

IN THE SUPREME COURT OF OHIO

Karl Friederich Jentgen, et al.

Appellants,

v.

Asplundh Tree Expert Co., et al.,

Appellees.

15-0225

On Appeal from the Delaware  
County Court of Appeals,  
Fifth Appellate District

Court of Appeals  
Case No. 04CAE-04-0028

**MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS  
KARL FRIEDERICH JENTGEN, JEFFREY JOSEPH JENTGEN, LISA ANN COKER,  
KRISTIN ANN JENTGEN, MICHAEL MOHR JENTGEN AND PHILIP JOHN JENTGEN**

Daniel J. Binau (0025376)  
Michael A. Coleman (0036723)  
37 West Broad Street, Suite 950  
Columbus, Ohio 43215-4159  
Telephone: 614.464.2572  
Telefax: 614.464.2245  
E-mail: DBinau@HMBC.com  
MColeman@HMBC.com

Counsel for Appellants,  
Karl Friederich Jentgen, Jeffrey Joseph  
Jentgen, Lisa Ann Coker, Kristin Ann  
Jentgen, Michael Mohr Jentgen and  
Philip John Jentgen

Stephen D. Jones (0018066)  
Jeremy S. Young (0082179)  
Roetzel & Andress, LPA  
155 East Broad Street, 12th Floor  
Columbus, Ohio 43215  
Telephone: 614.463.9770  
Telefax: 614.463.9792  
E-mail: sjones@ralaw.com  
jyoung@ralaw.com

Counsel for Appellees,  
Asplundh Tree Expert Co., Ohio  
Edison Company, and American  
Transmission Systems, Incorporated

Patrick Kasson (0055570)  
Zachary B. Pyers (0083606)  
Tyler Tarney (0089082)  
Reminger Co., LPA  
65 East State Street, 4<sup>th</sup> Floor  
Columbus, Ohio 43215  
Telephone: 614.228.1311  
Telefax: 614.232.2410  
E-mail: pkasson@reminger.com  
zpyers@reminger.com  
TTarney@reminger.com

Additional Counsel for Appellee,  
Asplundh Tree Expert Co.

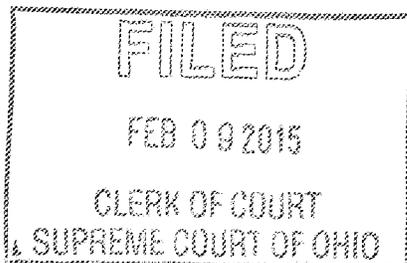


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**EXPLANATION OF WHY THIS CASE IS A CASE OF  
PUBLIC OR GREAT GENERAL INTEREST**

The ruling by the Fifth District Court of Appeals (“Ruling”) is a matter of great public and general interest because it highlights the confusion and lack of and need for clarity in determining the proper forum, evolving around what otherwise appears to be an unequivocal pronouncement of law from a series of decisions of this Court, albeit, a divided Court, concerning precisely which aspects for redress of disputes between a property owner’s rights and a utility under the terms of an easement when vegetation management issues are the impetus for the dispute.

The Ruling exacerbates the uncertainty of precisely when an issue between a private property owner and a utility may be deemed expressly contractual or tort, vesting jurisdiction within a court of law, or one of a vegetation management (service related) dispute to be decided administratively by the PUCO. It undermines the ability of parties to readily determine who has jurisdiction over a dispute and leads to a waste of judicial and/or administrative resources in resolution of a matter which may needlessly affect both substantial private property rights and a public policy consideration that it is an obligation of a utility to delivery of electric power is paramount to the public interest of Ohio

This Court set the stage for the confusion through its decisions in *Corrigan v. Illum. Co.*, 122 Ohio St.3d 265, 2009-Ohio-2524 and *Delost v. FirstEnergy Corp.*, 123 Ohio St.3d 113, 2009-Ohio-4305 (affirming certified question from appeals court in accordance with *Corrigan*). This Court held in *Corrigan* that the Ohio “Public Utilities Commission [“PUCO”] has exclusive jurisdiction over vegetation-removal dispute between landowner and utility company.” *Corrigan*, headnote. In reaching the pronouncement, this Court,

reiterated its prior determination that [t]he General Assembly enacted R.C. 4901.01 et seq. to regulate the business activities of public utilities and created PUCO to administer and enforce these provisions. *Corrigan*, ¶ 8, citing, *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St.3d 147, 150, 573 N.E.2d 655. This Court continued: This “jurisdiction specifically conferred by statute upon the Public Utilities Commission over public utilities of the state \* \* \* is so complete, comprehensive and adequate as to warrant the conclusion that it is likewise exclusive.” *Corrigan*, ¶ 8, citing, *State ex rel. N. Ohio Tel. Co. v. Winter* (1970), 23 Ohio St.2d 6, 9, 52 O.O.2d 29, 260 N.E.2d 827, quoting *State ex rel. Ohio Bell Tel. Co. v. Cuyahoga Cty. Court of Common Pleas* (1934), 128 Ohio St. 553, 557, 1 O.O. 99, 192 N.E. 787; see also *Kazmaier*, 61 Ohio St.3d at 152, 573 N.E.2d 655.

