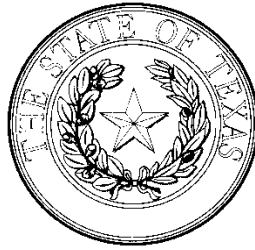


Opinion issued August 4, 2011.



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-10-00186-CV

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**JIM RUTHERFORD AND LINDA RUTHERFORD, Appellant**

**V.**

**CENTERPOINT ENERGY HOUSTON ELECTRIC, LLC, Appellee**

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**On Appeal from the 240th Judicial District Court  
Fort Bend County, Texas  
Trial Court Case No. 05-CV-144259**

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**MEMORANDUM OPINION**

This is a real property dispute concerning the scope of an express easement. The holders of the servient estate, Jim and Linda Rutherford, brought suit against the holder of the dominant estate, CenterPoint Energy Houston Electric LLC, for

trespass, breach of contract, negligence, gross negligence, and injunctive relief after CenterPoint removed trees and other vegetation from the easement on the Rutherfords' property. The case proceeded to a jury trial. After the Rutherfords rested at trial, CenterPoint moved for directed verdict on all claims. The trial court directed verdict in favor of CenterPoint and signed a take-nothing judgment in its favor. On appeal, the Rutherfords contend that the trial court erred in granting CenterPoint's motion for directed verdict because they presented sufficient evidence to raise a fact issue on their trespass, breach of contract, and negligence claims. We affirm the judgment of the trial court.

## **Background**

### *Underlying Facts*

In 1967, R.E. Smith conveyed to Houston Lighting and Power Company "an unobstructed easement" for "electrical transmission and distribution lines, consisting of variable numbers of lines, and all necessary or desirable appurtenances." The easement granted Houston Lighting the right:

(1) of ingress and egress to or from said right-of-way for the purpose of constructing, reconstructing, inspecting, patrolling, hanging new lines on, maintaining and removing said line and appurtenances; (2) to remove from said right-of-way and land adjacent thereto, all bushes, trees, and parts thereof, or other obstructions, which, in the opinion of the Houston Lighting & Power Company, endanger or may interfere with the efficiency, safety or proper maintenance of said line or its appurtenances; and (3) of exercising all other rights hereby granted.

The Rutherfords are the successors-in-interest to Smith, and CenterPoint is the successor-in-interest to Houston Lighting. In 2003, the Rutherfords purchased the property with the easement. At the time of their purchase, they had knowledge of the easement. The Rutherfords' property consists of a thirty-three-acre tract of land in Thompson, Texas. The Rutherfords' home is on the property.

The easement occupies ten acres of the thirty-three-acre property. It is 200 feet wide and runs east to west along the northern boundary of the Rutherfords' property. On the easement, there are four steel towers. Two of the towers hold up transmission lines of 138 kilovolts (kV), while the other two towers hold up transmission lines of 345 kV. Transmission lines are high voltage lines used to transport large amounts of power over long mileages to hundreds of thousands of people. The 138 kV transmission lines are thirteen feet from the southern edge of the easement, and the 345 kV transmission lines are twenty-four feet from the northern edge of the easement. The lines are between twenty-nine to forty-five feet above the ground. A line of trees separates the southern boundary of the easement from the Rutherfords' house. Another line of trees separates the northern boundary of the easement from the adjacent property. The middle of the easement is empty of vegetation.

In 2005, Trees, Inc., one of CenterPoint's vegetation maintenance contractors, removed all the indigenous trees that were in the easement from the

northern tree line. The Rutherfords received no notice from CenterPoint prior to the removal. The Rutherfords' landscaper estimated that CenterPoint had removed 580 trees, and the cost to replace the trees was \$66,810. A tree line remained on the border of the adjacent property north of the easement. Trees, Inc. also trimmed certain branches of those trees because they hung into the easement. Kenneth Coleman was an account manager at Trees, Inc. in 2005 and supervised the vegetation maintenance at the easement. He testified that CenterPoint instructed him to remove any vegetation in the easement that was ten feet or higher or that had the potential to grow ten feet or higher. Based on his thirty-three years of experience, he stated that most vegetation grows at least ten feet and that he is capable of identifying a low-growing species. To his knowledge, all the vegetation that was removed from the easement was at least ten feet or had the potential to grow to ten feet. Another CenterPoint contractor later returned to the easement to spray herbicide on the stumps of the removed trees to prevent re-sprouting. According to CenterPoint, herbicide is an accepted means for removal of vegetation near transmission lines.

