[Cite as *Ohio Edison Co. v. Cubick*, 2020-Ohio-7027.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

OHIO EDISON COMPANY,

Plaintiff-Appellee,

v.

KAREL CUBICK et al.,

Defendants-Appellants.

OPINION AND JUDGMENT ENTRY
Case No. 20 MA 0029

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2017 CV 1035

BEFORE:
Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
Affirmed.

Atty. John Dellick, Harrington, Hoppe & Mitchell, Ltd, 26 Market Street, Suite 1200, P.O. Box 6077, Youngstown, Ohio 44501 for Plaintiff-Appellee and

Atty. J. Thompson, *Atty. James Messenger*, *Atty. Jerry Bryan, Atty. Jerry Krzys*, Henderson, Covington, Messenger, Newman, 6 Federal Plaza Central, Suite 1300, Youngstown, Ohio 44503, for Defendants-Appellants.

Dated: December 24, 2020

Robb, J.

{¶1} Defendants-Appellants Karel Cubick, William Hendricks, Laguna, LLC, Robert Wentzel, Jr., and Diane Wentzel appeal the decision of Mahoning County Common Pleas Court overruling their objections to the magistrate's decision and adopting the magistrate's decision denying their motion for frivolous conduct. The issue in this case is whether that determination is correct. For the reasons expressed below, the trial court's decision is affirmed.

Statement of the Facts and Case

{¶2} Janet Hendricks Cubick and Robert Cubick (the Cubicks) owned property in Ellsworth Township, Mahoning County (the property) in 1959. Appellants are the successors of that interest.

{¶3} In 1959, the Cubicks granted an easement over a portion of the property to Plaintiff-Appellee Ohio Edison. The easement allowed Ohio Edison to erect transmissions lines and control vegetation within the easement. The easement read:

> The easement and rights herein granted 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, and the right of ingress and egress as mutually agreed upon, over and across said premises for access to and from said right-of-way during the period of construction, and the right to trim, cut, remove or otherwise control at any and all times such trees, limbs, underbrush or other obstructions within or adjacent to said right-of-way as may interfere with or endanger said structures, wires or appurtenances, or their operation.

1959 Easement.

{¶4} In 1959, a dispute arose concerning the use of spray herbicides to manage vegetation. The argument as to whether herbicides could be used concerned the phrase "and the right to trim, cut, remove or otherwise control" in the easement. Specifically, the focus was on the words "otherwise control." Ohio Edison wanted to use herbicides, while Appellants did not want Ohio Edison to use herbicides. Ohio Edison brought suit against the Cubicks seeking an injunction prohibiting the Cubicks from interfering with its rights under the easement. Mahoning County Common Pleas Court, in 1960, determined the easement did not grant Ohio Edison the right to use sprays after the electric transmission lines were constructed. That decision was never appealed.

{¶5} Both parties agree that in the 1959 lawsuit the issue of whether the Public Utility Commission of Ohio (PUCO) had exclusive jurisdiction of the vegetation issue was not raised to or addressed by the trial court.

{¶6} In 2017, Ohio Edison learned Appellant Cubick believed the 1959 lawsuit prevented Ohio Edison from using herbicides on his property. This resulted in Ohio Edison filing the instant lawsuit. 4/24/17 Complaint; 11/30/17 Amended Complaint. In the complaint, Ohio Edison asserted the trial court in the 1959 lawsuit did not have jurisdiction to determine the issue of vegetation management. It contended that issue was within the exclusive jurisdiction of the PUCO. Ohio Edison was seeking the right to use sprays to control vegetation within the right-of-way granted by the easement.

{¶7} Appellants filed an answer and counterclaim. 7/5/17 Answer and Counterclaim. They asserted res judicata barred the 2017 complaint because the issue was already decided in 1960 and was not appealed. In the counterclaim, Appellants asserted the act of Ohio Edison filing the complaint was frivolous conduct and they were entitled to damages.

{¶8} Ohio Edison answered the counterclaim denying its conduct was frivolous. 10/11/17 Reply to Counterclaim; 6/14/18 Reply to Counterclaim.