The Court further noted in *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, 893 N.E.2d 824, it previously “adopted a two-part test from *Pacific Indemn. Ins. Co. v. Illum. Co.*, Cuyahoga App. No. 82074, 2003-Ohio-3954, ¶ 15, to determine whether PUCO has exclusive jurisdiction over an action: “First, is PUCO’s administrative expertise required to resolve the issue in dispute? Second, does the act complained of constitute a practice normally authorized by the utility?” *Corrigan*, ¶ 11. The Court continued: “If the answer to either question is in the negative, the claim is not within PUCO’s exclusive jurisdiction.” *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, 893 N.E.2d 824, ¶s12-13. However, this Court reiterated that “[t]he broad jurisdiction of PUCO over service-related matters does not affect “the basic jurisdiction of the court of common pleas \* \* \* in other areas of possible claims against utilities, including pure tort and contract claims.” *Corrigan*, ¶ 9, citing *State*

*ex rel. Ohio Edison Co. v. Shaker* (1994), 68 Ohio St.3d 209, 211, 625 N.E.2d 608.

Unlike the two-part *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.* test to determine if a claim involving a utility falls within the exclusive jurisdiction of the PUCO, no such test exists to determine if a claim is one of pure tort or contract excluded from mandated administrative adjudication in the PUCO; rather it is a determination made by exclusion – one significantly obscured by both the facts presented to plead the claim and resulting from judicial action on the claim pled. Simply, a claim requesting contractual interpretation to determine the scope and breath of easement language between a private property owner and a utility or the tort affects to a private property owner alleged from utility action within the context of and easement innocently appear to be outside the scope of exclusive PUCO jurisdiction, yet, when such claims are coupled with or initiated by operative facts revolving around or stemming from vegetation management activities of the utility, or end in judicially made determinations of propriety in regards to such operative facts, there appears to be a distinction without a difference.

The Ruling highlights the concern that judicial action appears first necessary to determine that jurisdiction might otherwise be vested, exclusively, in the PUCO. Prophetically, this Court recognized the uncertainty of determining precisely where jurisdiction vests – the courts or the PUCO. In *Corrigan*, this Court stated:

In making this determination, we are not limited by the allegations in the complaint. *State ex rel. Columbia Gas of Ohio, Inc. v. Henson*, 102 Ohio St.3d 349, 2004-Ohio-3208, 810 N.E.2d 953, ¶ 19. Rather, we must review the substance of the claims to determine if service-related issues are involved. *Id.* at ¶ 20-21. “In other words, ‘casting the allegations in the complaint to sound in tort or contract is not sufficient to confer jurisdiction upon a trial court’ when the basic claim is one that the commission has exclusive jurisdiction to resolve.” *State ex rel. Illum. Co. v. Cuyahoga Cty. Court of Common Pleas*, 97

Ohio St.3d 69, 2002-Ohio-5312, 776 N.E.2d 92, ¶ 21, quoting *Higgins v. Columbia Gas of Ohio, Inc.* (2000), 136 Ohio App. 3d 198, 202, 736 N.E.2d 92. *Corrigan*, ¶ 10.

Indeed, the *Corrigan* decision contained dissents from the majority opinion challenging the notation of exclusivity of jurisdiction in the PUCO on the issue of the vegetation management plan of the utility versus the language of the utilities' easement.

More importantly, despite this Court's pronouncements on determination of jurisdiction, the Court of Appeal's confirmed jurisdiction of the trial court, even though it expressly determined that:

At issue in the instant appeal are eight trees which grow adjacent to the right-of-way, and which Ohio Edison identified as needing to be removed because the trees could potentially interfere or endanger its transmission/distribution line. Ohio Edison claimed it had the authority to remove the trees pursuant to its Vegetation Management Plan. Appellants did not want the trees to be removed, just trimmed. Appellants claimed tree trimming constitutes a service-related issue which is within the exclusive subject matter jurisdiction of the Public Utilities Commission of Ohio ("PUCO"). Ruling, ¶ 3.

and

In its finding of facts and conclusions of law filed contemporaneously with the judgment entry, the trial court set forth the language of the easement in Finding of Fact No. 2, cited above. The trial court found "[t]he removal of the 8 trees is pursuant to the Defendant's Vegetation Management Plan" and "[t]he Plaintiffs had not filed objections to the Ohio PUCO asserting their position prior to the action being filed." Finding of Fact Nos. 5 and 6. Ruling, ¶ 21.

While clearly, service related complaints stemming from a utility's actions under a PUCO approved Vegetation Management Plan occurring within the utility's easement falls *within* the exclusive jurisdiction of the PUCO for resolution, the question becomes how can the PUCO have exclusive jurisdiction on activities *outside* of the defined easement areas to the detriment of private property rights? This is the crux of the matter. The

Ruling, determining that acts of a utility beyond its easement area, not limited to those within or immediately adjacent to and/or contiguous with the boundaries of the easement area, in application and practical effect, expands the exclusive jurisdiction of the PUCO, beyond the contemplated scope of *Corrigan*, to determine matters otherwise confined to the province of the Courts. Alternatively, one must conclude that all acts of a utility, beyond the defined easement area fall within the exclusive jurisdiction of the PUCO, notwithstanding they are otherwise pure tort or contractual in nature. This is the basis of the errors of the Ruling.

The Court of Appeals erred in Ruling actions of the utility relating to tree and vegetation outside the boundaries of its easement area are within the exclusive jurisdiction of the PUCO, and by failing to limit the scope of the easement through the application of the easement language term “adjacent” consistent with prior Supreme Court determinations that the word is synonymous with the words adjoin and contiguous.

The Ruling expands the prior decisions of this Court and erodes the redress of private property rights against a utility’s actions through the courts at the expense of administrative action. Therefore this Court must grant jurisdiction to review and clarify the pitfalls of the Ruling.