Michael Pakeltis, a CenterPoint representative and manager in its transmission operations department, testified that CenterPoint, as a general practice, removes all trees that could grow ten feet or higher or that interfere with access to its transmission lines. CenterPoint adopted this practice because

transmission lines have high voltage and require greater clearances from trees than street-side distribution lines require. Pakeltis testified that, in CenterPoint's opinion, all the trees removed from the Rutherfords' easement could potentially interfere with the efficiency, safety, and maintenance of its transmission lines on the property. According to Pakeltis, trees along the sides of the easement can impede restoration and maintenance work on the transmission lines. CenterPoint must position large trucks between the outermost transmission line and the edge of the easement to safely complete certain maintenance and restoration works, such as replacing the line's insulator or restoring power if a natural disaster like a hurricane or tornado destroys a transmission tower. CenterPoint workers almost always work from the sides of the lines. Pakeltis also stated that controlling the trees at their youngest stage and removing them from the easement before they become a problem is the most cost-efficient method to maintain the transmission lines. CenterPoint believes this practice creates a more predictable and safer transmission corridor.

Jim Rutherford testified that CenterPoint treated the trees on his property differently than it treated trees on other properties in the area. He stated that mature trees were underneath the transmission lines on the property northeast of his property. This property is known as Edwards Cemetery. CenterPoint has not removed these trees. CenterPoint responded that it did not have the same type of

easement on the cemetery property as the one that it has on the Rutherfords' property. It only has an aerial easement of forty feet above ground over Edwards Cemetery. As a result, CenterPoint trimmed the tops of the trees in the cemetery at forty feet as opposed to removing them. Pakeltis testified these were the best rights CenterPoint could obtain at the time for that particular property.

### *Proceedings in the Trial Court*

In 2005, after CenterPoint had removed the trees from the easement on the Rutherfords' property, the Rutherfords filed suit, alleging trespass, breach of contract, negligence, and gross negligence. In addition, they sought temporary and permanent injunctions prohibiting CenterPoint from further removing any vegetation from the easement. A jury trial was conducted. After the Rutherfords rested, CenterPoint moved for a directed verdict on all claims against it, asserting among other grounds that the easement expressly authorized its removal of the trees on the property. The Rutherfords withdrew their request for injunctive relief, but argued against the motion on the other claims. The trial court granted CenterPoint's motion without specifying a reason and signed a take-nothing judgment in favor of CenterPoint.

### **Discussion**

On appeal, the Rutherfords contend that the trial court erred in granting a directed verdict on their claims of trespass, breach of contract, and negligence.

The Rutherfords do not brief their trial court claim for gross negligence. Without briefing on this claim, the trial court’s ruling on it stands. TEX. R. APP. P. 38.1(i) (stating that brief “must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.”); *see Franz v. Katy Indep. Sch. Dist.*, 35 S.W.3d 749, 755 (Tex. App.—Houston [1st Dist.] 2000, no pet.). Accordingly, we confine our discussion to the Rutherfords’ trespass, breach of contract, and negligence claims.

### *Standard of Review*

We review a grant of a directed verdict under a legal sufficiency analysis of the evidence. *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). When reviewing a directed verdict, we credit the favorable evidence if reasonable jurors could and disregard the contrary evidence unless reasonable jurors could not. *Id.* at 827. We determine whether there is any evidence of probative force to raise a fact issue on the question presented. *See, e.g., Bostrom Seating, Inc. v. Crane Carrier Co.*, 140 S.W.3d 681, 684 (Tex. 2004); *Szczepanik v. First S. Trust Co.*, 883 S.W.2d 648, 649 (Tex. 1994) (per curiam).

