

In the
Supreme Court of Ohio

CRAIG D. CORDER, et al.	:	Case No. 2023-0216
	:	
Appellees,	:	On Appeal from the
	:	Harrison County
v.	:	Court of Appeals,
	:	Seventh Appellate District
OHIO EDISON COMPANY,	:	
	:	Court of Appeals
Appellant.	:	Case No. 21 HA 0008

**MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST
IN SUPPORT OF APPELLANT OHIO EDISON COMPANY**

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INTRODUCTION

Ohio Edison has a utility easement allowing it to “trim, cut and remove” any vegetation or other obstructions that may, in its judgment, interfere with its power lines. This case presents the question whether this easement allows the company to clear vegetation using herbicide. If that question sounds familiar, it should. The Court previously considered whether the Public Utilities Commission or a common pleas court must answer the question in the first instance. *See Corder v. Ohio Edison Co.* (“*Corder II*”), 162 Ohio St. 3d 639, 2020-Ohio-5220 ¶1. The Court unanimously agreed that the interpretation of easements is a job for the common pleas courts, and remanded this case so that a Harrison County common pleas court could do just that. *Id.* at ¶¶3–4.

Justice DeWine, joined by then-Chief Justice O’Connor, dissented on the narrow issue of whether the case ought to be remanded. He explained that the easement’s language was too clear for remand to serve any purpose. The easements permit the company to “trim, cut and remove” vegetation. And the plain meaning of “remove” encompasses removal using herbicide. *Id.* at ¶¶32–34 (DeWine, J., concurring in part and dissenting in part). Rather than remanding for the common pleas court to say so, Justice DeWine would have resolved this straightforward issue.

Justice DeWine’s partial dissent correctly and persuasively interpreted the easements. But the Seventh District rejected Justice DeWine’s reading; its decision interpreted the easements *not* to permit Ohio Edison’s removal of vegetation through the application

of herbicide. It erred for many of the reasons already laid out by the *Corder II* dissent. This Court should reverse the Seventh District's judgment.

STATEMENT OF *AMICUS* INTEREST

The Attorney General "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. The Attorney General is interested in ensuring that Ohio's electrical grid is stable, reliable, and properly maintained.

STATEMENT OF THE CASE AND FACTS

1. Craig D. Corder, Jackie C. Corder, and Scott Corder own property in Harrison County. Prior owners of the properties granted electrical-transmission-line easements to the Ohio Public Service Company in 1948. *Corder II*, 162 Ohio St. 3d 639 at ¶5. Ohio Edison now holds these easements, all of which are identical in relevant respects. The easements allow Ohio Edison to "trim, cut and remove" any vegetation or other obstacles that it believes may interfere with its operation of electrical lines on the properties. *Id.*

After a widespread blackout in 2003, the Federal Electric Regulatory Commission required public utilities to implement a Transmission Vegetation Management program to prevent vegetation growth from threatening power transmission. *Id.* at ¶6. The Public Utilities Commission, in turn, required utility companies to establish preventative requirements sufficient to maintain "safe and reliable" electric service. Ohio Admin. Code 4901:1-10-27(E)(1). As a result, the Ohio Administrative Code now requires utilities to

develop a plan that discusses, among other things, how the utility intends to control vegetation in the utility's right-of-way. Ohio Admin. Code 4901:1-10-27(E)(1)(f).

2. Ohio Edison developed a Transmission Vegetation Management program that took effect in 2010. *Corder II*, 162 Ohio St. 3d 639 at ¶6. It filed the program with the Public Utilities Commission and provided evidence that showed its program is based upon generally accepted industry practices and procedures. *See* Ohio Admin. Code 4901:1-10-27(E)(2); *Corder II*, 162 Ohio St. 3d 639 at ¶¶7–9. Among other things, in order to prevent “catastrophic” contact between high-voltage power lines and vegetation, the program seeks to “totally eliminate” “incompatible vegetation” near the wires. *Corder v. Ohio Edison Co.* (“*Corder I*”), 2019-Ohio-2639 ¶¶23, 26 (7th Dist.). That goal requires application of herbicide as a “key component.” *Id.* at ¶23.