## **STATEMENT OF THE CASE AND FACTS**

### **A. STATEMENT OF THE CASE.**

Appellants, Karl Friederich Jentgen, Jeffrey Joseph Jentgen, Lisa Ann Coker, Kristin Ann Jentgen, Michael Mohr Jentgen, and Phillip John Jentgen (collectively "Appellants"), commenced their action in the Delaware County Common Pleas Court on December 20, 2012, against Appellee, Asplundh Tree Expert Co. ("Appellee Asplundh"), seeking

injunctive and declaratory relief and asserting claims for trespass to Appellants' real property, conversion of Appellants' real property / personal property, and breach of Ohio Revised Code § 901.51 statutory duties.

Also on December 20, 2012, after notice and hearing, the trial court issued a temporary restraining order restraining Appellee Asplundh, from among other things:

“\*\*\*entering upon any part of the Real Property of [Appellants], and from cutting, trimming, cutting down and removing trees and other vegetative growth on [Appellant]s' Real Property, both in and outside the limits of the easement area, on [Appellant]s' Real Property which is the subject of this litigation located at 3083 State Route 257 South, Ostrander, Ohio 43061, and destroying, removing and converting the same to the use and benefit of [Appellee Asplundh]. . . all being other than and contrary to the rights of ownership of the same by [Appellant]s.”

Appellee Asplundh subsequently removed the case to the United States District Court for the Southern District of Ohio on the basis of diversity jurisdiction, and filed its Answer containing counterclaims for declaratory judgment and injunctive relief. Appellants filed and served their Demand For Jury Trial on all issues in the action so triable.

On March 5, 2013, the Federal Court granted a Motion to Intervene filed by Appellee Ohio Edison, and ordered that the case be remanded to this Court for lack of complete diversity. Following remand, Appellee, American Transmission Systems, Incorporated ("Appellee ATSI")(Appellee Asplundh, Appellee Ohio Edison and Appellee ATSI collectively "Appellees"), filed a motion to intervene and participate as a party Defendant in the action, claiming lease rights in the easement area at issue through Appellee Ohio Edison. Appellee ATSI filed a similar motion while the case was pending in Federal Court, but the Court did not rule on the motion. Also without ruling on the

motion of Appellee ATSI, instead upon the agreement of the parties, Appellee ATSI was permitted to Intervene in this action as a party Defendant.

Each of Appellees filed Answers containing counterclaims setting forth claims nearly identical to each other and substantially similar to those contained in Appellants' Complaint.

Appellee Asplundh and Appellee Ohio Edison sought leave to file a Motion For Summary Judgment. The Motion For Leave was subsequently overruled by the trial court. At a status conference held April 9, 2013, the Court bifurcated the proceeding in the case on the issues of easement interpretation and damages. By Judgment Entry filed July 15, 2013, the Trial Court ordered the matter for hearing on October 14, 2013 "upon the issue of determining the boundaries and scope of the easement subject to this case". The matter came on before the trial court on October 14, 2013 on the declaratory judgment portion of the action. It is from this decision which Appellants appealed.

On April 23, 2014, Appellants' timely filed their Notice of Appeal to the Fifth District Court of Appeals.

On December 24, 2014, the Fifth District Court of Appeals issued an Opinion and Decision, overruling Appellants' assignments of error. The Opinion and Decision contained a dissent expressing that the appeal from the trial court was not a final appealable order. The Appellate Court's Ruling effectively denied Appellants the relief requested.

**B. STATEMENT OF THE FACTS:**

Appellant' real property is located in Scioto Township, Delaware County, Ohio, and consists of approximately 141.080 acres. It is covered with a patch of old growth forest

consisting of approximately 24.340 acres. The real property is subject to an easement and right-of-way in favor of Appellee Ohio Edison "for lines for the transmission and distribution of electric current, including telephone and telegraph upon, over, under, and across" the real property.

The right-of-way is specifically defined and described as "[a] strip of land 50 feet wide; 25 feet on each side of a center line, which center line of right-of-way is generally described in a metes and bounds fashion.

Additional rights, obligations and limitations are typed into the form easement document then used by Appellee Ohio Edison in a disjointed and ambiguous fashion, taken as a whole with the other items set forth therein. These include:

Together with the right to install guy wires and anchors within or adjacent to the right-of-way herein granted wherever necessary.

All timber to be cut in log lengths and wood and brush to be burned.

Entrance to said right of way fom State Route # 257 will be over and through the lane at tenant house.

The remainder of the easement and right-of-way form document continues with a preprinted list of additional rights, obligations and limitations on the use of the easement and right-of-way stated as follows:

The easement and rights herein granted shall include the right to erect, inspect, operate, replace, repair, patrol, and permanently maintain upon, over, under and along the above described right-of-way across said premises all necessary structures, wires , cables and other usual fixtures and appurtenances used for or in connection with the transmission and distribution of electric current, including telephone and telegraph and the right to trim, cut, remove, or otherwise control at any and all times such trees, limbs, underbrush or other obstruction within or adjacent to said right-of-way as may interfere with or endanger said structures, wires or appurtenances, or their operation.

The Grantors reserve the right to use the ground between said structures and beneath said wires, provided, that such use does not interfere with or obstruct the rights herein granted, and the Grantors agree that no building, obstruction or impediment of any kind shall be placed within said right-of-way or between said structures or beneath said wires without prior written approval of the Grantee.

The Grantee will repair or replace all fences, gates, lanes, driveways, drains, ditches, damaged or destroyed by it on said premises caused by the construction or maintenance of said lines.

