

[Cite as *Schad v. Ohio Edison Co.*, 2010-Ohio-585.]

COURT OF APPEALS  
ASHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

JACOB SCHAD, JR.  
Plaintiff-Appellant

-vs-

OHIO EDISON COMPANY  
Defendant-Appellee

JUDGES:  
Hon. Julie A. Edwards, P.J.  
Hon. William B. Hoffman, J.  
Hon. Patricia A. Delaney, J.

Case No. 09-COA-024

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Ashland County Court of  
Common Pleas, Case No. 08-CIV-311

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

February 18, 2010

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

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*Hoffman, J.*

{¶1} Plaintiff-appellant Joseph Schad appeals the June 15, 2009 Judgment Entry of the Ashland County Court of Common Pleas granting summary judgment in favor of Defendant-appellee Ohio Edison Company.

#### STATEMENT OF THE FACTS AND CASE

{¶2} On December 28, 2007, the Ohio Edison Company (hereinafter “Ohio Edison”) removed ninety hemlock bushes from property owned by Appellant Jacob Schad at 1157 Co. Rd. 1356, Ashland, Ohio. There is an easement on the property in favor of Ohio Edison.

{¶3} Appellant trimmed the bushes when he was younger, and several years ago Davey Tree Service trimmed the hedge row for Ohio Edison. The bushes were approximately twelve to fifteen feet in height, and the transmission line above the hedge row measures 39.9 feet at its lowest point.

{¶4} On July 1, 2008, Jacob Schad and Georgeann Schad filed a complaint in the Ashland County Court of Common Pleas alleging conversion and intentional infliction of emotional distress against the Ohio Edison Company and Nelson Tree Service. The complaint prayed for judgment in a sum exceeding \$25,000 and for punitive damages, attorney fees and costs. Nelson Tree Service was later dismissed as a party-defendant, and an amended complaint was filed naming only Jacob Schad as plaintiff.

{¶5} Appellee Ohio Edison filed a motion for summary judgment on Appellant’s claims. Via Judgment Entry of June 15, 2009, the trial court granted summary judgment in favor of Ohio Edison.

{¶16} Appellant now appeals, assigning as error:

{¶17} “I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT ON THE AUTHORITY OF CORRIGAN V. ILLUMINATING CO., SLIP OPINION NO. 2009-OHIO-2524, AND DISMISSING PLAINTIFF’S CONVERSION ACTION WHICH DEPRIVED PLAINTIFF OF HIS CONSTITUTIONAL RIGHT TO REDRESS IN THE COURTS OF THIS STATE FOR INJURY DONE ON HIS LAND UNDER ARTICLE I, §16 OF THE CONSTITUTION OF OHIO.”

{¶18} We review Appellant’s assignment of error pursuant to the standard set forth in Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 448, 663 N.E.2d 639, 1996-Ohio-211:

{¶19} “Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274.”

{¶10} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same

standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 506 N.E.2d 212.

{¶11} The easement encumbering Appellant's property expressly grants Ohio Edison the following rights:

{¶12} "[T]he right to erect, inspect, operate, replace, repair, patrol and permanently maintain upon, over, under and along the above described right-of-way across said premises all necessary structures, wires, cables, and other usual fixtures and appurtenances used for or in connection with the transmission and distribution of electric current, including telephone and telegraph and the right of ingress and egress upon, over and across said premises for such access to and from said right-of-way and the right to trim, cut, remove or otherwise control at any and all such times such trees, limbs, underbrush or other obstacles within or adjacent to said right-of-way as may interfere with or endanger said structures, wires or appurtenances, or their operation."

{¶13} In *Corrigan v. Illuminating Co.*, 2009-Ohio-2524, the Ohio Supreme Court addressed the issued raised herein:

{¶14} "The General Assembly enacted R.C. 4901.01 et seq. to regulate the business activities of public utilities and created PUCO to administer and enforce these provisions. *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St.3d 147, 150, 573 N.E.2d 655. R.C. 4905.26 provides that PUCO shall hear complaints filed against public utilities alleging that 'any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable,

unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential.’ This ‘jurisdiction specifically conferred by statute upon the Public Utilities Commission over public utilities of the state \* \* \* is so complete, comprehensive and adequate as to warrant the conclusion that it is likewise exclusive.’ *State ex rel. N. Ohio Tel. Co. v. Winter* (1970), 23 Ohio St.2d 6, 9, 52 O.O.2d 29, 260 N.E.2d 827, quoting *State ex rel. Ohio Bell Tel. Co. v. Cuyahoga Cty. Court of Common Pleas* (1934), 128 Ohio St. 553, 557, 1 O.O. 99, 192 N.E. 787; see also *Kazmaier*, 61 Ohio St.3d at 152, 573 N.E.2d 655.

