In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-17-00067-CV

SOUTHWESTERN ELECTRIC POWER COMPANY, Appellant

V.

KENNETH LYNCH, TOMMY BATCHELOR, AND TWANT WILSON, Appellee

On Appeal from the 202nd District Court
Bowie County, Texas
Trial Court No. 15C1494-202

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Justice Moseley

MEMORANDUM OPINION

In Bowie County, Texas, Kenneth Lynch, Tommy Batchelor, and Twant Wilson filed a declaratory judgment suit against Southwestern Electric Power Company (SWEPCO), asking the trial court to declare that SWEPCO's prior use of certain utility easements across their respective tracts of land limited the width of its easement to thirty feet. SWEPCO filed a plea to the jurisdiction, which the trial court denied, and entered a general denial, asserting various affirmative defenses. After a bench trial, the trial court found for the Appellees, declared that SWEPCO's prior use of the easement across the Appellees' properties limited its present and future use to a width of thirty feet, and awarded the Appellees attorney fees and costs.

On appeal, SWEPCO contends that the trial court erred by: (1) denying its plea to the jurisdiction; (2) interpreting the deeds using extrinsic evidence; and (3) awarding attorney fees and costs.

We affirm the trial court's judgment because a justiciable controversy existed in the case, extrinsic evidence was admissible to determine the extent of SWEPCO's use under the existing easements, and the trial court possessed jurisdiction over the matter.

I. Factual and Procedural Background

The Appellees own certain tracts of real property in Bowie County, Texas, each of which is encumbered by utility easements in favor of SWEPCO. The easements were each granted to SWEPCO in 1949 by the respective Appellees' predecessors in title, and the operative language in each of the easements is identical. The pertinent part of each of the easements says,

> [A]n easement or right-of-way [is granted to Southwestern Gas & Electric Company] for an electric transmission and distributing line, consisting of variable numbers of wires, and all necessary or desirable appurtenances (including towers or poles made of wood, metal or other materials, telephone and telegraph wires, props and guys), at or near the location and along the general course now located and staked out by the said Company over, across and upon the following described lands . . . .
>
> Together with the right of ingress and egress over my (our) adjacent lands to or from said right-of-way for the purpose of constructing, reconstructing, inspecting, patrolling, hanging new wires on, maintaining and removing said line and appurtenances . . . .

None of these 1949 right-of-way conveyances contain a metes and bounds description of the easement. SWEPCO and its predecessor in interest have continuously utilized the easement granted in the deeds to construct, service, and maintain electric transmission lines along the same general paths across the Appellees' lands since construction of the lines in 1949. Appellees' properties are located along the transmission line between New Boston and DeKalb, Texas.

During the period of 2014–2015, SWEPCO rebuilt and modernized the transmission lines, which included replacing the existing wooden pole support structures that had been previously installed with steel pole structures along the existing route. In preparation for the rebuild, SWEPCO sent letters to landowners along the electric transmission line route (including Appellees Lynch and Wilson) informing them of the then-anticipated rebuild and modernization, offering to pay each of the current property owners to whom these were sent $1,000 "to supplement the existing easement on [the] property to bring the rights and restrictions to SWEPCO's standing right of way requirements." A supplemental easement, survey plat, easement payment schedule, and W-9 were enclosed with the letter. The offered supplemental easement and plat sought to "revise[], modif[y] and clarif[y]" the "width, and boundaries" of SWEPCO's easement then-

unspecified width to a specific width of one hundred feet (fifty feet on each side of the centerline of the existing line). The Appellees refused to grant the supplemental easements, but SWEPCO entered their properties to complete the upgrade under the authorization of the 1949 right-of-way deeds. SWEPCO completed the modernization of the transmission line in 2015.

The Appellees allege that during the rebuild, SWEPCO and its agents "took the position that [under the 1949 right-of-way deeds,] it had previously acquired a blanket easement over" the Appellees' properties. On October 19, 2015, after the rebuild was complete, the Appellees filed a declaratory judgment action against SWEPCO, alleging that SWEPCO was unilaterally attempting to broaden the easement and its easement rights and asking the trial court to declare that SWEPCO's easement under the general terms of the 1949 right-of-way deeds was limited to fifteen feet on each side of the transmission poles, because it is sufficient for operating and maintaining the lines and it is the width and path of the easement SWEPCO "utilized and maintained" during its years of prior use. SWEPCO filed a plea to the jurisdiction, entered a general denial, and made special exceptions, asserting various affirmative defenses. SWEPCO also filed counterclaims against the Appellees, and two of their wives, alleging that under its interpretation of the deeds, the Appellees had trespassed. Some of the trespasses alleged by SWEPCO included the construction of a dwelling house, allowing trees to grow, and constructing and maintaining a pond within the 100-foot easement SWEPCO claimed was necessary to utilize and maintain the transmission lines.