3. The Corders learned in 2017 that First Energy, Ohio Edison's service company, planned to use herbicide to remove vegetation that it determined posed a risk to the transmission lines that ran across the Corders' properties. *Id.* at ¶¶14, 25. The Corders believed, however, that application of herbicides would interfere with their ability to use the properties to run an organic farm. *Corder II*, 162 Ohio St. 3d 639 at ¶10. Hoping to stop the application of herbicides, they filed a declaratory-judgment action in which they sought a declaration that the easements did not permit Ohio Edison to use herbicides. *Id.*

The trial court held, *sua sponte*, that it lacked jurisdiction to resolve the dispute—it believed the Public Utilities Commission had exclusive jurisdiction over the case. *Corder I*, 2019-Ohio-2639 at ¶16.

4. On appeal, the Seventh District reversed. Its decision contains two significant holdings relevant to this case. *First*, the Seventh District held that the Public Utilities Commission did not have exclusive jurisdiction. The interpretation of easements, the court concluded, is not a utility-service question requiring the Commission’s administrative expertise; rather, it involves the type of contract-interpretation question that courts regularly address. *Id.* at ¶¶38–39. *Second*, the court held that the easements were ambiguous. *Id.* at ¶¶51–52. The Seventh District remanded to the trial court and instructed that court to interpret the term “remove” in the easements. *Id.* at ¶53.

5. Ohio Edison appealed and challenged the Seventh District’s determination that the trial court, not the Public Utilities Commission, had jurisdiction to interpret the easements. *Corder II*, 162 Ohio St. 3d 639 at ¶1. The Court accepted the case for review and ultimately agreed with the Seventh District that the trial court had subject-matter jurisdiction. *Id.* at ¶28. The Court found, however, that the Seventh District had improperly “looked beyond the narrow issue raised on appeal,” and that it “went too far by reviewing the merits of the Corders’ causes of action and finding that the easements are ambiguous.” *Id.* at ¶¶29–30. Such findings, the Court held, “were beyond the scope of the appeal.” *Id.* at ¶30. The Court therefore vacated the Seventh District’s decision and

remanded the case so that the trial court could interpret the easements in the first instance. *Id.* at ¶31.

Justice DeWine, joined by then-Chief-Justice O'Connor, concurred in part and dissented in part. *Corder II*, 162 Ohio St. 3d 639 at ¶32 (DeWine, J., concurring in part and dissenting in part). He agreed that the trial court, not the Public Utilities Commission, had jurisdiction to interpret the easements. *Id.* at ¶34. But Justice DeWine objected to remanding the case without resolving the legal question whether the easements permitted the use of herbicide. *Id.* Rather than remanding, he would have reached the underlying issue and held that the easements permitted Ohio Edison to use herbicides on the Corders' property. *Id.* at ¶46. Because the easements "unambiguously gave Ohio Edison the ability to remove vegetation using herbicide," he wrote, "the case should be remanded to the trial court to enter a declaratory judgment in favor of Ohio Edison." *Id.*

6. On remand, the trial court rejected that interpretation. It held that the easements unambiguously *prohibited* the use of herbicides. R.65, 7/28/2021 Judgment Entry, *Corder v. Ohio Edison Co.*, No. CVH-2017-0057 at 4. The trial court read the easements' language narrowly. Although the easements granted Ohio Edison "the right to trim, cut and remove" vegetation, the trial court interpreted that language as allowing Ohio Edison to remove only vegetation that it cuts down. *Id.* "For 'remove' to be a standalone right," the court wrote, "the words 'trim and cut'" would have to be rendered "superfluous." *Id.* In light of its determination that the easements granted no freestanding right

to remove vegetation, the trial court determined that the easements unambiguously prohibited the use of herbicide. *Id.* It thus granted the Corders' motion for summary judgment. *Id.* at 5.

7. Ohio Edison appealed, and the Seventh District affirmed on alternative grounds. *See Corder v. Ohio Edison Co.* ("App.Op."), 2022-Ohio-4818 ¶¶18–21, 27–29 (7th Dist.). The word "remove," the court stated, generally means "to move from a place or position, to take away, or to take off or shed." *Id.* at ¶27. According to the Seventh District, the use of herbicide does not fit within that narrow definition of "remove." *Id.* The court additionally stressed the absence of a serial comma in the phrase "trim, cut and remove." *Id.* at ¶28. The lack of a comma, it held, bore "grammatical significance," indicating that the easements conferred no independent right to remove, but rather a narrow right to carry away vegetation that had already been cut or trimmed. *Id.*; *Corder I*, 2019-Ohio-2639 at ¶¶41–42.