{¶9} Appellants filed summary judgment motions on the complaint and counterclaim. 10/18/17 Appellant Cubick and Hendricks' Motion for Summary Judgment;

3/27/18 Appellant's Motion for Summary Judgment on Counterclaim; 5/24/18 Appellant Wentzel Motion for Summary Judgment.

{¶10} Ohio Edison voluntarily dismissed the complaint and filed a motion in opposition to summary judgment on the counterclaim. 6/14/18 Notice of Voluntary Dismissal; 6/14/18 Motion in Opposition to Summary Judgment on Counterclaim.

{¶11} The magistrate then ordered mediation on the counterclaim. Following failed mediation, Appellants filed another motion in support of frivolous conduct. 9/7/18 Motion. Ohio Edison filed a motion in opposition to frivolous conduct. 9/7/18 Motion.

{¶12} Considering the arguments on the counterclaim for frivolous conduct, the court denied Appellants' and Appellee's motions for summary judgment on that issue holding that the allegations of frivolous conduct were not properly addressed by way of a motion for summary judgment. 2/14/19 J.E. The trial court set the matter for an evidentiary hearing. 2/14/19 J.E.

{¶13} The evidentiary hearing was held on March 13, 2019. Following the hearing, the magistrate denied Appellants' motion for frivolous conduct. 12/10/19 Magistrate Decision. It explained under R.C. 2323.51, an attorney fees award is allowed for a party who is subjected to frivolous conduct. 12/10/19 Magistrate Decision. The test for frivolous conduct is whether no reasonable lawyer would have brought the action in light of the existing law. 12/10/19 Magistrate Decision. The magistrate concluded that given the arguments and the evolving law on the exclusive jurisdiction of PUCO regarding vegetation management, the filing of the 2017 compliant does not rise to the level of frivolous conduct even though there was a 1960 decision from Mahoning County Common Pleas Court that was not appealed. 12/10/19 Magistrate Decision.

{¶14} Appellants objected to the Magistrate Decision. 12/11/19 Objections. The trial court held a hearing on the objections on January 23, 2020. Following the hearing, the trial court overruled the objections and adopted the magistrate's decision. 2/10/20 J.E. It stated, "In consideration of the law and argument presented by the parties, this Court finds that the filing of this action by Plaintiff, challenging the jurisdiction of this Court, whether Plaintiff was correct or not, does not rise to the level of frivolous conduct. This

Court cannot conclude that no reasonable lawyer would have brought the action in light of the existing law." 2/10/20 J.E.

{¶15} Appellants appealed that decision.

First Assignment of Error

"The trial court erred as a matter of law in its February 10, 2020 Judgment Entry by failing to find that Ohio Edison engaged in frivolous conduct, as defined in R.C. 2323.51(A)(2)(a)(ii), because Ohio Edison's claims are clearly barred by res judicata."

{¶16} Frivolous conduct and the ability to award attorney fees is governed by R.C. 2323.51. Section (B)(1) states that within 30 days after the entry of a final judgment in a civil action or appeal, a party adversely affected by frivolous conduct may file a motion for court costs, reasonable attorney's fees, and for other reasonable expenses that were incurred in the litigation. R.C. 2323.51(B)(1). Frivolous conduct is defined as conduct of a party to a civil action that satisfies any of the following:

> (i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.
>
> (ii) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.
>
> (iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
>
> (iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.

R.C. 2323.51(A)(2).

{¶17} Appellants assert Ohio Edison's conduct is frivolous under either (i) or (ii). Appellants argue the trial court's decision that there was no frivolous conduct is incorrect because the issue raised and litigated in the 1959 lawsuit is the same issue raised in the 2017 complaint. Appellants contend the claims raised now are barred by res judicata's concept of collateral estoppel. They also argue the law is clear; the issue of what the language of the easement means is a matter to be decided by the trial court, not the PUCO.

{¶18} Appellee counters by arguing the trial court's decision was correct. It asserted the trial court lacked subject matter jurisdiction over the vegetation/easement issue raised in the 1959 lawsuit. Thus, the decision rendered by the common pleas court in the 1959 lawsuit was void. It asserts the vegetation/easement issue falls within the exclusive jurisdiction of the PUCO, and the trial court did not have subject matter jurisdiction to decide the issue raised in the 1959 lawsuit. It specifically cites to current decisions from the Ohio Supreme Court and this court on the evolving law of PUCO's exclusive jurisdiction.