SWEPCO's plea to the jurisdiction argued that the claims asserted were not justiciable and not ripe and that the Appellees lacked standing, all of which deprived the trial court of subject-

matter jurisdiction. After a hearing, the trial court denied the plea. SWEPCO later nonsuited its counterclaims without prejudice and dismissed the Appellees' wives from the suit. After nonsuiting its counterclaims, and in light of further discovery and the Appellees' amended pleadings, SWEPCO reurged its plea to the jurisdiction on the same grounds as before and filed traditional and no-evidence motions for summary judgment, arguing that the 1949 right-of-way deeds unambiguously granted a general easement and should be construed as such by the trial court as a matter of law. The Appellees filed a response, as well as their own motion for summary judgment, asserting (among other things) that SWEPCO was attempting to unilaterally broaden its easement rights under the 1949 right-of-way deeds, despite the fact that SWEPCO's prior use and maintenance of the easement was limited to fifteen feet on each side of the then-existing transmission pole and that such a thirty-foot easement is sufficient for future operation and maintenance of the transmission line.[1] The trial court denied SWEPCO's motion to strike the Appellees' summary judgment evidence, denied its reurged plea to the jurisdiction, and denied its motions for summary judgment. The Appellees' motions for summary judgment were carried with the case.

The case proceeded to a bench trial. SWEPCO argued that the 1949 right-of-way deeds unambiguously granted them a general easement and that they should be construed as general easements as a matter of law. The Appellees "want[ed] the Court to draw the line in the sand" to prohibit SWEPCO from using those easement documents to broaden its easement in the future, "[b]ecause without the line in the sand, the landowners can never make productive use of their

[1]The record does not contain affidavits supporting the Appellees' motions for summary judgment.

property because they don't know when SWEPCO is going to choose to push that line back." In support of their motions and petition for declaratory relief, the Appellees produced, over SWEPCO's objections, testimony from Lynch, Wilson, Batchelor, and others who owned property along the transmission line that was encumbered by the 1949 right-of-way deeds.

The first witness called by the Appellees was Trey Bergeret, a transmission right-of-way supervisor for SWEPCO. Bergeret acknowledged that the 1949 right-of-way deeds were the source of SWEPCO's right of way and easement rights over the Appellees' properties and other properties along the transmission line between New Boston and DeKalb. Bergeret was unaware of any SWEPCO utility easements along the transmission line between New Boston, Texas, to DeKalb, Texas, from 1949 that defined the easement's width in terms of feet or meters. The following colloquy occurred on direct examination of Bergeret:

> Q . . . [W]hat is SWEPCO's position as to the scope or width of the easement that it acquired under these 1949 right of way deeds?
>
> A These easements are what we classify as a general easement that give us the right to use as much as we reasonably determine each time we need to use the easement.
>
> Q Okay. And on Kenneth Lynch's property, how wide -- or what is the scope of your easement on that property?
>
> A Same as I just mentioned, as much as we reasonably need each time we need to use it.
>
> Q Okay. And that would include the whole property?
>
> A These are general easements, yes, sir.
>
> Q Okay. And that would include the property where his house sits?
>
> A Yes, sir. Technically, yes.

Appellees asked Bergeret whether "SWEPCO can use however much of [the Appellees'] property it deems fit," and he answered, "It has reasonable use each time we need to yes, sir," but this was tempered by SWEPCO's goal to be "property owner friendly and . . . as least intrusive as possible." In response to a hypothetical question, Bergeret testified that a claim of a one-hundred-foot easement across the Appellees' properties would be inconsistent with SWEPCO's claim of a "general easement" across the properties.

Lynch testified that he had worked, hunted, and fished on properties along the transmission line for over forty-five years. He and his wife purchased their property along the transmission line in 1999 and 2007, where they now have a home, barns, sheds, and fruit trees. Some of their pecan trees are within twenty-five feet of the transmission line.