A directed verdict is warranted when the evidence is such that no other verdict can be rendered and the moving party is entitled, as a matter of law, to a judgment. *See B & W Supply, Inc. v. Beckman*, 305 S.W.3d 10, 15 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). A trial court may order a directed verdict in

favor of a defendant when: (1) a plaintiff fails to present evidence raising a fact issue essential to the plaintiff's right of recovery; or (2) the plaintiff admits or the evidence conclusively establishes a defense to the plaintiff's cause of action. *See Prudential Ins. Co. of Am. v. Fin. Rev. Servs., Inc.*, 29 S.W.3d 74, 77 (Tex. 2000). A trial court may properly direct a verdict if no evidence of probative force raises a fact issue on the material questions in the lawsuit. *See id.*

However, the trial court errs if it directs a verdict when a material issue is raised by the evidence. *See Hycarbex, Inc. v. Anglo-Suisse, Inc.*, 927 S.W.2d 103, 107 (Tex. App.—Houston [14th Dist.] 1996, no writ). If there is any conflicting evidence of probative value on any theory of recovery, a directed verdict is improper and the case must be remanded for the jury to determine that issue. *See Szczepanik*, 883 S.W.2d at 649. If reasonable minds could differ as to the controlling facts, a trial court errs if it grants a directed verdict and refuses to submit the issues to the jury. *See Latham v. Castillo*, 972 S.W.2d 66, 68 (Tex. 1998).

### *Express Easements*

“An easement is a non-possessory interest that authorizes its holder to use property for a particular purpose.” *Koelsch v. Indus. Gas Supply Corp.*, 132 S.W.3d 494, 497 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (citing *Marcus Cable Assocs. v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002)). We interpret



easements according to basic principles of contract construction and interpretation. *Marcus Cable*, 90 S.W.3d at 700; *DeWitt County Elec. Co-op., Inc. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999); *Koelsch*, 132 S.W.3d at 497. Courts construe contracts as a matter of law, and we review their rulings de novo. See *J.M Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003) (applying rule in arbitration-agreement context) (citing *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983)). The intent of the parties, as expressed in the grant, determines the scope of the interest conveyed. *Marcus Cable*, 90 S.W.3d at 700–01; *Koelsch*, 132 S.W.3d at 497–98. To interpret the parties’ intentions adequately and to discern the scope of the rights conveyed to the easement holder, we focus on the terms of the granting language. See *Marcus Cable*, 90 S.W.3d at 701.

We rely solely on the written terms of the easement unless the language is ambiguous. *Koelsch*, 132 S.W.3d at 498. When terms are not defined, we give them their “plain, ordinary, and generally accepted meaning.” *Marcus Cable*, 90 S.W.3d at 701. Courts must consider the entire writing, assume that the parties intended to give effect to every clause they chose to include, and strive to harmonize and give effect to all the provisions of the contract by analyzing the provisions with reference to the whole agreement. *Frost Nat’l Bank v. L & F Distribs.*, 165 S.W.3d 310, 312 (Tex. 1999); *Koelsch*, 132 S.W.3d at 498; see also *Seagull Energy E & P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 345 (Tex.

2006). “When interpreting the granting language of an easement, we resolve doubts about the parties’ intent against the grantor, or servient, estate and adopt the interpretation that is the least onerous to the grantee, or dominant, estate in order to confer on the grantee the greatest estate permissible under the instrument.” *CenterPoint Energy Houston Elec. LLC v. Bluebonnet Drive, Ltd.*, 264 S.W.3d 381, 388–89 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). No rights pass to the easement holder by implication except those that are “reasonably necessary” to enjoy the rights that the easement grants expressly. *Marcus Cable*, 90 S.W.3d at 701. Accordingly, if the grant expressed in the easement cannot be construed to apply to a particular purpose, a use for that purpose is not allowed. *See id.*

#### *Trespass and Breach of Contract*

The Rutherfords contend that the trial court erred in directing verdict on their trespass and breach of contract claims because they raised a fact issue with regard to each element of those claims. In response, CenterPoint asserts that both claims require a showing that CenterPoint exceeded its rights under the easement. According to CenterPoint, no evidence exists that it exceeded those rights by removing the trees and other vegetation. Therefore, it maintains that the trespass and breach of contract claims fail as a matter of law.

