[Cite as *Jentgen v. Asplundh Tree Expert Co.*, 2014-Ohio-5870.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

KARL FRIEDERICH JENTGEN, ET AL.

Plaintiffs-Appellants

-vs-

ASPLUNDH TREE EXPERT CO., ET AL.

Defendants-Appellees

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

Case No. 14 CAE 04 0028

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 12 CVH 12 1442
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 24, 2014

APPEARANCES:

For Plaintiffs-Appellants

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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.

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Hon. Sheila G. Farmer

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Hon. William B. Hoffman

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Hon W. Scott Gwin

Hoffman, P.J., disssenting

{¶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.[1] 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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[1] 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.[2]

{¶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.

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HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

KARL FRIEDERICH JENTGEN, ET AL.	:	
Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
ASPLUNDH TREE EXPERT CO., ET AL.	:	
Defendants-Appellees	:	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.

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[2] 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.

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Hon. Sheila G. Farmer

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Hon. William B. Hoffman

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Hon W. Scott Gwin