Lynch, a licensed surveyor with almost fifty years of experience, testified that he was familiar with the 1949 right-of-way deeds covering the Appellees' properties. He interpreted the 1949 right-of-way deeds to grant SWEPCO the right to install, maintain, and rebuild the line, but he conceded that he did not know how much space was reasonable for SWEPCO to construct, reconstruct, maintain, inspect, or patrol the transmission line. He was unaware of any survey or deed record showing that SWEPCO had a one-hundred-foot easement over his properties. However, during discovery, when asked to produce any document that disclosed, discussed, or referenced the scope of SWEPCO's easement across the Appellees' properties, SWEPCO produced the surveys showing a one-hundred-foot easement it had attached to the letters seeking to purchase a supplemental easement as well as aerial photographs of the properties purportedly showing a one-hundred-foot easement. He testified that, to his knowledge and memory of the

properties affected, the location, scope of use, and course of the transmission line had not changed during his familiarity with the property, and the one-hundred-foot supplemental easement SWEPCO and its field agent, Coates Field Services, Inc., sought to obtain from him during the rebuild was inconsistent with its prior maintenance and use of the right-of-way easement. He testified regarding this suit, "All I'm needing to know is tell me how much of my property I can use. I need to build hay barns and other things."

While the Appellees refused to grant SWEPCO the supplemental easements, Lynch testified that others owning property along the transmission line did grant them. Lynch testified that following the completion of the project, SWEPCO cleared and cut back a one-hundred-foot easement along the transmission line through the properties for which it was able to secure the supplement. However, Lynch and his survey crew visited several properties along the transmission line between New Boston and Dekalb that were also encumbered by the 1949 deed language, set out stakes fifteen and fifty feet on each side of the transmission line, and took photographs showing the rebuilt line existing and operating within the thirty-foot easement.

Batchelor testified that he obtained his property along the transmission line in 2001 and 2004. He stated that his property contains woods, pasture, and a pond in which he had fished and swum since he was a young teenager and that there are large, adult trees within twenty-seven to twenty-eight feet of the transmission line. The transmission line has crossed his property for as long as he has owned it, but he testified that SWEPCO has never mowed, trimmed, or maintained the area around the line since he has owned the property. Batchelor said that he personally watched portions of SWEPCO's line rebuild, both on his property and that of his neighbors, seeing

SWEPCO take down the old, wooden support poles and install new, metal poles and rehang the transmission lines. He testified that SWEPCO even rebuilt the line through a pine thicket, with only "15 or 20 foot on either side, probably." During the rebuild on his property, SWEPCO did not alter his pond or cut down any trees that were near the line.

Batchelor testified further that during the course of the rebuild, he spoke with Coates' representatives, who were trying to get him to grant the supplemental easement. They told Batchelor that SWEPCO "had a blanket easement" and that they were trying to "upgrade" or "redo this easement to 100 foot or whatever through the property," claims he had never heard before. Adult trees and a portion of Batchelor's pond are located within the area shown to be the requested 100-foot easement shown in SWEPCO's survey and aerial photographs of the property. He agreed that under the 1949 right-of-way deeds, SWEPCO had a right to reconstruct the transmission line, but he disputed any claim that SWEPCO had a one-hundred-foot easement across his property, and prior to the events of this case, he had never seen a survey showing such an easement. Like Lynch, Batchelor conceded that he did not know how much space was reasonable for the transmission line.

Wilson bought his property along the transmission line in 1986. He has a home (built in the early 1970s), outbuildings, pecan trees, and timber on the land. On at least one occasion, in 2005, Wilson saw agents of SWEPCO performing maintenance along the transmission line. They told him they were instructed to trim his pecan tree limbs back fifteen feet from the center of the transmission line.

Before or during the rebuild, Wilson received a letter from SWEPCO informing him of the rebuild and offering $1,000.00 if he would grant a supplemental easement. The survey attached to the letter showed a one-hundred-foot easement across his property. As shown in the survey, the one-hundred-foot easement would cut through his house. Wilson disagreed with any claim that the 1949 right-of-way deeds granted SWEPCO a one-hundred-foot easement across his property, but he conceded that he did not know how much space SWEPCO might need to operate, repair, and maintain the line in the future. He wanted the court "to determine how much easement SWEPCO has, 15 feet, 30 feet, 100 foot" because he did not know "where [he] could build or put anything." The Appellees asked the court to declare a specific width for SWEPCO's easement under the 1949 right-of-way deeds based on the company's prior use of the easement.