{¶19} The trial court determined Ohio Edison's action of filing the complaint challenging the jurisdiction of the common pleas court in 1959 did not rise to the level of frivolous conduct. 2/10/20 J.E. The trial court stated it could not conclude that no reasonable attorney would have brought the action in light of the existing law. 2/10/20 J.E.

{¶20} Appellate courts have indicated no single standard of review applies in R.C. 2323.51 cases; either a de novo or an abuse of discretion standard of review is applied depending on the arguments and findings. *U.S. Bank Tr., N.A. v. Watson*, 3d Dist. Paulding No. 11-19-09, 2020-Ohio-3412, ¶ 64; *Brisco v. U.S. Restoration & Remodeling, Inc.*, 10th Dist. Franklin No. 18AP-109, 2019-Ohio-5318, ¶ 13; *Keith-Harper v. Lake Hosp. Sys., Inc.*, 2017-Ohio-7361, 96 N.E.3d 823, ¶23 (11th Dist.). In order to determine the standard of review, we must consider "'whether the trial court's determination resulted from factual findings or a legal analysis.'" *Breen v. Total Quality Logistics*, 10th Dist. Franklin No. 16AP-3, 2017-Ohio-439, ¶ 11. "When the question regarding what

constitutes frivolous conduct calls for a legal determination, such as whether a claim is warranted under existing law, an appellate court is to review the frivolous conduct determination de novo, without deference to the trial court's decision." *Watson*, 2020-Ohio-3412 at ¶ 64, citing *Natl. Check Bur. v. Patel*, 2d Dist. Montgomery No. 21051, 2005-Ohio-6679, ¶ 10. *See also Brisco*, 2019-Ohio-5318 at ¶ 13 (Legal questions are reviewed de novo.). However, if there is no disputed issue of the law and the question is purely factual, an abuse of discretion standard of review is applied. *Watson*, 2020-Ohio-3412 at ¶ 64, citing *Riverview Health Inst., L.L.C. v. Kral*, 8th Dist. Cuyahoga No. 24931, 2012-Ohio-3502, ¶ 33. *See also Brisco*, 2019-Ohio-5318 at ¶ 13 (Trial courts' factual determinations will not be disturbed where the record contains competent, credible evidence to support its determinations.). Likewise, the ultimate decision whether to award sanctions under R.C. 2323.51 will not be reversed absent a showing of an abuse of discretion. *Watson* at ¶ 64, citing *State ex rel. Bell v. Madison Cty. Bd. of Commrs.*, 139 Ohio St.3d 106, 2014-Ohio-1564, 955 N.E.2d 995, ¶ 10. *See also Brisco* at ¶ 13.

{¶21} Frivolous conduct as defined under R.C. 2323.51 is viewed objectively, rather than subjectively. *Olenchick v. Scramling*, 11th Dist. Lake No. 2020-L-014, 2020-Ohio-4110, ¶ 46. It must involve egregious conduct; merely winning a legal battle or proving factual assertions incorrect is not enough. *Id*. R.C. 2323.51 must be carefully applied so "legitimate claims are not chilled." *Burchett v. Larkin,* 192 Ohio App.3d 418, 2011–Ohio–684, 949 N.E.2d 516, ¶ 20 (4th Dist.). The statute was not intended to punish misjudgment or tactical error. *Id*. Rather, it was designed to chill egregious, overzealous, unjustifiable, and frivolous action. *Id.* Consequently, the test is whether no reasonable lawyer would have brought the action in light of the existing law; a claim is frivolous if it is absolutely clear under the existing law that no reasonable lawyer could argue the claim. *Ohio Power Co. v. Ogle,* 4th Dist. Hocking No.12CA14, 2013-Ohio-1745, ¶ 30.

{¶22} Here, the arguments that res judicata bars the 2017 suit are legal arguments, not factual arguments.

{¶23} In Ohio, the doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata, and issue preclusion, also known as collateral estoppel. *State ex rel. Schachter v. Ohio Pub. Emps. Retirement Bd.,* 121 Ohio

St.3d 526, 2009-Ohio-1704, 905 N.E.2d 1210, ¶ 27. The assertion is collateral estoppel precludes the 2017 action and thus, renders the 2017 action frivolous.

