

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA**

OLIVE OIL, LLC, :  
 :  
 Plaintiff-Appellant, :  
 : No. 112181  
 v. :  
 :  
 THE CLEVELAND ELECTRIC :  
 ILLUMINATING COMPANY, :  
 :  
 Defendant-Appellee. :

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**JOURNAL ENTRY AND OPINION**

**JUDGMENT: VACATED AND REMANDED**  
**RELEASED AND JOURNALIZED: July 20, 2023**

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Civil Appeal from the Cuyahoga County Court of Common Pleas  
Case No. CV-19-912282

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***Appearances:***

Law Office of Matthew S. Romano, LLC and Matthew S.  
Romano, *for appellant.*

Benesch, Friedlander, Coplan & Aronoff, L.L.P., Brian N.  
Ramm, and Justin L. Monday, *for appellee.*

MARY EILEEN KILBANE, J.:

{¶ 1} Plaintiff-appellant Olive Oil, LLC (“Olive Oil”) appeals from the trial court’s judgment granting defendant-appellee The Cleveland Electric Illuminating Company’s (“CEI”) motion for partial summary judgment, denying Olive Oil’s

motion for leave, and dismissing the case pursuant to Civ.R. 41(A)(2). For the reasons that follow, we vacate the trial court's order dismissing the case and remand.

### **Factual and Procedural History**

{¶ 2} This case began in 2017 and has a long and convoluted procedural history; this is the second appeal in the case.

{¶ 3} Olive Oil is an Ohio limited liability company solely owned and operated by Mike Gantous ("Gantous"). Olive Oil owns real estate located at 130 Front Street ("the property") in Berea, Ohio. The property includes residential and commercial property, including Mike's Bar & Grill, a restaurant owned by another company of Gantous's, J.A.M.S., L.L.C. The property also includes a parking lot situated between the buildings and West Street.

{¶ 4} Since at least 1987, and until 2017, CEI ran power lines over the southeast corner of the parking lot, between a pole on West Street and a pole on the south side of School Street ("old wires"). In 2017, because of a development project involving other entities, CEI moved the pole from the south side of School Street to the public right-of-way on the north side of the street. Moving the pole across the street caused the wires strung between it and the pole on West Street ("new wires") to occupy a larger portion of space over Olive Oil's parking lot. Gantous did not consent to having the new wires span over his property, and litigation ensued.

{¶ 5} Olive Oil initially filed a complaint against CEI in November 2017; due to an issue with trial witnesses, Olive Oil voluntarily dismissed this complaint

without prejudice on February 25, 2019. On March 8, 2019, Olive Oil filed a complaint against CEI.<sup>1</sup>

{¶ 6} On October 11, 2019, CEI filed a motion for summary judgment as to all of Olive Oil's claims and a separate motion for summary judgment as to Olive Oil's request for punitive damages and attorney fees. The trial court denied both motions.

{¶ 7} The case proceeded to a jury trial on January 27, 2020. Olive Oil presented its case-in-chief and rested. CEI then moved for a directed verdict on Olive Oil's claims for violations of R.C. 2307.60 and 2307.61(A)(1), tortious interference, unjust enrichment, civil conspiracy, quiet title, injunctive relief, trespass, and spoliation, as well as its request for attorney fees and punitive damages.

{¶ 8} The trial court granted directed verdicts on all of Olive Oil's claims except those for declaratory judgment and injunctive relief. The trial proceeded and CEI presented its case-in-chief. The trial court ultimately dismissed Olive Oil's declaratory judgment and injunctive relief claims pursuant to Civ.R. 41(B) for failure to prosecute.

{¶ 9} Olive Oil appealed, and CEI filed a cross-appeal. This court affirmed in part, reversed in part, and remanded the case back to the trial court. *Olive Oil, L.L.C. v. Cleveland Elec. Illum. Co.*, 8th Dist. Cuyahoga No. 109553, 2021-Ohio-

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<sup>1</sup> The complaint named three additional entities as defendants; none of those defendants are a party to this appeal.