A trespasser has neither express nor implied permission to enter the property of another, but enters it nonetheless. *Mellon Mortg. Co. v. Holder*, 5 S.W.3d 654,

671 (Tex. 1999); *Koelsch*, 132 S.W.3d at 497. An easement holder who exceeds the rights granted by the owner of the servient estate thus commits a trespass. Compare *Marcus Cable*, 90 S.W.3d at 703 (reversing trial court's grant of summary judgment on trespass claim in favor of easement holder, who had installed cable-television lines on easement, because easement document only granted right to use land for purpose of constructing and maintaining facilities to transmit electricity, not cable) with *Koelsch*, 132 S.W.3d at 499 (holding that no trespass occurred where easement holder constructed above-ground block valve assembly because easement document granted right to "lay, operate, renew, alter, inspect, and maintain two pipe lines . . . upon, over, under and through" property); *CenterPoint Energy Houston Elec. LLC*, 264 S.W.3d 381, 388–89 (holding that no trespass occurred where easement holder allowed assignee to install and use cellular telecommunication equipment within easement because easement document granted right of way for "all necessary and desirable appurtenances" including "telephone and telegraph wires"). A party claiming trespass must establish that the defendant committed an act that exceeded the bounds of any legal rights the defendant may have possessed. See *Koelsch*, 132 S.W.3d at 497.

To prevail on a breach of contract claim, a party must establish that: (1) a valid contract existed between the plaintiff and the defendant; (2) the plaintiff tendered performance or was excused from doing so; (3) the defendant breached

the terms of the contract; and (4) the plaintiff sustained damages as a result of the defendant's breach. *See Valero Mktg. & Supply Co. v. Kalama Int'l*, 51 S.W.3d 345, 351 (Tex. App.—Houston [1st Dist.] 2001, no pet.). “A breach occurs when a party fails or refuses to do something he has promised to do.” *Dorsett v. Cross*, 106 S.W.3d 213, 217 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *see DeWitt*, 1 S.W.3d at 98 (holding that trial court properly granted directed verdict in favor of electrical cooperative on breach of contract claim, where cooperative had cut down two trees and trimmed another in easement, because easement document gave cooperative right to “cut and trim trees within the right-of-way.”).

As CenterPoint notes, an element essential to both trespass and breach of contract is that CenterPoint's action exceeded the rights granted to it by the easement. If the scope of the rights granted by the easement included the removal of the trees and other vegetation in the easement, then the action was authorized and the Rutherfords cannot prevail on either claim.

Here, the easement granted CenterPoint an “unobstructed easement”, along with the right “to remove from said right-of-way and land adjacent thereto, all bushes, trees, and parts thereof, or other obstructions, which, in the opinion of [CenterPoint], endanger or *may* interfere with the efficiency, safety or proper maintenance of said line or its appurtenances.” [Emphasis added] *See Nalle v. Taco Bell Corp.*, 914 S.W.2d 685, 687 (Tex. App.—Austin 1996, writ denied)

(holding that the word “may” means possibility) (citing Black’s Law Dictionary 979 (6th ed.1990))). Pakeltis stated that, in CenterPoint’s opinion, all the trees and other vegetation that were removed from the easement on the Rutherford’s property could have interfered with the efficiency, safety, and maintenance of its transmission lines on the property. CenterPoint has a general policy to remove all vegetation that can grow at least ten feet high in a transmission easement because transmission lines have such high voltage. In accord with this policy, CenterPoint’s contractor removed all trees along the northern border of the easement and other vegetation. Coleman testified that all vegetation he removed was at least ten feet or had the potential to grow at least ten feet. From a maintenance and safety perspective, Pakeltis explained that trees of such height along the edge of an easement may impede work on the transmission lines because CenterPoint must position large trucks between the outermost line and the edge of the easement to safely complete certain maintenance and restoration projects. In addition, he said that in the event that the entire transmission line is destroyed CenterPoint may need the entire width of the easement to replace the line and restore power. From an efficiency perspective, Pakeltis stated that controlling the trees at their youngest stage and removing them from the easement before they become a problem is the most cost-efficient method to maintain the transmission lines. Because CenterPoint offered its opinion that the trees and other vegetation it

removed from the easement could have interfered with the efficiency, safety, and maintenance of the transmission lines, CenterPoint acted within in the scope of the express easement when it removed the vegetation.