{¶24} It has been explained collateral estoppel, or issue preclusion, "prevents parties or their privies from relitigating facts and issues in a subsequent suit that were fully litigated in a prior suit." *Thompson v. Wing*, 70 Ohio St.3d 176, 183, 637 N.E.2d 917 (1994). "Collateral estoppel applies when the fact or issue: (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action." *Id. See also McCabe Corp. v. Ohio Environmental Protection Agency*, 10th Dist. Franklin No. 12AP-204, 2012-Ohio-6256, ¶ 19 ("[T]he elements of issue preclusion under Ohio law are that: (1) the identical issue or fact was actually and directly at issue in a previous action; (2) the issue or fact was passed upon and determined by a court of competent jurisdiction; (3) the issue or fact was actually litigated, directly determined, and essential to the final judgment in the prior action; and (4) both actions involved the same parties, or their privies.").

{¶25} It is admitted by the parties they are either the same parties or in privity with the parties from the 1959 lawsuit. It is also undisputed the issue in the 1959 lawsuit was whether the easement allowed herbicides to be used within the easement after construction of the transmission lines. The primary issue in this case is whether the alleged lack of subject matter jurisdiction of the 1959 Mahoning County Common Pleas Court over the issues raised in the 1959 lawsuit means collateral estoppel is applicable and renders the filing of the 2017 complaint frivolous conduct.

{¶26} We have previously explained that the dismissal for lack of subject matter jurisdiction operates as a "final judgment on the merits" for collateral estoppel to preclude subsequent litigation. *Diagnostic & Behavioral Health Clinic, Inc. v. Jefferson Cty. Mental Health, Alcohol & Drug Addiction Bd.,* 7th Dist. Jefferson No. 01 JE 5, 2002–Ohio–1567, ¶ 14-16. When a common pleas court rules on the question of the scope of its own jurisdiction, that decision is final and the correctness of that determination becomes irrelevant when the time for appeal has passed. *Id*. at ¶ 14. Therefore, after the time for

appeal has lapsed, res judicata bars the argument that the common pleas court was without jurisdiction to decide issues. *Id*. We further explained in that case:

> "It is well-settled law that dismissal of a suit for lack of subject matter jurisdiction 'precluded relitigation of the same issue of subject matter jurisdiction in a second federal suit on the same claim.' *Oglala Sioux Tribe v. Homestake Mining Co.,* 722 F.2d 1407, 1411 (1983) (citing 18 C. Wright, A. Miller & E. Cooper Federal Practice and Procedure, § 4402 at 11). As the Supreme Court explained in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee:* A party that has had an opportunity to litigate the question of subject matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of *res judicata* apply to jurisdictional determinations both subject matter and personal. 456 U.S. 694,702." *Fletcher v. City of Paducah* (Aug. 23, 1990) United States Court of Appeals for the Sixth Circuit No. 89-6569, unreported.

Id. at ¶ 16.

{¶27} We then explained, "If *res judicata* could never bar a plaintiff from refiling based upon the lack of subject matter jurisdiction, a party could forum shop until they found a court to accept their case. If a party cannot cure the defect that prevents the exercise of jurisdiction over the claim, and disagrees with the trial court's decision, the proper avenue would be the appellate process." *Id.* at ¶ 18.

{¶28} Therefore, the case law is clear; if subject matter jurisdiction is litigated and decided, then res judicata does bar relitigation. The question then becomes, what is the effect if subject matter jurisdiction was not raised, analyzed, or a decision expressly rendered on it?

{¶29} The statements in our *Diagnostic & Behavioral Health Clinic, Inc.* opinion imply res judicata would not bar relitigation when subject matter jurisdiction was not raised or expressly decided in the first case, and the issue raised in the subsequent case is whether the court that first rendered a decision had subject matter jurisdiction.

Furthermore, the Ohio Supreme Court has explained res judicata will only apply where the issue was specifically decided in the prior proceeding. *State ex rel. Kroger Co. v. Indus. Comm.,* 80 Ohio St.3d 649, 651, 687 N.E.2d 768 (1998) (Case did not deal with the issue of subject matter jurisdiction). The Tenth Appellate District in a mandamus action concerning an Industrial Commission decision concluded when a subject matter jurisdiction question is not raised and the order makes no reference to the subject matter jurisdictional question, it will not conclude that subject matter jurisdiction was fully litigated. *State ex rel. Gen. Elec. Co. v. Indus. Comm.*, 10th Dist. Franklin No. 06AP-648, 2007-Ohio-3293, ¶ 16.