The easement and right-of-way traverses through the forest.

Appellee Asplundh is a contractor / agent for or on behalf of Appellee Ohio Edison in regards to transmission line maintenance and/or vegetation control. Appellee Asplundh has no independent rights vis-à-vis Appellants' real property interest, including the easement. Appellee Asplundh's rights are not greater than those of its principal; yet, they may be more limited. The dispute herein arises from actions of Appellee Asplundh outside the defined right of way set forth in the easement.

There is little dispute or disagreement between Appellants and Appellees as to the scope of the rights to cut trees and remove brush within the 50 foot right-of-way identified in the easement. In fact, that area is for the most part clear cut and free of trees and brush and maintained in such a state by Appellants for the benefit of Appellee Ohio Edison. This is true regardless of the non-performance by Appellees of the reciprocal rights and obligations contained in the easement; e.g., removal of cut brush, traveling outside of the defined "tenant house lane" to access the right-of-way, etc.

On the other hand, wholesale clear cutting of mature and maturing trees outside of the 50 foot right-of-way identified in the easement, regardless of Appellees' on corridor compliance with regulatory conditions, with impunity and total disregard for the property

rights of Appellants is the focus of the issue in dispute. Appellees have identified, marked and even cut down a significant number of mature growth and hearty trees (over a hundred), without reference to less intrusive remediation of concerns and the lack of the consent of Appellants, outside of the 50 foot right-of-way identified in the easement, resulting in significant monetary damages to Appellants. Appellees mark trees on the “hard edge” of the right away for removal; a term in and of itself which is ambiguous. It simply means a tree off the edge of the right-of-way regardless of distance from the right-of-way; but how far off the right-of-way creates the ambiguity in context of the rights of Appellants and the easement. It could be right on the edge, off the edge by 1, 2, 3, 10 or even more feet. Unreasonable usurpation and destruction of Appellants’ property and timber growth through Appellees unfettered cutting enlarges the easement and right-of-way area well beyond its 50 foot grant, all contrary to the property rights of Appellants.

PUCO Vegetation Management Plans govern the activities of a utility in maintaining and protecting its transmission and distribution lines ensuring the unobstructed flow of electricity within the utility’s easement. Such Vegetation Management Plans cannot affect private property rights beyond the utility’s easement.

#### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

Proposition of Law No. 1: Actions of a Utility outside of an easement area sounding in tort or involving contract determinations are within the jurisdiction of the courts for redress notwithstanding attributes that may otherwise tend to confer jurisdiction over the issues on the PUCO.

This Court reiterated in *Corrigan* that “the broad jurisdiction of PUCO over service-related matters does not affect ‘the basic jurisdiction of the court of common pleas \* \* \* in other areas of possible claims against utilities, including pure tort and contract claims.’”

*Corrigan*, ¶ 9, citing, *State ex rel. Ohio Edison Co. v. Shaker* (1994), 68 Ohio St.3d 209, 211, 625 N.E.2d 608. However, vegetation management issues pertain solely to easement areas of the utility. They do not address private property issues beyond the property rights of the utility under the easement. Outside of the easement area, any contractual or tort matter that may appear to otherwise involve vegetation management, e.g., trimming or removal of trees or other vegetation, beyond a defined right-of-way or not expressly granted by an easement, must be deemed to be non-service related and not within the exclusive jurisdiction of the PUCO. Remedy for those issues must be reserved to the Courts.

The Court of Appeals Ruling did the opposite. While it acknowledged at issue were utility activities with respect to removal of vegetation outside the easement area and rights granted the utility it determined they must be service related and within the exclusive jurisdiction of the PUCO for determination. Yet, despite the erroneous conclusion the Court failed to determine it lacked jurisdiction over the claims. The Ruling has simply provided additional rights to a utility beyond that contemplated in the easement and as a result expanded the jurisdiction of the PUCO to hear complaints regarding those matters to the detriment of the private property rights not encumbered by the easement. It has effectively precluded remedy through the courts.

This Court should grant jurisdiction for review and clarification of the misguided expansion otherwise foretold by the dissents in *Corrigan*.

Proposition of Law No. II: The meaning of a word as defined by the Supreme Court should be applied to define and construe the context of the same word used in a private agreement – an easement.

In construing documents, the words employed should be given their ordinary meaning by the courts. However, when the term has been defined and reconciled with other similar words by a decision of the Supreme Court, that definition, and all of its limitations, whether narrow or broad, should be applied.

In Ohio, the word “adjacent” has been the subject of litigation in order to determine its scope. The term has been scrutinized and found to be narrowly construed in scope to be synonymous with ‘contiguous’ and ‘adjoining’. *City of Middletown v. McGee* (1988), 39 Ohio St.3d 284, 530 N.E.2d 902 (application of the word in the context of annexation statutes). Therein this Ohio Supreme Court determined:

The terms "adjacent," "contiguous" and "adjoining" are all used by the Revised Code statutes governing annexation. See *R.C. 709.02, 709.13 through 709.16, 709.18, 709.22 through 709.24*. **These terms are not defined by the Revised Code, but are generally understood to be synonymous in Ohio** and in other jurisdictions. See *Watson v. Doolittle* (1967), 10 Ohio App.2d 143, 147, . . . , 226 N.E.2d 771, 774. (Emphasis added). *Middletown* at 285, 530 N.E.2d 902, 903.