After the rebuild, Lynch visited some other properties along the line (owned by nonparties) and put out stakes showing the location of the outside perimeters of an easement that was thirty-feet wide versus one that was one-hundred-feet wide. His purpose in doing this was to reflect that the new line occupied about the same space as the old one and that a one-hundred-foot easement would consume trees and other features. Some of the photographs were admitted as evidence. A few other property owners owning property along the transmission line who were not parties to the suit also testified over SWEPCO's objections. Their properties were all encumbered by the same utility easement language contained in the 1949 right-of-way deeds. During the rebuild, Todd Lowe spoke with a Coates representative, who told him that SWEPCO claimed a one-hundred-foot easement across his property. Photographs of Jim Cherry's property showed the new support poles and rebuilt transmission line used approximately the same amount of space as the

previous one. Cherry testified that during the rebuild, agents of SWEPCO began clearing the easement on property back to fifty feet on either side of the transmission pole, until he ordered them to cease. He advised them of the terms of the 1949 right-of-way deeds, and they told him that SWEPCO had a blanket easement across the property; nevertheless, they followed his instructions to stop clearing the wider area.

After a bench trial, the trial court found for the Appellees, declared that SWEPCO's prior use of the easement across the Appellees' properties limited its present and future use to thirty feet and awarded the Appellees attorney fees and costs. Following the judgment, the trial court entered findings of fact and conclusions of law. SWEPCO timely filed this appeal.

II. Is There a Justiciable Controversy?

In its first point of error, SWEPCO contends the trial court erred in denying its plea to the jurisdiction because there is no justiciable controversy. Because ripeness, or justiciability, is an element of subject-matter jurisdiction, it is a legal question subject to de novo review. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998); *Save Our Springs Alliance v. City of Austin*, 149 S.W.3d 674, 680 (Tex. App.—Austin 2004, no pet.).

Under the Uniform Declaratory Judgments Act (UDJA), "[a] person interested under a deed . . . may have determined any question of construction or validity arising under the instrument . . . and obtain a declaration of rights, status, or other legal relations thereunder." TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(a) (West 2015). Texas courts have often applied the UDJA in

resolving disputes regarding the existence and scope of easements.[2] *See, e.g.*, *Boerschig v. Sw. Holdings, Inc.*, 322 S.W.3d 752, 762–63 (Tex. App.—El Paso 2010, no pet.). However, a declaratory judgment action does not expand the scope of the trial court's jurisdiction. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.002(b) (West 2015); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993); *City of Austin v. Whittington*, 385 S.W.3d 28, 33 (Tex. App.—Austin 2007, no pet.). A declaratory judgment action does not vest a court with the power to pass upon hypothetical or contingent situations. *Empire Life Ins. Co. of Am. v. Moody*, 584 S.W.2d 855, 858 (Tex. 1979); *Tex. Health Care Info. Council v. Seton Health Plan, Inc.*, 94 S.W.3d 841, 846 (Tex. App.—Austin 2002, pets. denied). Consequently, "[a] declaratory judgment requires a justiciable controversy as to the rights and status of [the] parties . . . and the declaration sought must actually resolve the controversy." *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 163–64 (Tex. 2004). "A justiciable controversy is one in which a real and substantial controversy exists involving a genuine conflict of tangible interest and not merely a theoretical dispute." *Tex. Dep't of Pub. Safety v. Moore*, 985 S.W.2d 149, 153 (Tex. App.—Austin 1998, no pet.). A justiciable controversy must exist at every stage of a lawsuit. *See Coburn v. Moreland*, 433 S.W.3d 809, 825 (Tex. App.—Austin 2014, no pet.).

"Ripeness 'is a threshold issue that implicates subject matter jurisdiction . . . [and] emphasizes the need for a concrete injury for a justiciable claim to be presented.'" *Robinson v.*

[2]*See also Holmstrom v. Lee*, 26 S.W.3d 526, 532 (Tex. App.—Austin 2000, no pet.) (affirming trial court's declaratory judgment that Appellees had easement appurtenant to use water and septic lines); *see also Koonce v. J.E. Brite Estate*, 663 S.W.2d 451, 452 (Tex. 1984) (determination under UDJA of whether implied easement by necessity had been established); *Jones v. Fuller*, 856 S.W.2d 597, 602 (Tex. App.—Waco 1993, writ denied) (declaratory judgment that deed had conveyed to Appellees valid easements appurtenant).