{¶30} Here, the issue of whether PUCO or the trial court had jurisdiction over the vegetation control easement language was not raised or addressed in the 1959 lawsuit. Thus, based on the above analysis, res judicata does not bar the 2017 lawsuit.

{¶31} That conclusion, however, does not necessarily mean the 2017 action was not frivolous. The issue then is, what is the law on the easement language and herbicides, and is it clear the trial court has jurisdiction over that issue? If it is questionable as to whether or not the trial court had subject matter jurisdiction in the 1959 lawsuit, then the trial court's decision was correct – Ohio Edison's filing of the 2017 action would not be frivolous and the trial court's decision would be correct. However, if there is no basis in law to find the common pleas court did not have subject matter jurisdiction over the issue in the 1959 lawsuit, the filing of the 2017 action, even though subject matter jurisdiction was not raised in 1959, would still mean the act of filing the suit amounted to frivolous conduct. Therefore, if res judicata did not bar the 2017 action, the question is, what is the status of the law on the issue of whether the language of the easement prohibits the use of herbicides within the easement? Is that issue to be decided by the trial court or is that issue to be decided by PUCO?

{¶32} Ohio Edison claims current case law indicates the easement/vegetation management issue raised in the 1959 lawsuit would now fall under the exclusive jurisdiction of the PUCO. It claims, at the minimum, the current case law makes it questionable as to who would have jurisdiction over the issue.

{¶33} The issue of who had jurisdiction, the trial court or PUCO, is often disputed and results in appeals. Depending on the parties' position, they take differing positions of whether PUCO or the trial court has jurisdiction. Therefore, despite Appellants' assertions, there are cases where Ohio Edison or a utility company has argued the trial court has jurisdiction; and there are situations where it has argued the PUCO has exclusive jurisdiction. Therefore, any assertion by Appellants that we should only be bound by what Ohio Edison has asserted in some of its past cases is without merit.

{¶34} The exclusive jurisdiction of PUCO "includes matters * * * such as rates and charges, classifications, and service." *Valentin v. Ohio Edison*, 7th Dist. Mahoning No. 11 MA 93, 2012-Ohio-2437, ¶ 9, citing *Higgins v. Columbia Gas of Ohio, Inc.*, 136 Ohio App.3d 198, 201, 736 N.E.2d 92 (7th Dist.2000). The Ohio Supreme Court has indicated the PUCO has broad jurisdiction over service related matters and that jurisdiction does not affect the common pleas court's jurisdiction over pure tort and contract claims against utilities. *Corrigan v. Illum. Co.*, 122 Ohio St.3d 265, 2009-Ohio-2524, 910 N.E.2d 1009, ¶ 9, quoting *State ex rel. Ohio Edison Co. v. Shaker*, 68 Ohio St.3d 209, 211, 625 N.E.2d 608 (1994). In determining whether the claims raised are within the exclusive jurisdiction of the PUCO or are instead pure tort or contract claims, the court "must review the substance of the claims to determine if service-related issues are involved." *Corrigan* at ¶ 10. Accordingly, "[c]asting 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 relating to service, a claim which only the PUCO has jurisdiction to resolve." *Higgins,* 136 Ohio App.3d at 202.

{¶35} The Ohio Supreme Court *Corrigan* case dealt with the removal of a tree located within the utility's easement. The plaintiff in that case sued the electric utility to prevent the removal of the tree. The Supreme Court used a two-part test (sometimes called the *Allstate* test) to determine if the PUCO had exclusive jurisdiction over the issue. The first part asks, "is PUCO's administrative expertise required to resolve the issue in dispute?" *Corrigan*, 122 Ohio St.3d 265 at ¶ 11, quoting *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.,* 119 Ohio St.3d 301, 2008-Ohio-3917, 893 N.E.2d 824, ¶ 12. The second part asks, "does the act complained of constitute a practice normally authorized by the

utility?" *Id*. "If the answer to either question is in the negative, the claim is not within PUCO's exclusive jurisdiction." *Corrigan* at ¶ 12, quoting *Allstate* at ¶ 13.