Of course, other variations to the definition of the word “adjacent” may exist, but those most common are consistent with the interpretation of the Supreme Court. For example, the definition from Dictionary.com is: lying near, close, or contiguous; adjoining; . . . at <http://dictionary.reference.com/browse/adjacent?s=t>. That definition contains all the words reconciled together by the Supreme Court in *Middletown*. Nonetheless, the Court of Appeals chose to ignore that decision and instead employed a variation of the definition. The difference in application of varying definitions of the term “adjacent” in this instance is

the difference between jurisdiction over issues occurring "within" the confines of the easement, as limited to those "adjacent" [contiguous / adjoining] being exclusive to the PUCO, and issues "outside" the easement area [beyond those which are adjacent / contiguous / adjoining] being within the jurisdiction of the courts. Application of the definition of the term "adjacent" employed by the Court of Appeals expands the jurisdiction of the PUCO beyond the limits of the easement by now subjecting matters beyond the area of the dominant estate to those that are occurring on the subservient estate.

The Court of Appeals stated:

The easement granted Ohio Edison "the right to trim, cut, remove or otherwise control at any and all times such trees, limbs, underbrush or other obstruction within or adjacent to said right-of-way *as may interfere with or endanger said structure, wires or appurtenances, or their operation.*" (Emphasis added.) To place a definitive measurement on the term "adjacent" as appellants seek could potentially interfere with or endanger the structure, wires or appurtenances, or the operation of such. "Adjacent" is defined in *Black's Law Dictionary* 41 (1990) as: "Lying near or close to; sometimes, contiguous; neighboring. *Adjacent* implies that the two objects are not widely separated, though they may not actually touch,\*\*\*while *adjoining* imports that they are so joined or united to each other that no third object intervenes." ***Because trees or limbs located on appellants' property could potentially interfere with or endanger the power transmission lines, no "definitive measurement" can be made.*** Ohio Edison has discretion to determine whether particular vegetation "may interfere or endanger" its equipment. Any challenge to that discretion falls within the purview and jurisdiction of the PUCO. (Bold emphasis added.) Ruling, ¶ 22.

The result is that application of the *Allstate* test to determine jurisdiction has been eliminated by the action of the Court of Appeals.

## CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. Appellants request that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

**HARRIS, McCLELLAN, BINAU & COX, P.L.L.**



Daniel J. Binau (0025376)  
Michael A. Coleman (0036723)  
37 West Broad Street, Suite 950  
Columbus, Ohio 43215-4159  
Telephone: 614.464.2572  
Telefax: 614.464.2245  
E-mail: DBinau@HMBC.com  
MColeman@HMBC.com

Counsel for Appellants, Karl Friederich  
Jentgen, Jeffrey Joseph Jentgen, Lisa Ann  
Coker, Kristin Ann Jentgen, Michael Mohr  
Jentgen and Philip John Jentgen

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing *Memorandum In Support Of Jurisdiction Of Appellants Karl Friederich Jentgen, Jeffrey Joseph Jentgen, Lisa Ann Coker, Kristin Ann Jentgen, Michael Mohr Jentgen and Philip John Jentgen*, was served, upon each of the parties or their Counsel of record by ordinary U.S. mail, postage pre-paid, and e-mail, this February 9, 2015, at their respective mailing and e-mail

addresses noted below:

Stephen D. Jones, Esq.  
Jeremy S. Young, Esq.  
Roetzel & Andress, LPA  
155 East Broad Street, 12th Floor  
Columbus, Ohio 43215  
Telephone: 614.463.9770  
Telefax: 614.463.9792  
E-mail: sjones@ralaw.com  
jyoung@ralaw.com

Counsel for Appellees,  
Asplundh Tree Expert Co., Ohio  
Edison Company, and American  
Transmission Systems, Incorporated

Patrick Kasson, Esq.  
Zachary B. Pyers, Esq.  
Tyler Tarney, Esq.  
Reminger Co., LPA  
65 East State Street, 4<sup>th</sup> Floor  
Columbus, Ohio 432  
Telephone: 614.228.1311  
Telefax: 614.232.2410  
E-mail: pkasson@reminger.com  
zpyers@reminger.com  
TTarney@reminger.com

Additional Counsel for Appellee,  
Asplundh Tree Expert Co.

  
Daniel J. Binau (0025376)

# **APPENDIX**

**A**

P

COURT OF APPEALS  
DELAWARE COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

KARL FRIEDERICH JENTGEN, ET AL.  
Plaintiffs-Appellants

JUDGES:  
Hon. William B. Hoffman, P.J.  
Hon. W. Scott Gwin, J.  
Hon. Sheila G. Farmer, J.

-vs-

Case No. 14 CAE 04 0028

ASPLUNDH TREE EXPERT CO.,  
ET AL.

Defendants-Appellees

OPINION

43  
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148

CHARACTER OF PROCEEDING:

Appeal from the Court of Common  
Pleas, Case No. 12 CVH 12 1442

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiffs-Appellants

DANIEL J. BINAU  
MICHAEL A. COLEMAN  
37 West Broad Street, Suite 950  
Columbus, OH 43215-4159

For Defendants-Appellees

STEPHEN D. JONES  
JEREMY S. YOUNG  
PNC Plaza, Twelfth Floor  
155 East Broad Street  
Columbus, OH 43215

PATRICK KASSON  
ZACHARY B. PYERS  
65 East State Street, 4th Floor  
Columbus, OH 43215

JAN ANTONOPLOS  
CLERK

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COURT OF APPEALS  
DELAWARE COUNTY, OHIO  
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*Farmer, J.*

{¶1} Appellants herein, Karl Friederich Jentgen and others, own approximately 141 acres of land, which includes approximately 24 plus acres of old growth forest located adjacent to and contiguous with the Scioto River. The property is subject to an easement to appellee, Ohio Edison. Appellee, American Transmission Systems, Incorporated (hereinafter "ATSI"), is lessee of the easement and owns electrical facilities located within the easement's right of way. Appellee, Asplundh Tree Expert Company, is ATSI's independent vegetation management contractor.