Parker, 353 S.W.3d 753, 755 (Tex. 2011) (quoting *Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998) ("The constitutional roots of justiciability doctrines such as ripeness, as well as standing and mootness, lie in the prohibition on advisory opinions, which in turn stems from the separation of powers doctrine.")). To determine whether a claim is ripe, we consider "whether, *at the time a lawsuit is filed*, the facts are sufficiently developed 'so that an injury has occurred or is likely to occur, rather than being contingent or remote.'" *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851–52 (Tex. 2000) (quoting *Patterson*, 971 S.W.2d at 442). "A case is not ripe when determining whether the plaintiff has a concrete injury depends on contingent or hypothetical facts, or upon events that have not yet come to pass." *Id*. at 852; *see Camarena v. Tex. Emp't Comm'n*, 754 S.W.2d 149, 151 (Tex. 1988) (trial court cannot grant relief based on "a hypothetical situation which might or might not arise at a later date").

Although a fully ripened cause of action may not be necessary for a justiciable controversy to exist, the maintenance of an action for declaratory judgment requires a

> "fact situation [which] manifests the presence of ripening seeds of a controversy," such that "the claims of several parties are present and indicative of threatened litigation in the immediate future which seems unavoidable, even though the differences between the parties as to their legal rights have not reached the state of an actual controversy."

Trinity Settlement Servs., LLC v. Tex. State Sec. Bd., 417 S.W.3d 494, 506 (Tex. App.—Austin 2013, pet. denied) (quoting *Moore*, 985 S.W.2d at 154). Consequently, "A claimant is not required to show that the injury has already occurred, provided the injury is imminent or sufficiently likely."

City of Waco v. Tex. Natural Res. Conservation Comm'n, 83 S.W.3d 169, 175 (Tex. App.—Austin 2002, pet. denied) (citing *Gibson*, 22 S.W.3d at 852).

The Appellees sought a declaration that due to its use of the easement under the 1949 right-of-way deeds, SWEPCO's future use of their property is limited to the reasonable and necessary thirty feet in width that it has used in the past. SWEPCO contends that the Appellees' action fails for lack of a present, justiciable controversy because the Appellees did not allege that any action or proposed action by SWEPCO violated the 1949 right-of-way deeds or that SWEPCO was preventing them from taking any present or proposed action on their properties. The Appellees argue that the there is a ripe, justiciable controversy because, due to SWEPCO's position that the deeds allow it to use as much of the servient property as is reasonably necessary at the time, SWEPCO could raise its nonsuited trespass claims against them at any time in the future, and because of the uncertainty created by SWEPCO's position under the deeds, they are effectively being denied the full use of their property, as they do not know the extent to which they can use their properties in the future without risking possible opposition or trespass claims by SWEPCO.

The facts of this case are similar to those of *High Mountain Ranch Group, LLC v. Niece*. 532 S.W.3d 513, 516 (Tex. App.—Texarkana 2017, no pet.). High Mountain owned, and unsuccessfully tried to sell, two adjacent lots in a subdivision; one lot was zoned commercial, and the other, Lot 34, was restricted to residential use and subject to certain setback requirements. *Id.* High Mountain filed a declaratory judgment action seeking, in part, a declaration that the restrictions were illegal, void, and unenforceable, or a modification of the restrictions so that they did not apply to Lot 34, alleging that the restrictions were not properly executed, notarized, and

recorded and that there was a lack of notice and privity of estate. *Id.* at 516–17 n.11. High Mountain argued that there was a justiciable controversy because its inability to sell the property "for its true value, or for any value" was due to the residential use and setback restrictions burdening Lot 34 and that a justiciable controversy began in the case when the appellees either failed to respond to its intra-subdivision petition for removing the restrictions or objected to their removal. *Id.* at 517.

The trial court in *High Mountain* concluded that there was no justiciable controversy before it, and we affirmed, finding, in pertinent part, that (1) whether the restrictions were binding on Lot 34 decided an abstract question and sought an advisory opinion because there was no claim that the restrictions had been violated; (2) although potential purchasers of the lot may be concerned that the restrictions would be enforced if a commercial venture was established on Lot 34, "such speculation by a potential purchaser [did] not create a justiciable controversy"; and (3) the appellees' opposition to High Mountain's declaratory judgment suit did not create a justiciable controversy. *Id.* at 518–20.