2309 (“*Olive Oil I*”). Specifically, this court found that it was error for the trial court to dismiss Olive Oil’s trespass claim on the basis that Olive Oil failed to establish damages because the failure to prove damages was not fatal to Olive Oil’s trespass claim. *Id.* at ¶ 15. This court stated that there was evidence that CEI had acquired a prescriptive easement for the old wires running over Olive Oil’s property and thus remanded the case “for determinations of whether CEI acquired a prescriptive easement, whether the new wires impermissibly exceed the scope of any such easement and thereby constitute a trespass on Olive Oil’s property and if so, the measure of damages that result from the trespass.” *Id.* at ¶ 18. This court affirmed the directed verdict on Olive Oil’s civil conspiracy claim and statutory claims pursuant to R.C. 2307.60 and 2307.61. *Id.* at ¶ 25 and 31.

**{¶ 10}** With respect to the trial court’s dismissal for failure to prosecute Olive Oil’s declaratory judgment action, this court found that although the trial court erred in dismissing the claim for failure to prosecute, the error was harmless to the extent that the claim, itself, was outside the scope of the Declaratory Judgment Act. *Id.* at ¶ 36.

**{¶ 11}** Finally, this court overruled both parties’ assignments of error and cross-assignments of error relating to the denials of their respective motions for summary judgment, holding that the subsequent jury trial rendered any error in denying the motions moot. *Id.* at ¶ 54.

**{¶ 12}** On remand, on November 11, 2021, Olive Oil filed a motion for leave to take limited discovery on damages. Olive Oil argued that discovery should be

permitted because such evidence would be material in establishing the value of damages and because the relevant information and evidence relating to damages was created only after Olive Oil was permitted to take discovery in these proceedings.

**{¶ 13}** On November 12, 2021, CEI filed a motion for leave to file a motion for partial summary judgment as to Olive Oil's claim for punitive damages.

**{¶ 14}** On November 18, 2021, CEI filed a brief in opposition to Olive Oil's motion for leave to conduct additional discovery. The same day, Olive Oil filed a motion for leave to file a reply brief in support of its motion for leave to conduct additional discovery.

**{¶ 15}** On December 7, 2021, the trial court granted Olive Oil's motion for leave to file a reply brief, denied Olive Oil's motion for leave to conduct additional discovery, and granted CEI's motion for leave to file a motion for partial summary judgment.

**{¶ 16}** On January 6, 2022, CEI filed a motion for partial summary judgment as to Olive Oil's claims for punitive damages and attorney fees. On February 3, 2022, Olive Oil filed a brief in opposition to CEI's motion for partial summary judgment. On February 14, 2022, CEI filed a reply brief in support of its motion for partial summary judgment.

**{¶ 17}** On April 1, 2022, the trial court granted CEI's motion for partial summary judgment.

**{¶ 18}** The parties proceeded to prepare for trial on the remaining issue of trespass according to this court's remand.

**{¶ 19}** On November 9, 2022, the trial court issued the following journal entry:

87 Dis. W/O Prej. — Final

Trial preparation hearing held on 11/04/2022. All parties appeared with counsel and discussed the upcoming trial. Rather than have a jury trial only on the issue of nominal damages, the court hereby dismisses this matter without prejudice pursuant to Ohio Civ.R. 41(A)(2), to allow plaintiff to exercise its appellate right to appeal this court's order, dated 04/01/2022. This dismissal is without prejudice, preserving plaintiff's ability to refile the instant matter if necessary. Final. There is no just cause for delay.

It is so ordered.

Pursuant to Civ.R. 58(B), the Clerk of Courts is directed to serve this judgment in a manner prescribed by Civ.R. 5(B). The clerk must indicate on the docket the names and addresses of all parties, the method of service, and the costs associated with this service.

**{¶ 20}** On November 30, 2022, Olive Oil filed a timely notice of appeal. Olive Oil raises three assignments of error for our review:

I. The trial court's order granting CEI's motion for partial summary judgment against punitive damages and attorney's fees is reversible error.