{¶36} In *Corrigan*, under the first part of the test, the Ohio Supreme Court considered provisions of the Ohio Administrative Code requiring utility companies to maintain their transmission equipment, which included developing a program for right-of-way vegetation control. *Corrigan* at ¶ 15, quoting Ohio Adm. Code 4901:1-10-27(E)(1)(f). The court then concluded the decision to remove a tree is governed by a utility company's vegetation-management plan, which is regulated by the PUCO. *Corrigan* at ¶ 15. Furthermore, "PUCO's administrative expertise is required to resolve the issue of whether removal of a tree is reasonable." *Id*. As to the second part of the test, the *Corrigan* Court held, "[v]egetation management is necessary to maintain safe and reliable electrical service." *Id.* at ¶ 16. Thus, the *Corrigan* court answered both questions in the affirmative and determined the issue raised was within the exclusive jurisdiction of the PUCO.

{¶37} Since *Corrigan*, appellate courts have addressed vegetation issues and whether the claims raised fall within the exclusive jurisdiction of the PUCO or whether the claims are pure tort or contract and, thus, within the jurisdiction of the common pleas court. The common question asked concerns cutting down trees/bushes or trimming bushes/trees within the easement. That issue has been determined to be within the exclusive jurisdiction of the PUCO. *See e.g.*, *Mihiylov v. Ohio Edison Co.*, 9th Dist. Summit No. 28140, 2017-Ohio-915, ¶ 8 (determining how much of a tree must be trimmed to control the vegetation in a utility's right-of-way is a dispute within the exclusive jurisdiction of PUCO); *Schad v. Ohio Edison Co.*, 5th Dist. Ashland No. 09-COA-024, 2010-Ohio-585, ¶ 21 (challenging the decision to remove bushes is not a challenge to the easement, but rather is a challenge to Ohio Edison's vegetation management program).

{¶38} Similar to removing trees, the Tenth Appellate district determined damage caused from failing to cut down a tree and from the removal of a tree after it fell was within the exclusive jurisdiction of the PUCO. *Pacific Indemnity Co. v. Deems*, 2020-Ohio-250, 143 N.E.3d 597, *appeal not allowed sub nom. Pacific Indemn. Co. v. Deems*, 158 Ohio St.3d 1523, 2020-Ohio-3018, 145 N.E.3d 313 (10th Dist.). That case involved a tree falling during a windstorm and causing damage to a neighbor's property. The landowner

had warned the neighbors and the power company the tree was precariously hanging over power lines. During the removal of the tree, the utility company allegedly caused more damage to the property and the landowner sued for damages. The appellate court affirmed the trial court's decision that the claims raised fell within the exclusive jurisdiction of PUCO.

{¶39} The Tenth Appellate District answered the first part of the test in the affirmative, and held there was no error in the trial court's determination a utility company's decision to remove a tree involves the expertise of the PUCO, and the manner and methods in which to remove a fallen tree from a power line to restore electric service implicates the issue of whether the response by appellees complied with industry standards and guidelines approved by the PUCO. *Pacific Indemnity Co.* at ¶ 15-18. Under the second part of the test, the Tenth Appellate District also answered the question in the affirmative. It relied heavily on the Supreme Court's statement in *Corrigan* that "[v]egetation management is necessary to maintain safe and reliable electrical service." *Pacific Indemnity Co.* at ¶ 19, citing *Corrigan* at ¶ 16. The Tenth Appellate District found no fault with the trial court's reliance on the utility company's reliance on experts to determine whether to remove a tree; reliance on experts in that area was a practice normally authorized by the utility. *Pacific Indemnity Co.* at ¶ 20. It also concluded the act of removing the tree to restore electrical service is an emergency response by a utility and constitutes a practice normally authorized by the utility. *Id*. at ¶ 21.