Here, as in *High Mountain*, there is no claim that the 1949 right-of-way deeds have been or are about to be violated by either party. Similar to the Appellees in *High Mountain*, the Appellees describe their injury, in part, as a potential loss in property value, arguing that they face an "imminent injury" because SWEPCO's claim of "a blanket easement and the right to use as much of the properties as it determined was needed" stigmatized and injured their property rights because they would "have to disclose SWEPCO's claim" when "marketing their respective

properties." However, we find this case distinguishable from *High Mountain* due to two differing facts.

In *High Mountain*, we found that a potential purchaser's possible concerns regarding their possible property usage did not create a justiciable controversy; in contrast, the current property owners are the ones who are "concerned" that even though they face no current opposition to their present or proposed property usage, SWEPCO "may choose to pursue enforcement" of its interpretation of the 1949 right-of-way deeds to oppose the owners' future usage. *Id.* at 519. In addition, SWEPCO's counterclaims asserted that the Appellees' present usage, including pecan trees, structures, a pond, and a residence, trespassed on SWEPCO's easement, and though SWEPCO nonsuited the counterclaims, it did so without prejudice, meaning that SWEPCO could raise them again at any time.[3] This situation "manifests the presence of ripening seeds of a controversy . . . even though the differences between the parties as to their legal rights have not reached the state of an actual controversy." *See Trinity Settlement Servs., LLC*, 417 S.W.3d at 506 (quoting *Moore*, 985 S.W.2d at 154); *see also City of Waco*, 83 S.W.3d at 175 (claimant must show injury or that "injury is imminent or sufficiently likely"). Therefore, we agree with the trial court that this case presents a present, justiciable controversy, and we overrule this point of error.

III. Did the Trial Court Err in Declaring the Easements to be Thirty Feet in Width?

In its second point of error, SWEPCO contends that the trial court erred in "rewriting an unambiguous general [e]asement based on inadmissible extrinsic evidence." Essentially, SWEPCO argues that the evidence is legally insufficient to support the judgment because the only

[3]This position was ratified in the testimony of SWEPCO's agent.

evidence supporting the judgment, the testimony of the Appellees and their witnesses regarding SWEPCO's prior usage of their property, was inadmissible extrinsic evidence.

A no-evidence or legal sufficiency challenge is sustained only when: (1) the record discloses the complete absence of a vital fact; (2) the court is barred by the rules of evidence or other law from giving weight to the only evidence offered to prove a vital fact; (3) the only evidence is no more than a scintilla; or (4) the evidence conclusively establishes the opposite fact. *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005). Here, SWEPCO argues that the trial court was barred from considering the Appellees' extrinsic testimony and evidence regarding its prior use of the easement.

The express terms of the easement determine the scope of the easement holder's rights. *DeWitt Cty. Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96, 103 (Tex. 1999).[4] "The rules of contract construction and interpretation apply to easement agreements." *Id*. at 100. To determine the scope of the easement holder's rights, the court determines the contracting parties' intentions, as expressed in the grant. *Id*. The court reads the terms of the easement as a whole to reach an interpretation of the parties' intentions and to carry out the purpose for which the easement was created. *Id*. The court is to assume the contracting parties intended for every clause in an agreement to have some effect. *Koelsch*, 132 S.W.3d at 498. When the provisions of an agreement appear to be in conflict with one another, the court will harmonize them, if at all possible, to reflect

[4]Unless the language in an agreement is ambiguous, the court relies solely on the written instrument. *Koelsch v. Indus. Gas Supply Corp*., 132 S.W.3d 494, 498 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (citing *Adams v. Norsworthy Ranch, Ltd.*, 975 S.W.2d 424, 427 (Tex. App.—Austin 1998, no pet.)). "Whether a contract is ambiguous is a question of law." *Weaver v. Highlands Ins. Co*., 4 S.W.3d 826, 830 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (citing *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983)). At trial, neither party argued that the 1949 right-of-way deeds were ambiguous, nor did the trial court find them to be so.

the parties' intentions. *Id.* The court should examine and consider the entire contract to harmonize and to give effect to all of its provisions, so that none will be rendered meaningless. *Id.*