{¶2} The easement includes language granting Ohio Edison "the right to trim, cut, remove or otherwise control at any and all times such trees, limbs, underbrush or other obstruction within or adjacent to said right-of-way as may interfere with or endanger said structure, wires or appurtenances, or their operation." The easement extends 25 feet on each side of the center of the transmission/distribution line.

{¶3} At issue in the instant appeal are eight trees which grow adjacent to the right-of-way, and which Ohio Edison identified as needing to be removed because the trees could potentially interfere or endanger its transmission/distribution line. Ohio Edison claimed it had the authority to remove the trees pursuant to its Vegetation Management Plan. Appellants did not want the trees to be removed, just trimmed. Appellants claimed tree trimming constitutes a service-related issue which is within the exclusive subject matter jurisdiction of the Public Utilities Commission of Ohio ("PUCO").

{¶4} On December 20, 2012, appellants filed a verified complaint and application for temporary restraining order, preliminary and permanent injunction

against Asplundh, seeking declaratory judgment as to the parties' rights regarding the easement (Count One), and claiming trespass (Count Two), conversion (Count Three), and breach of R.C. 901.51 (Count Four). Appellants also sought injunctive relief (Count Five).

{¶5} Ohio Edison and ATSI both intervened. Thereafter, appellees filed counterclaims for declaratory judgment, breach of covenant, and trespass, and requested injunctive relief.

{¶6} On April 9, 2013, the trial court bifurcated the declaratory judgment action concerning the parties' respective rights relative to the easement from the trespass and conversion claims.

{¶7} The declaratory judgment/injunctive relief portion of the case came on for trial before the court on October 14, 2013. Following the close of appellant's case, the trial court directed a verdict for Asplundh. By judgment entry filed March 25, 2014, the trial court found the language in the easement to be clear, unambiguous, and enforceable, decreed the parties' rights and obligations under the easement, denied appellants' claims for declaratory judgment and injunctive relief, and granted appellees' counterclaims for declaratory judgment and injunctive relief.

{¶8} Appellants filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶9} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR THROUGH AN ABUSE OF DISCRETION BY FAILING TO DECLARE ALL THE RIGHTS UNDER THE EASEMENT LANGUAGE IN CONTROVERSY, AND TO DEFINE CERTAIN

TERMS CONTAINED THEREIN CONSISTENT WITH APPLICABLE LAW, SO AS TO ADD CLARITY AND ELIMINATE AND REMOVE UNCERTAINTY IN ITS APPLICATION AND TERMINATE THE CONTROVERSY RESULTING THEREFROM AS REQUIRED BY THE DECLARATORY JUDGMENT STATUTE."

II

{¶10} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR THROUGH AN ABUSE OF DISCRETION BY FAILING TO REFUSE TO DECLARE ALL THE RIGHTS UNDER THE EASEMENT LANGUAGE IT OTHERWISE BELIEVED WAS UNAMBIGUOUS, SO AS TO AVOID FURTHER UNCERTAINTY AND CONTROVERSY, AS CONTEMPLATED IN THE DECLARATORY JUDGMENT STATUTE."

III

{¶11} "THE TRIAL COURT LACKED JURISDICTION TO MAKE ANY DETERMINATIONS OR DECLARATIONS AFFECTING CLEARING AND MAINTAINING VEGETATION WITHIN THE RIGHT-OF-WAY."

IV

{¶12} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR THROUGH AN ABUSE OF DISCRETIONARY TRYING THIS MATTER BEFORE THE BENCH WHEN A JURY TRIAL WAS DEMANDED AND NOT WAIVED PURSUANT TO THE OHIO CIVIL RULE OF PROCEDURE 39(A)."

{¶13} At the outset, a discussion on whether the March 25, 2014 judgment entry is a final appealable order is warranted.

{¶14} The December 20, 2012 verified complaint at ¶ 4 sets forth the operative facts upon which appellants rested their claims for trespass (Count Two), conversion (Count Three), and breach of R.C. 901.51 (Count Four):

Defendant, Asplundh Tree Expert Co. ("Defendant Asplundh"), a Pennsylvania corporation, licensed to transact business in the State of Ohio, by itself and/or acting individually and/or in concert with others, without permission or privilege to do so, and over the express objections of Plaintiffs, entered and trespassed upon the Real Property of Plaintiffs outside the limits of the easement area, and without reasonable excuse, method or process, began and continues to recklessly cut, trim, cut down and remove trees and other vegetative growth on Plaintiffs' Real Property, outside the limits of the easement area, destroying, removing and converting the same and the by products thereof to its use and benefit, including that within the easement area, contrary to the terms of the easement, all to the damage and detriment of Plaintiffs.

{¶15} The explicit language of the trial court's March 25, 2014 judgment entry extinguished all of the claims for trespass, conversion, and breach of R.C. 901.51, addressing the underlying facts of appellants' claims by finding appellees had the right to enter appellants' lands and remove the trees and vegetative growth *adjacent* to the easement area:

2. Ohio Edison and ATSI, and their authorized agents, including Asplundh, are permitted to clear and maintain a path 25 feet on either side of the center of the transmission/distribution line to properly, safely and efficiently operate, inspect, maintain and repair its electric transmission line.

