the court below and it has, accordingly, been waived and cannot be made here.

In their Court of Appeals brief, for example, the Defendants-Appellants raised just one assignment of error that the trial court supposedly erred “in determining that the appellee’s appropriation . . . is necessary for a public use.” (Appellants’ Court of Appeals Brief, pg. i.) The assignment made no mention of any argument based on some “environmental harm” meeting the condemnee’s burden of proof.

In the Court of Appeals below, Defendants-Appellants’ arguments meander over a broad area. They argue, for example, that Ohio Power failed to show necessity because it failed to take into account “anticipated load increases,” failed to consider “aesthetic” issues, and failed to use other plans that might be “more environmentally friendly.” (Appellants’ Court of Appeals’ Brief, pgs. 8, 9.)

Forgetting that Defendants-Appellants simply raised these questions and never presented any affirmative evidence about these matters, Defendants-Appellants’ argument in the Court of

Appeals appears to be that simply raising these questions constitutes sufficient evidence of abuse of discretion.

Now, however, Defendants-Appellants go even further afield and argue not that they met their burden, which is their only argument in the courts below, but that this Court should alter Chapter 163, ORC, to hold that the burden should somehow shift to Ohio Power. Defendants-Appellants argue that the mere allegation of these matters should be sufficient under Chapter 163, ORC, and that it should be amended by judicial interpretation to require Ohio Power “to support its choice of location and methods of construction with more than a simple resolution . . .” (Defendants-Appellants’ Memorandum in Support of Jurisdiction, pg. 10.)

This argument was not raised in the courts below. It cannot be raised here.

CONCLUSION

Aside from Defendants-Appellants’ attempts to recast their arguments and create burdens that do not exist in Ohio law, this simple fact remains – Defendants-Appellants had their day in court and failed in their burden of proof. There is nothing new, novel, interesting, or challenging about this issue. Defendants’ proposed change to Chapter 163, ORC, creates burdens and elements that do not presently exist and should be refused, especially in a case without any factual record to support those proposed revisions.

Two courts and four judges have heard and duly considered Defendants-Appellants’ arguments. All have consistently, unanimously, and properly ruled against Defendants-Appellants. A further review is not warranted and will not serve any great or public interest.

Brian L. Buzby

Brian L. Buzby (0023124)

Counsel of Record

Daniel B. Miller (0080767)

PORTER WRIGHT MORRIS & ARTHUR, LLP

41 South High Street

Columbus, Ohio 43215-6194

(614) 227-1995

bbuzby@porterwright.com

Attorneys for Plaintiff-Appellee,
Ohio Power Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Memorandum of Plaintiff-Appellee, Ohio Power Company, Opposing Jurisdiction was served by regular U.S. mail, postage prepaid, on this 11th day of January, 2010, on the following persons:

Ray R. Michalski, Esq.

D. Joe Griffith, Esq.

Dagger, Johnston, Miller, Ogilvie & Hampson, LLP

144 East Main Street

P.O. Box 667

Lancaster, Ohio 43130-0667

Attorneys for Defendants-Appellants,

Charles and Melanie Ogle

Brian L. Buzby

Brian L. Buzby