{¶40} In 2019, our court was asked to decide if a common pleas court correctly determined the PUCO had exclusive jurisdiction over the herbicide/vegetation issue. *Corder v. Ohio Edison Co.*, 7th Dist. Harrison No. 18 HA 0002, 2019-Ohio-2639, ¶ 1, *review allowed,* 157 Ohio St.3d 1439, 2019-Ohio-4211, 132 N.E.3d 700. At issue in that case was language in four easements that allowed the utility to "cut, trim and remove" vegetation within the easement. We determined the word "remove" in that phrase was ambiguous. *Id*. at ¶ 41-44. "Remove" could include the use of herbicides to get rid of the vegetation. *Id*. at ¶ 41. Or, the phrase used could mean the vegetation could be cut and removed, or trimmed and removed, and in that context "remove" meant to haul away after cutting or trimming. *Id*. at ¶ 41. Therefore, based on the language of the easement, we

determined the terms of the easements limit the utility's authority to "cut, trim and remove" underbrush and given that "remove" is subject to multiple interpretations, the term is ambiguous. *Id*. at ¶ 51. We remanded the matter and limited the remand to the interpretation of the ambiguous term. *Id*. at ¶ 52. We indicated if the trial court concluded the easements granted the utility the authority to use herbicide, then the PUCO has exclusive jurisdiction over the reasonableness of the utility's decision. *Id*.

{¶41} The easements in the *Corder* case and the underlying case are similar; the language in the easements is only slightly different. The focus in the 1959 lawsuit was on the language "otherwise control." That said, the similarity between the *Corder* case and the case at hand is that both courts were asked what the language of the easement meant.[1]

{¶42} *Corder* was appealed and accepted for review by the Ohio Supreme Court. Recently, the Court released its decision; it affirmed our decision in part. *Corder v. Ohio Edison Co.*, __ Ohio St.3d __, 2020-Ohio-5220, ¶ 2-4. The Court once again explained that the PUCO has exclusive jurisdiction over most matters relating to public utilities, including the rates charged and the services provided. *Id*. at ¶ 2. However, the Court emphasized, "the PUCO is not a court of general jurisdiction, and it may not adjudicate claims involving competing property rights, including those asserted by or against a public utility." *Id*. It reasoned that "the determination of the scope of an easement does not depend on the PUCO's exercise of its administrative expertise or its review of a public utility's vegetation-management program, but rather requires a court to interpret and apply the language of the instrument creating the easement." *Id*. "Interpreting legal instruments is a judicial function, even when the property rights of a public utility are at stake." *Id*. The Supreme Court affirmed in part our decision and concluded that the common pleas court has subject matter jurisdiction to determine whether the use of herbicides to control vegetation is within the scope of the public utility's easement. *Id*. at

[1] In the 1959 case, the language of a letter that was sent during the negotiations of the easement was considered when determining what the easement language meant. That letter is not a part of the record in this case, but parts of it are referenced in other materials that are part of the record.

We do not need to get into the issue of what the letter or easement means because that issue was not ruled upon in the 2017 case. Ohio Edison voluntarily dismissed the action.

¶ 3 (The Supreme Court also reversed in part our decision finding the language of the easement was ambiguous; it stated we went beyond the narrow issue presented.).

{¶43} The Ohio Supreme Court's decision in *Corder* indicates the common pleas court, not the PUCO, determines what the language used in the easement means. The trial court in 1959 determined the language used in the easement did not permit the use of herbicides after construction of the transmission lines.

{¶44} The *Corder* decision going forward indicates that if Ohio Edison files another suit similar to this one in the common pleas court against Appellants, then that conduct could constitute frivolous conduct. However, at the time the 2017 lawsuit was filed by Ohio Edison, *Corder* was not decided. The Ohio Supreme Court's acceptance to review *Corder* indicates that the area of law needed clarification. Furthermore, a review of the other cases with easements and vegetation control also demonstrates the nuances in this area of the law and do not necessarily indicate the lawsuit was not warranted at the time it was filed.

{¶45} Therefore, for the above stated reasons, it cannot be concluded that the lawsuit was not warranted under existing law at the time it was filed. We cannot conclude that the filing of the 2017 lawsuit constituted frivolous conduct under R.C. 2323.51(B)(1)(ii); it cannot be concluded that no reasonable attorney would have filed the 2017 lawsuit. The trial court's decision to overrule the objections and adopt the magistrate's decision was correct.

Second Assignment of Error

"The trial court abused its discretion in its February 10, 2020 Judgment Entry by failing to discuss any undisputed facts or any relevant substantive law."