II. The trial court's order denying Olive Oil's motion for leave to take limited discovery on damages is reversible error.

III. The trial court's order of dismissal pursuant to Ohio Civ.R. 41(A)(2) is reversible error.

**{¶ 21}** On March 28, 2023, this court ordered supplemental briefing as follows:

The trial court's April 1, 2022 order granted the defendant's motion for summary judgment on plaintiff's claims for punitive damages and attorney's fees, as well as disallowing new evidence of actual damages. On November 9, 2022, the trial court dismissed the matter without prejudice pursuant to Civ.R. 41(A)(2) and held there is not just reason for delay so that an appeal could be taken. This court orders the parties by April 11, 2023, to brief whether a final, appealable order is presented, including but not limited to (1) whether adding Civ.R. 54(B) language to the April 1, 2022 order rendered it a final, appealable order; (2) whether a dismissal without prejudice pursuant to Civ.R. 41(A)(2) may be a final, appealable order; and (3) whether combination of the two presented a final, appealable order. Notice issued.

{¶ 22} Both parties filed supplemental briefs on April 11, 2023.

### **Legal Analysis**

{¶ 23} We begin by reiterating the convoluted procedural posture of this case; in an apparent attempt to preserve Olive Oil's rights, the trial court dismissed the case without prejudice to allow Olive Oil to appeal the trial court's April 1, 2022 summary judgment decision on damages. The April 1, 2022 journal entry is not a final appealable order, and the trial court's addition of Civ.R. 54(B) language to its subsequent journal entry dismissing the case did not somehow convert the April 1, 2022 journal entry into a final appealable order.

{¶ 24} Here, although the trial court did not dismiss Olive Oil's claims with prejudice, because Olive Oil had previously voluntarily dismissed its complaint and then refiled it under Ohio's savings statute, the trial court's dismissal without prejudice, in effect, functioned as a dismissal with prejudice, "bar[ring] [plaintiff's] ability to ever re-file the case." *Whipple v. Estate of Prentiss*, 2020-Ohio-2825, 154 N.E.3d 550, ¶ 15 (8th Dist.), citing *Vaught v. Pollack*, 8th Dist. Cuyahoga No.

103819, 2016-Ohio-4963, ¶ 13 (“A party can use the savings statute to refile a case one time only.”) Therefore, we apply a heightened abuse of discretion standard to the trial court’s dismissal. *Id.*, citing *St. Vincent Charity v. Michael Paluscsak*, 8th Dist. Cuyahoga No. 108641, 2020-Ohio-1501, ¶ 23, 26-27.

**{¶ 25}** In *Olive Oil I*, this court remanded the case to the trial court with a special mandate to carry our judgment into execution. Specifically, we remanded “for determinations of whether CEI acquired a prescriptive easement, whether the new wires impermissibly exceed the scope of any such easement and thereby constitute a trespass on Olive Oil’s property and if so, the measure of damages that result from the trespass.” *Olive Oil I* at ¶ 18. The trial court’s dismissal of the case following this remand was entered specifically to avoid having a trial “only on the issue of nominal damages.” Because the trial court’s dismissal was entered in contravention of the special mandate from this court, we find that the dismissal was an abuse of discretion.

**{¶ 26}** Accordingly, we vacate the trial court’s November 9, 2022 order dismissing the case and remand the case for a determination of the foregoing issues outlined in the special mandate in *Olive Oil I*. The trial court received a mandate from this court that was not carried out. Therefore, the case is remanded for determinations of whether CEI acquired a prescriptive easement, whether the new wires impermissibly exceed the scope of any such easement and thereby constitute a trespass on Olive Oil’s property and if so, the measure of damages that result from the trespass.



{¶ 27} Judgment vacated and remanded.

It is ordered that costs herein taxed are to be split amongst the parties.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MARY EILEEN KILBANE, JUDGE

EILEEN A. GALLAGHER, P.J., and  
EILEEN T. GALLAGHER, J., CONCUR