A grant or reservation of an easement "in general terms implies a grant of unlimited reasonable use such as is reasonably necessary and convenient and as little burdensome as possible to the servient owner." *Severance v. Patterson*, 370 S.W.3d 705, 721 (Tex. 2012) (quoting *Coleman v. Forister*, 514 S.W.2d 899, 903 (Tex. 1974)). "Nothing passes by implication 'except what is reasonably necessary' to fairly enjoy the rights expressly granted." *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 701 (Tex. 2002) (quoting *Coleman*, 514 S.W.2d at 903). "What is reasonably necessary for the full enjoyment of the easement will be determined by a construction of the language of the express grant, considered in the light of the surrounding circumstances." *Bland Lake Fishing & Hunting Club v. Fisher*, 311 S.W.2d 710, 715–716 (Tex. Civ. App.—Beaumont 1958, no writ). "It is a well settled rule that where the grant does not state the width of the right-of-way created, the grantee is entitled to a suitable and convenient way sufficient to afford ingress and egress to the owner of the dominant estate." *Murphy v. Long*, 170 S.W.3d 621, 627 (Tex. App.—El Paso 2005, pet. denied) (citing *Crawford v. Tenn. Gas Transmission Co.*, 250 S.W.2d 237, 240 (Tex. Civ. App.—Beaumont 1952, writ ref'd)).

Here, the terms of the 1949 right-of-way deeds granted an easement in general terms, but did not specify the width of the easement. Therefore, SWEPCO was entitled to use as much of the Appellees' property as is reasonably necessary, while being as little of a burden as possible. *See Severance v. Patterson*, 370 S.W.3d at 721. It is for the trier of fact to determine how wide an easement is reasonably necessary. *See Reaves v. Lindsay*, 326 S.W.3d 276, 282 (Tex. App.—

Houston [1st Dist.] 2010, no pet.); *see also Forister v. Coleman*, 538 S.W.2d 14, 15–16 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.) (holding question of what is reasonable access across walkway easement is a fact issue to be determined by jury). Because the general terms of the easement in this case describe a framework or skeleton of the easement conveyed without describing its width, the trial court could resort to extrinsic evidence in order to determine the width of the easement. *See W. Beach Marina, Ltd. v. Erdeljac*, 94 S.W.3d 248, 265 (Tex. App.—Austin 2002, no pet.) (extrinsic evidence admitted to determine easement's validity); *see also Vinson v. Brown*, 80 S.W.3d 221, 227 (Tex. App.—Austin 2002, no pet.).

SWEPCO does not dispute that the testimonial and photographic evidence, admitted over its objection, supports the trial court's judgment that "a thirty (30) foot easement is reasonably necessary for the operation, use and maintenance of the transmission line across the Plaintiffs' respective properties." Wilson testified that in 2005, agents of SWEPCO told him they were instructed to trim his pecan trees back fifteen feet from the center of the transmission line. Lynch testified and produced photographs showing that after the rebuild, the new poles and transmission line existed and operated within a thirty-foot-wide area. Batchelor testified that a portion of the rebuilt line ran through a pine thicket, where the line had "15 or 20 foot on either side, probably." Photographs of Cherry's property showed that the rebuilt line used approximately the same width-area as the old line.

SWEPCO primarily relies on *Knox v. Pioneer Natural Gas Co.* and *Central Power & Light Co. v. Holloway*, 431 S.W.2d 436 (Tex. Civ. App.—Corpus Christi 1968, no writ). In *Knox*, a deed granted Pioneer Natural Gas Company a pipeline right-of-way across a ranch "of sufficient

width to permit the grantee to lay, maintain, operate and remove a pipe line for the transportation of gas." *Knox v. Pioneer Natural Gas Co.*, 321 S.W.2d 596, 598 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.). Without Knox's permission, Pioneer removed the existing eight-inch and fifteen-inch, low-pressure pipelines and replaced them with a twelve-inch, high-pressure pipeline to meet the increased demand for gas, and Knox sued for trespass. *Id.* at 599. The court noted that these forward-looking easements,

> by necessity, must be made under conditions somewhat different from those existing at the time of the conveyance. In the absence of language specifically negativing it, it will be assumed that the parties contemplated changes in the use of the servient tenement by the normal development in the use of the dominant tenement.