{¶15} “The broad jurisdiction of PUCO over service-related matters does not affect “the basic jurisdiction of the court of common pleas \* \* \* in other areas of possible claims against utilities, including pure tort and contract claims.’ *State ex rel. Ohio Edison Co. v. Shaker* (1994), 68 Ohio St.3d 209, 211, 625 N.E.2d 608. Consequently, we must determine whether the claims raised by the Corriganes in their complaint are within PUCO’s exclusive jurisdiction or are pure tort and contract claims that do not require a consideration of statutes and regulations administered and enforced by the commission.

{¶16} “\*\*\*

{¶17} “Despite the Corriganes’ argument that we are presented with a pure contract matter, this case is not about an easement. There is no question that the company has a valid easement and that the tree is within the easement. Furthermore, the language of the easement is unambiguous and provides the company with the following rights:

{¶18} “ ‘Said right and easement shall include the right of the Grantee, its successors and assigns, at all times to enter upon the right of way occupied by said transmission lines for the purpose of constructing, inspecting, protecting, repairing or removing said towers, wires, fixtures and appliances, together with *full authority to cut and remove any trees, shrubs or other obstructions* upon the above described property *which may interfere or threaten to interfere with the construction, operation and maintenance of said transmission lines.*’ (Emphasis added.)

{¶19} “This language grants the company the right to remove any tree within the easement that could pose a threat to the transmission lines. See also *Beaumont v. FirstEnergy Corp.*, 11th Dist. No. 2004-G-2573, 2004-Ohio-5295, 2004 WL 2804801, ¶ 22.

{¶20} “It is clear from the record that the Corrigan’s are not contesting the meaning of the language of the easement but rather the company’s decision to remove the tree instead of pruning it. In 2000, the company changed its vegetation-management plan so that its policy was to remove vegetation that threatened to interfere with its lines. Although the Corrigan’s disagree with this policy, the broad language of the easement granted to the company allows the utility to remove trees within its easement that may interfere or threaten to interfere with its power lines. Therefore, the Corrigan’s complaint with the decision to remove the tree is really an attack on the company’s vegetation-management plan. That type of complaint is a service-related issue, which is within PUCO’s exclusive jurisdiction.”

{¶21} Based upon the Supreme Court’s holding in *Corrigan*, we find the trial court did not err in granting summary judgment in favor of Ohio Edison. Appellant’s

complaint challenging the decision to remove the bushes is not a challenge to the easement itself but rather challenges Ohio Edison's policy to remove the bushes rather than periodically trim them; therefore, the complaint is a service-related issue within the exclusive jurisdiction of the PUCO.<sup>1</sup>

{¶22} The assignment of error is overruled.

{¶23} The June 15, 2009 Judgment Entry of the Ashland County Court of Common Pleas is affirmed.

By: Hoffman, J.

Edwards, P.J. and

Delaney, J. concur

s/ William B. Hoffman \_\_\_\_\_  
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards \_\_\_\_\_  
HON. JULIE A. EDWARDS

s/ Patricia A. Delaney \_\_\_\_\_  
HON. PATRICIA A. DELANEY

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<sup>1</sup> Though Appellant raises an interesting challenge based upon the constitutional open access to the courts provision, this Court is not at liberty to ignore, let alone de facto, reverse the decision of the Ohio Supreme Court.

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

JACOB SCHAD, JR.  
Plaintiff-Appellant

-vs-

OHIO EDISON COMPANY  
Defendant-Appellee

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JUDGMENT ENTRY

Case No. 09-COA-024

For the reason stated in our accompanying Opinion, the June 15, 2009 Judgment Entry of the Ashland County Court of Common Pleas is affirmed. Costs to Appellant.

s/ William B. Hoffman  
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards  
HON. JULIE A. EDWARDS

s/ Patricia A. Delaney  
HON. PATRICIA A. DELANEY