{¶46} Appellants assert the trial court made no findings of fact and conclusions of law and thus, the decision must be reversed and remanded for findings and conclusions to be made. Appellee asserts findings of fact and conclusions of law are not required under R.C. 2323.51.

{¶47} At the outset, it is noted the facts in this case are not at issue. Rather, the issues are whether res judicata applies and whether the easement/herbicide issue is a

matter within the jurisdiction of the common pleas court or the PUCO. These are legal issues.

{¶48} The Fifth Appellate District has held:

> Civ.R. 52 specifically applies when questions of fact are tried by the court without a jury. *Northern Ohio Sewer Contrs. v. Bradley Dev. Co.,* 159 Ohio App.3d 794, 825 N.E.2d 650, 2005–Ohio–1014, ¶ 22. However, Civ.R. 52 further states, in pertinent part, that "[f]indings of fact and conclusions of law required by this rule and by Rule 41(B)(2) are unnecessary upon all other motions including those pursuant to Rule 12, Rule 55 and Rule 56." Ohio courts have concluded that "when Civ.R. 52 does not require the court to issue findings of fact and conclusions of law, the court has no duty to issue them and the time for filing a notice of appeal is not tolled." See *Hamad v. Hamad,* Franklin App.No. 06AP–516, 2007–Ohio–2239, ¶ 22, quoting *Savage v. Cody–Zeigler, Inc.,* Athens App. No. 06CA5, 2006–Ohio–2760, ¶ 14. There is no authority in Ohio law for extending Civ.R. 52 to apply to R.C. 2323.51 motions, and a trial court is not required to issue findings of fact and conclusions of law with its denial of a motion for sanctions for frivolous conduct. See *Clemens v. Detail At Retail, Inc.,* Cuyahoga App.Nos. 85681 and 86252, 2006–Ohio–695, ¶ 17.

Marsh v. Deems, 5th Dist. Richland No. 07 CA 91, 2008-Ohio-3430, ¶ 19. *See also Ferron v. Video Professor, Inc.*, 5th Dist. Delaware No. 08-CAE-09-0055, 2009-Ohio-3133, ¶ 117 ("A trial court is not required to issue findings of facts and conclusions of law with its denial of a motion for sanctions for frivolous conduct.").

{¶49} Other appellate courts agree with that determination. *Clemens v. Detail At Retail, Inc.*, 8th Dist. Cuyahoga No. 85681, 2006-Ohio-695, ¶ 8-10 ("No Ohio cases have held that when ruling on sanctions a court is required to issue findings of fact and conclusions of law."), citing *Lorain v. Elbert*, 9th Dist. Lorain No. 97CA006747 (April 22, 1998); *Donnell v. Donnell*, 6th Dist. Sandusky No. S-94-031 (Sept. 22, 1995).

{¶50} Therefore, findings of fact and conclusions of law are not required. Regardless, the purpose of findings of fact and conclusions of law are to inform the parties and the appellate court of the legal and evidentiary bases for the decision. *State v. Clifford*, 1st Dist. Hamilton No. C-190586, 2020-Ohio-4129, ¶ 18. The purpose is "to aid the appellate court in reviewing the record and determining the validity of the basis of the trial court's judgment." *In re Adoption of Gibson*, 23 Ohio St.3d 170, 172, 492 N.E.2d 146 (1986). *See also Werden v. Crawford*, 70 Ohio St.2d 122, 124, 435 N.E.2d 424 (1982). In reviewing the trial court's judgment, the parties' arguments, and the fact the issues were legal issues, the judgment entry provided adequate information to aid in the appellate review of the decision. Thus, even if a more detailed judgment entry was required, reversal and remand for more indepth findings and conclusions is not warranted.

{¶51} This assignment of error is meritless.

Conclusion

{¶52} Both assignments of error lack merit. The filing of the 2017 complaint was not barred by res judicata. Furthermore, given the law at the time of the filing of the 2017 complaint, the trial court correctly concluded that Ohio Edison's conduct was not frivolous as enumerated under R.C. 2323.51. It cannot be concluded that no reasonable attorney would have filed the 2017 action. The trial court's judgment is affirmed.

Donofrio, J., concurs.

Waite, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.