The Seventh District, rather than concluding that the easements *unambiguously* conferred only this narrow removal right, determined that its reading made the easements ambiguous. App.Op. ¶¶4, 20. That ambiguity, it determined, favored the landowners. The court consulted parol evidence to help it divine the proper reading of the easements. *Id.* at ¶¶20–21. It found that utility companies had not historically exercised their rights under the easements by applying herbicide. And it noted the absence of definitive proof that the easements' drafters anticipated the use of herbicide. Based on all

this, it determined that the parol-evidence rule did not support the use of herbicides. *Id.* at ¶21.

8. Ohio Edison appealed again, raising two propositions of law. The Court accepted Ohio Edison's second proposition, which asserted that the Seventh District's decision frustrated both the easements' purpose and R.C. 4905.22's requirement that utilities deliver necessary and adequate power. *04/25/2023 Case Announcements, 2023-Ohio-1326; see also Ohio Edison Memorandum in Support of Jurisdiction.*

ARGUMENT

Amicus Attorney General's Proposition of Law:

The words chosen by the drafters of an easement are the best indication of intent and purpose, and a clearly-expressed easement is not made ambiguous by the absence of optional punctuation.

Easements are a form of contract and must be "interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language." *Skivolocki v. East Ohio Gas Co.*, 38 Ohio St. 2d 244, syl.1 (1974). When "an easement is created by an express grant, ... the extent of and limitations on the use of the land depend on the language in the grant." *State ex rel. Wasserman v. City of Fremont*, 140 Ohio St. 3d 471, 2014-Ohio-2962 ¶28. "The language of the easement, considered in light of the surrounding circumstances, is the best indication of the extent and limitations of the easement." *Id.* That is why, when interpreting an easement, courts give the words used in the easement

their “plain and ordinary meaning.” *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St. 2d 241, 245–246 (1978).

Properly interpreted, the easements here entitle Ohio Edison to use herbicides to remove trees, underbrush, and other vegetation that it determines may interfere with its power lines.

A. The plain and ordinary meaning of “remove” allows the use of herbicide.

Begin with the easements’ language:

The easement and rights herein granted shall include the right to erect, inspect, operate, replace, repair, patrol and permanently maintain upon, over and along the above described right-of-way across said premises all necessary structures, wires and other usual fixtures and appurtenances used for or in connection with the transmission and distribution of electric current, and the right of ingress and egress upon, over and across said premises for access to and from said right-of-way, and the right to trim, cut and remove at any and all times such trees, limbs, underbrush or other obstructions as in the judgment of Grantee may interfere with or endanger said structures, wires or appurtenances, or their operation.

Corder II, 162 Ohio St. 3d 639 at ¶40 n.2 (DeWine, J., concurring in part and dissenting in part) (underlining omitted).

While the easements grant Ohio Edison a variety of rights, just one set of rights is relevant here. Specifically, the easements empower Ohio Edison to “trim, cut and remove” any vegetation that it believes may interfere with the operation of its powerlines. Of all the words in that phrase, the one most relevant to the present dispute is “remove.”

“Remove” is a broad word. At the time the easements were drafted, “remove” was defined as: “1. To change or shift the location, position, station, or residence of... 2. To move by lifting, pushing aside, taking away or off, or the like... 4. to get rid of as though by moving; to eradicate; to eliminate...” *Webster’s New International Dictionary* 2108 (2nd ed. 1948). Its definition has not substantively changed in the last seventy-five years. For example, Webster’s Third New International Dictionary still defines “remove” as: “1: to change or shift the location, position, station, or residence of... 2: to move by lifting, pushing aside, or taking away or off: put aside, apart, or elsewhere... 4: to get rid of as though by moving: ERADICATE, ELIMINATE...” *Webster’s Third New International Dictionary* 1921 (1993). And the American Heritage Dictionary defines “remove” as: “1. To move from a place or position occupied... 2. To transfer or convey from one place to another... 3. To take off... 4. To take away; withdraw... 5. To do away with; eliminate...” *American Heritage Dictionary* 1486 (5th ed. 2011).

Courts give the word “remove” a similarly broad definition. This Court, for example, has observed that “remove” means “to move by lifting, pushing aside, or taking away or off” or “to get rid of: eliminate.” *Hewitt v. L.E. Myers Co.*, 134 Ohio St. 3d 199, 2012-Ohio-5317 ¶¶28–29. And the Sixth District has noted that remove means “to move by lifting, pushing aside, or taking away or off”; also ‘to get rid of: eliminate.’” *McKinney v. CSP of Ohio, LLC*, 6th Dist. Wood No. WD-10-070, 2011-Ohio-3116, ¶17 (quoting *Merriam-Webster’s Collegiate Dictionary* 987 (10th ed. 1996)).