3. Ohio Edison and ATSI, and their authorized agents, including Asplundh, are permitted to trim and remove trees adjacent to the defined right-of-way area that may interfere with or endanger the transmission line.

4. Plaintiffs' are not permitted to interfere with, resist, prevent or otherwise obstruct the clearing, tree trimming and tree removal within or adjacent to the defined right-of-way in the easement.

{¶16} In its finding of facts and conclusions of law filed contemporaneously with the judgment entry, the trial court found the following at Finding of Fact No. 2:

2. The easement contained the following language granting Ohio Edison Company "the right to trim, cut, remove or otherwise control at any and all times such trees, limbs, underbrush or other obstruction within or adjacent to said right-of-way as may interfere with or endanger said structure, wires or appurtenances, or their operation." Joint Exhibit 1.

{¶17} The trial court concluded the following at Conclusion of Law Nos. 2 and 6:

2. The Ohio case law is clear that the easement's use of the word "adjacent" is unambiguous and enforceable giving the power company the rights to remove or trim tress and vegetation adjacent to their right of way easement of 50 feet if the growth may "interfere with or endanger said structures, wires or appurtenances, or the operation."

6. Plaintiffs' position that certain tress in the area adjacent to the right-of-way should be trimmed rather than removed constitutes a service-related issue, which is within the exclusive subject matter jurisdiction of the Public Utilities Commission of Ohio (PUCO).

{¶18} Upon review, we find the March 25, 2014 judgment entry to be a final appealable order, and we will address the merits of the appeal.

I

{¶19} Appellants claim the trial court erred and abused its discretion in failing to fully declare all of the parties' rights under the easement, and in failing to define certain terms used therein. Specifically, appellant asserts the trial court failed to define the scope of the term "adjacent", thereby leading "to the continuing uncertainties in relation to the activities undertaken by Appellees,\*\*\*and the property and fee holder rights of Appellants." Appellants' Brief at 15-16.

{¶20} In *Myers v. McCoy*, 5th Dist. Delaware No. 2004CAE07059, 2005-Ohio-2171, ¶ 17, this court explained the following:

The grant of an easement includes the grant of all things necessary for the dominant estate to use and enjoy the easement, *Day, Williams & Company v. RR. Company* (1884), 41 Ohio St.3d 392. Thus, in determining the nature and extent of an easement, the court must construe the easement in a manner permitting the dominant estate to carry out its purpose, *Alban [v. R.K. Company]*, 15 Ohio St.2d 229 (1968)], *supra*.

{¶21} In its finding of facts and conclusions of law filed contemporaneously with the judgment entry, the trial court set forth the language of the easement in Finding of Fact No. 2, cited above. The trial court found "[t]he removal of the 8 trees is pursuant to the Defendant's Vegetation Management Plan" and "[t]he Plaintiff's had not filed objections to the Ohio PUCO asserting their position prior to the action being filed." Finding of Fact Nos. 5 and 6.

{¶22} The trial court found, and we agree, the use of the word "adjacent" in the easement is unambiguous and enforceable. The easement granted Ohio Edison "the right to trim, cut, remove or otherwise control at any and all times such trees, limbs, underbrush or other obstruction within or adjacent to said right-of-way *as may interfere with or endanger said structure, wires or appurtenances, or their operation.*" (Emphasis added.) To place a definitive measurement on the term "adjacent" as appellants seek could potentially interfere with or endanger the structure, wires or appurtenances, or the operation of such. "Adjacent" is defined in *Black's Law Dictionary* 41 (1990) as: "Lying near or close to; sometimes, contiguous; neighboring. *Adjacent* implies that the two

objects are not widely separated, though they may not actually touch,\*\*\*while *adjoining* imports that they are so joined or united to each other that no third object intervenes." Because trees or limbs located on appellants' property could potentially interfere with or endanger the power transmission lines, no "definitive measurement" can be made. Ohio Edison has discretion to determine whether particular vegetation "may interfere or endanger" its equipment. Any challenge to that discretion falls within the purview and jurisdiction of the PUCO.

{¶23} Assignment of Error I is denied.

II

{¶24} Appellants claim the trial court erred and abused its discretion in failing to declare all rights under the easement regardless of its belief that the easement language was unambiguous. Appellants assert the trial court failed to address the easement language relative to "clean-up and removal of felled vegetation and repairs and replacements required for damage caused." Appellants' Brief at 20.

{¶25} In their request for declaratory judgment, appellants did not seek a declaration relative to the aforementioned language. "It is axiomatic that a party cannot raise new issues or legal theories for the first time on appeal and failure to raise an issue before the trial court results in waiver of that issue for appellate purposes." *Dudley v. Dudley*, 12th Dist. Butler No. CA2008-07-165, 2009-Ohio-1166, ¶ 18. As appellants did not present this argument to the trial court, we need not consider the issue on appeal.

{¶26} Assignment of Error II is denied.

## III

{¶27} Appellants claim the trial court lacked jurisdiction to make any declaration as to the rights of the parties under the easement as exclusive jurisdiction over vegetation management issues lies with the PUCO.

{¶28} As the trial court found, the dispute herein involved the interpretation of an easement, i.e., a declaration of the parties' rights thereunder. The trial court expressly stated the PUCO had exclusive jurisdiction over the reasonableness of service-related issues. To such extent, we find the trial court did not err contrary to appellants' assertion. In its Conclusion of Law No. 6, the trial court stated: "Plaintiffs' position that certain trees in the area adjacent to the right-of-way should be trimmed rather than removed constitutes a service-related issue, which is within the exclusive subject matter jurisdiction of the Public Utilities Commission of Ohio (PUCO)."