The Rutherfords point out that CenterPoint removed “border” trees more than fifty feet away from the nearest power line, and that it removed trees that could not be any sort of obstruction. CenterPoint did not remove the trees underneath the transmission lines on the Edwards Cemetery property, and these trees have not endangered or impaired those lines. The easement for the Edward Cemetery property, however, has different terms than those in the easement for the Rutherfords’ property. Under the Edward Cemetery easement, CenterPoint only has the right to trim the tops of the trees in the cemetery at forty feet. Under the Rutherford easement, CenterPoint has right to remove all vegetation if, in its sole opinion, the vegetation may interfere with the efficiency, safety, or maintenance of the transmission line. The Rutherfords did not show any removal took place outside the easement. The Rutherfords also point out that they received no prior notice of the removal of the trees. The easement, however, did not require that CenterPoint provide them with notice prior to their removal.

The Rutherfords correctly note that the easement language allows them to construct a fence within the easement property. When read with the tree obstruction provision, they argue, the express easement allows for at least fence-

high vegetation; CenterPoint's right to remove vegetation is qualified by the allowance for fencing. We disagree. Although the Rutherfords can fence and also plant trees on the land encumbered by the easement, CenterPoint has an express right to remove the trees, unlimited by the fence provision and limited only by its opinion as to the need to remove vegetation. Although the clear-cutting operation here appears to be overkill, it was within CenterPoint's right to do it.<sup>1</sup> Accordingly, because the easement authorized CenterPoint's actions, the trial court did not err in granting directed verdict on the Rutherfords' claims for trespass and breach of contract.

### *Negligence*

The Rutherfords maintain that the trial court erred in directing verdict on their negligence claim because they raised a fact issue with regard to each element of that claim. According to the Rutherfords, Centerpoint had a duty to comply with the terms of the easement and a duty to provide them with notice prior to any tree trimming or herbicide application. The Rutherfords assert that CenterPoint breached these duties, and their breach caused them damages in the loss of the trees. In response, CenterPoint, citing *DeWitt*, contends that the Rutherfords

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<sup>1</sup> We note that the easement does not give the right to CenterPoint to administer herbicide to the land. CenterPoint does so at its peril to the extent such chemicals do more than merely "remove" existing plant obstructions. But the Rutherfords did not complain in the trial court or on appeal about the administration of chemicals separate from the tree removal, so that is not a basis for reversal.

cannot bring a negligence claim because the contract, and not common-law negligence, governs their dispute. *See DeWitt*, 1 S.W.3d at 98.

In *DeWitt*, a landowner sued a power company for breach of contract, negligence, and Deceptive Trade Practices Act violations after the utility company cut down two trees that were on its easement and trimmed another that had grown within the easement. *See id.* at 98. A main issue was whether the easement agreement gave the utility company the right to cut the trees. *Id.* The landowners argued they could maintain the negligence claim independently of the contract claim because, in the absence of a contractual agreement, the utility company would be liable in negligence if it entered the property and cut down the trees. *Id.* at 105. They also argued the damage was to the value of the trees and not the value of the easement. *Id.* The Texas Supreme Court rejected this argument, holding that the contract, and not common-law negligence, governs any dispute between the parties in these circumstances. *Id.* The supreme court concluded that the trial court did not err in granting a directed verdict for the utility company on the negligence claim. *Id.*

Here, like in *DeWitt*, the main issue was whether the easement agreement gave CenterPoint the right to remove the trees and vegetation. The easement spelled out the respective rights of CenterPoint and the Rutherfords. The contract, and not common-law negligence, governs their dispute. *See DeWitt*, 1 S.W.3d at



98. Accordingly, we hold that the trial court did not err in directing verdict on the Rutherfords' negligence claim.

### **Conclusion**

We hold that the trial court did not err in granting directed verdict on the Rutherfords' claims for trespass and breach of contract because the easement authorized CenterPoint's actions. We also hold that the trial court did not err in directing verdict on the Rutherfords' negligence claim because the contract, and not common-law negligence, governs their dispute. We therefore affirm the judgment of the trial court.

Jane Bland  
Justice

Panel consists of Justices Jennings, Higley and Bland.