The plain meaning of “remove” resolves this case. Because the common definition of “remove” includes “elimination,” the most natural reading of the easements gives Ohio Edison the power to eliminate obstructing vegetation. The easements contain no limiting language that would narrow the other words. The easements do not, for example, restrict *how* Ohio Edison may “trim, cut and remove” problematic vegetation and other obstructions. Nor does other language in the easements suggest that “remove” should be given anything other than its broad, commonly-understood definition. And that definition allows Ohio Edison to use whatever means it reasonably deems necessary—including the use of herbicides—to remove obstructions from the covered property.

The context in which the word “remove” appears buttresses this reading. Ohio Edison’s power to remove obstructions under the easements is not limited to removing vegetation that has first been cut or trimmed. The easements give Ohio Edison “the right to trim, cut and remove at any and all times ... trees, limbs, underbrush or *other obstructions.*” See *Corder I*, 2019-Ohio-2639 at ¶12. Not all obstructions can be removed by trimming or cutting, however. A narrow interpretation of the word “remove,” such as the one the Seventh District adopted below would leave Ohio Edison powerless to intervene if, for example, a kite became entangled in its powerlines. See *Corder II*, 162 Ohio St. 3d 639 at ¶43 (DeWine, J., concurring in part and dissenting in part). “An easement should be interpreted to give effect to the language used in the instrument and to carry out the

purpose for which it was created.” *Wasserman*, 140 Ohio St. 3d 471 at ¶33. The only way to give full effect to the easements’ text is by reading them to give Ohio Edison a catch-all right to remove obstructions from its right-of-way—a catch-all permitting the removal of *all* vegetation that interferes with the right-of-way, regardless of whether it has previously been cut or trimmed.

The *noscitur a sociis* canon further confirms that the word “remove” in the phrase “trim, cut and remove” retains its broad meaning (“to eliminate”), rather than the narrower meaning (“[t]o move by lifting, pushing aside, taking away or off”). *Webster’s Second New International Dictionary* at 2108. Under the doctrine of *noscitur a sociis* “words that are listed together should be understood in the same general sense.” *Vossman v. Airnet Sys., Inc.*, 159 Ohio St. 3d 529, 2020-Ohio-872 ¶19. Here, the first two words concern specific ways of eliminating obstructions. So when the word “remove” appears in a list of verbs relating to the elimination of obstructions, it is best understood to bear a similar but separate meaning. *Id.* Thus, “remove” functions as a catch-call that encompasses forms of elimination not specifically enumerated.

B. The Seventh District adopted an overly narrow interpretation of the easements.

The Seventh District adopted a narrow interpretation that improperly limits Ohio Edison’s ability to remove problematic vegetation and other obstructions. It held that the phrase “trim, cut and remove” is ambiguous because there is no comma after the word “cut.” App.Op. ¶28. It then cited that ambiguity as a reason to ignore the easements’ text

and to rely instead on parol evidence that, it believed, suggested the original parties never intended to allow the use of herbicides. *Id.* at ¶¶20–21.

The Seventh District erred. The easements’ language is not ambiguous and, even if it were, the Seventh District erred in concluding that the language is best read as prohibiting the use of herbicides.

1. The Seventh District’s comma-based argument fails. The court determined that, because there is no comma after the word “cut,” the word “remove” must be narrowly construed to mean: “to move from a place or position, to take away, or to take off or shed.” App.Op. ¶27; *Corder I*, 2019-Ohio-2639 at ¶41. This places far too much significance on the absence of optional punctuation.

While sound drafting may support use of a serial comma, “courts should not rely much if any on its omission.” Antonin Scalia & Bryan A. Garner, *Reading Law* 166 (2012). Many “leading grammarians, while sometimes noting that commas at the end of series can avoid ambiguity, concede that use of such commas is discretionary.” *United States v. Bass*, 404 U.S. 336, 340 n.6 (1971); *see also Hatcher v. Hatcher*, 158 N.E.3d 326, 331 (Ill. Ct. App. 2020); *Princeton Excess & Surplus Lines Ins. Co. v. Hub City Enters.*, 418 F.Supp. 3d 1060, 1066–67 (M.D. Fla. 2019)). And because a comma is optional, “[t]he absence of a comma between the words ‘cut’ and ‘remove’ may tell us nothing more than the drafter’s stance on the Oxford-comma debate.” *Corder II*, 162 Ohio St. 3d. 639 at ¶40 & n.1 (DeWine, J., concurring in part and dissenting in part).