{¶29} Assignment of Error III is denied.

## IV

{¶30} Appellants claim the trial court erred and abused its discretion in conducting a bench trial when they filed a jury demand.

{¶31} Civ.R. 38(B) provides: "Any party may demand a trial by jury on any issue triable of right by a jury\*\*\*." Once properly demanded, a jury trial is required unless the parties later stipulate to a trial by the court or the court determines that the right to a jury trial as to some or all of the issues does not exist. Civ.R. 38(A). R.C. 2311.04 states:

Issues of law must be tried by the court, unless referred as provided in the Rules of Civil Procedure. Issues of fact arising in actions

for the recovery of money only, or specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or unless all parties consent to a reference under the Rules of Civil Procedure.

All other issues of fact shall be tried by the court, subject to its power to order any issue to be tried by a jury, or referred.

{¶32} As none of the parties' claims for declaratory judgment and injunctive relief sought to recover money or specific real or personal property, we find the trial court did not abuse its discretion in conducting a bench trial as to the bifurcated declaratory judgment/injunction claims of the parties.

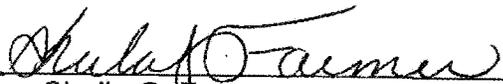
{¶33} Assignment of Error IV is denied.

{¶34} The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby affirmed.

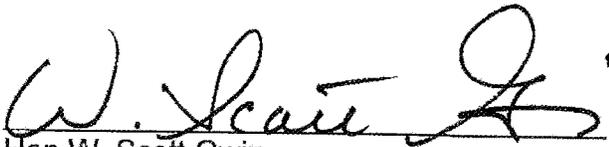
By Farmer, J.

Gwin, J. concurs.

Hoffman, P.J. dissents.

  
\_\_\_\_\_  
Hon. Sheila G. Farmer

\_\_\_\_\_  
Hon. William B. Hoffman

  
\_\_\_\_\_  
Hon W. Scott Gwin

*Hoffman, P.J., dissenting*

{¶35} While I agree with the majority's analysis and disposition of Appellant's four assignments of error, I, nevertheless, dissent from the majority's conclusion the judgment entry being appealed is a final appealable order.

{¶36} I begin by recognizing declaratory judgment is a special proceeding under R.C. 2505.02. At the same time, I note Appellants begins their STATEMENT OF THE CASE by stating, "This is an appeal from the decision of the Trial Court, on less than all of the claims asserted in the pleadings..." (Appellant's Brief at p.1, unpaginated). Left undetermined were Appellants' claim for damages for trespass, conversion, and violation of R.C. 901.51. While likely said claims will/would be dismissed given the trial court's judgment on declaratory judgment/injunctive relief, said claims, nevertheless, remain undetermined.

{¶37} I note the trial court did not include Civ. R.54(B) language in its Judgment Entry.<sup>1</sup> The fact the remaining claims were bifurcated does not eliminate the need for resolution of these claims before its order become a final appealable order.

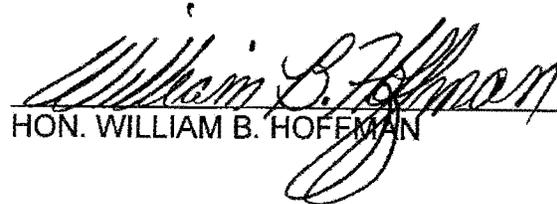
{¶38} The finality of the trial court's March 25, 2014 Judgment Entry is further complicated by the fact Appellees' counterclaims for damages also remain pending. The judgment in Asplundh's favor on its declaratory judgment/injunctive relief claim does not preclude judgment in favor of Jentgen on Asplundh's claims for monetary damages - providing an additional reason the judgment being appealed is not yet final.

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<sup>1</sup> I am aware the Clerk of Courts sent the parties a "Notice of Final Appealable Court Order" as being filed with the Clerk and journalized on March 25, 2014. Such declaration by the clerk does not alter the requirements of R.C. 2505.02.

See *Walburn v. Dunlap*, 121 Ohio St.3d 373, 2009-Ohio-1221, for an analogous result in an insurance coverage case.<sup>2</sup>

{¶39} Based upon the above, I conclude the trial court's March 25, 2014 Judgment Entry is not a final appealable order. I would dismiss this case for lack of jurisdiction.

  
HON. WILLIAM B. HOFFMAN

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<sup>2</sup> The Ohio Supreme Court found no final appealable order existed in *Walburn* despite the presence of Civ. R.54(B) language. Because Appellees' declaratory judgment/injunctive relief claims and its counterclaims for damages appear to be inextricably intertwined with Appellants' declaratory judgment/injunctive relief claims, I offer no opinion at this time as to whether inclusion of Civ. R.54(B) language in the trial court's March 25, 2014 Judgment Entry would result in a final appealable order.

**B**

R

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

KARL FRIEDERICH JENTGEN, ET AL.

Plaintiffs-Appellants

-vs-

ASPLUNDH TREE EXPERT CO.,  
ET AL.

Defendants-Appellees

43  
161

JUDGMENT ENTRY

Case No. 14 CAE 04 0028

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio is affirmed. Costs to appellants.

*Sheila G. Farmer*  
Hon. Sheila G. Farmer

Hon. William B. Hoffman

*W. Scott Gwin*  
Hon W. Scott Gwin

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