Perhaps more fundamentally, the comma's absence cannot plausibly be understood to bear on the narrowness or breadth of the word "remove." The easements say that Ohio Edison can "cut, trim and remove." This confers a list of rights. The question is whether it confers three independent rights (rights to cut, to trim, and to remove) or, as the Seventh District concluded, two independent rights (the right to cut and the right to trim) and one dependent right (the right to remove what is cut and trimmed). The missing comma cannot yield the second reading. For one thing, giving the comma significance means reading the third word ("remove") to modify only the word not set off by a comma ("trim"). On that interpretation, Ohio Edison can remove what it trims, but not what it cuts. That is quite absurd; property easements should not be read to turn on distinctions that only the most metaphysically minded barbers are qualified to draw. The only way to avoid *this* problem is by creating another: the Seventh District would rewrite the phrase to give Ohio Edison rights to "cut [and remove, and] trim and remove." An interpretation that requires so much rewriting is no interpretation at all.

2. Because the Seventh District's reading is indefensible, its reading does not show that the easements are ambiguous. To be sure, the parties dispute the easements' meaning. But mere disagreement about the meaning of words in a contract does not imply ambiguity. *Tattletale Portable Alarm Sys. v. MAF Prods*, No. 2:14-cv-00574, 2016 U.S. Dist. LEXIS 128814, at *18 (S.D. Ohio Sept. 21, 2016). Because the easements are *not* ambiguous,

the Seventh District committed error by considering parol evidence. *Shifrin v. Forest City Enters., Inc.*, 64 Ohio St. 3d 635, 638 (1992).

Regardless, the Seventh District erred in its approach to resolving the easements' supposed ambiguity. In particular, the Seventh District erred by looking beyond the text of the easements themselves. App.Op. ¶¶20–21. The original parties executed the easements in 1948. The Seventh District took this to mean that the only permissible methods of removing vegetation today are those that the parties to the easements would have contemplated in 1948. That is wrong. An easement is not a time capsule that forever anchored to a single point in time. So, “in the absence of specific language to the contrary, the easement holder ‘is entitled to vary the mode of enjoyment and use of the easement by availing himself of modern inventions if by doing so he can more freely exercise the purpose for which the grant was made.’” *Crane Hollow Inc. v. Marathon Ashland Pipe Line, LLC*, 138 Ohio App.3d 57, 67 (4th Dist. 2000) (quoting *Ohio Oil Gathering Corp. II v. Shrimplin*, No. 89-CA-20, 1990 WL 108737, at *2 (5th Dist. July 23, 1990)); *Regan v. Sturges*, 2016-Ohio-8226 ¶19 (11th Dist.) (same); *Andrews v. Columbia Gas Transmission Corp.*, 544 F.3d 618, 624 (6th Cir. 2008) (same).

Consistent with that principle, courts have routinely found that an easement holder is allowed to employ modern technology and methods when carrying out the purpose of an easement. The Fifth District held in *Oil Gathering Corp. II*, for example, that an easement holder could use modern machines and practices when maintaining an

easement, even if the modern means were more destructive than the means used when the easement was executed in 1924. 1990 WL 108737, at *2–3. And the Sixth District held in *Joseph Bros. Co., LLC v. Dunn Bros., Ltd.*, that an easement holder was allowed to replace a static sign with a more modern electronic display. 2019-Ohio-4821 ¶59 (6th Dist.).

It therefore does not matter whether or not the drafters of the easements in 1948 anticipated the widespread adoption of herbicides in the twenty-first century. As discussed above, *see* 9–11, the easements give Ohio Edison the power to remove vegetation and other obstructions from its right-of-way. And because the easements do not limit that power in any way, it makes no difference whether Ohio Edison removes vegetation with a shovel, backhoe, or by spraying herbicide. Whatever method it chooses, it is still acting within the scope of the power that the easements give it.

CONCLUSION

The Court should reverse the judgment of the Seventh District.

Respectfully submitted,

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I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellant Ohio Edison Company was served this 29th day of June, 2023, by e-mail on the following:

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