Id. at 601. Finding that Pioneer's use was consistent with the purpose of the easement and used no more land than was reasonably necessary, the court held that Pioneer did not trespass because the language of its grant, even though it lacked a specific width, clearly gave it a right in excess of the one it actually used and that right would still exist even though Pioneer had exercised a lesser privilege than the one granted.

Under *Knox*, SWEPCO contends that because 1949 right-of-way deeds granted it a right to use as much property as was reasonably necessary, it did not lose that right by only using a thirty-foot-wide portion of the property in the past. *See id.* at 596 (citing *Lone Star Gas Co. v. Childress*, 187 S.W.2d 936 (Tex. Civ. App.—Waco 1945, no pet.)). However, that statement of law is inapplicable to this case because, in general easement cases, it has only been applied to easements which also grant an express right to lay additional lines in the future. *Pioneer Natural Gas Co. v. Russell*, 453 S.W.2d 882, 885–86 (Tex. Civ. App.—Amarillo 1970, writ ref'd n.r.e.)

(citing *Strauch v. Coastal States Crude Gathering Co.*, 424 S.W.2d 677 (Tex. Civ. App.—Corpus Christi 1968, writ dism'd); *Williams v. Humble Pipe Line Co.*, 417 S.W.2d 453 (Tex. Civ. App.—Houston 1967, no writ), *Coastal States Crude Gathering Co. v. Cummings*, 415 S.W.2d 240 (Tex. Civ. App.—Waco 1967, writ ref'd n.r.e.), *Phillips Petroleum Co. v. Lovell*, 392 S.W.2d 748, 749 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.)).

In C*entral Power & Light v. Holloway*, 431 S.W.2d 436 (Tex. Civ. App.—Corpus Christi 1968, no writ), Central had an easement across Hollaway's property granting it a general easement for an electric transmission line

> at or near the location and along the general course now located and staked out by said Central Power and Light Company, over, across and upon [the property] . . . Together with the right of ingress and egress over my (our) adjacent lands to or from said right of way for the purpose of Constructing, reconstructing, inspecting, patrolling, Hanging new wire on, maintaining and Removing said line, poles, wires and appurtenances; the right to relocate along the same general direction of said line . . . .

Id. at 437–38. Central proposed to rebuild the line in the same location with the same width as the existing line, but the rebuilt line would have fewer and taller poles. *Id.* at 438. Hollaway sued to enjoin the rebuild, arguing that once Central built and maintained the existing the line, "the utility company's rights became fixed and certain and [could not] now be changed." *Id.* Reversing the trial court's finding for Hollaway, the court of appeals found that since Central was given the express right to reconstruct and relocate (along the same direction) the transmission line, the original parties did not intend "such an unreasonable . . . result[] that would require the company to re-install its electric line at the exact same elevation where it was first placed." *Id.* at 439. However, *Central* is inapplicable to this case because (in addition to the powers granted SWEPCO

under the 1949 right-of-way deeds) Central possessed the additional power of relocating the transmission line. *See id.* at 437–38.

We agree with the trial court that under a general easement, once the location of the easement is selected by the grantee, its rights then become fixed and certain. *See Houston Pipe Line Co. v. Dwyer*, 374 S.W.2d 662, 666 (Tex. 1964). In *Dwyer*, the Dwyers' predecessors in interest granted the company an easement stating, "First Party . . . does hereby grant, sell and convey unto second party a right of way to lay, maintain, operate, repair and remove a Pipe Line for the transportation of gas." *Id.* at 663. The parties struck the words "and remove" from the easement and deleted a paragraph in the habendum clause giving the right to construct additional pipelines over the property, but they authorized a removal of the pipeline upon termination of the easement. *Id.* The Dwyers' sought a declaratory judgment that the easement across their property had lapsed and terminated when Houston Pipe Line removed the eighteen-inch, low-pressure pipeline that was originally installed and replaced it with a thirty-inch, high-pressure pipeline along the same course. *Id.*

The purpose of the easement was stated in general terms, but the grantee's rights were expressly limited to "laying, constructing, maintaining, operating and repairing a pipeline"; the grantee did not have the express right to remove and replace the pipeline. *Id.* at 665. The court noted that although the terms of the easement did not limit the size of the pipe to be laid, "it [did] not necessarily follow that the parties, for a consideration of $32.00, intended to burden their land with an easement which might be enlarged over and over again, as often as an increase in demands for gas might make it necessary." *Id.* at 665–66. The court held that once the grantee constructed

its eighteen-inch pipeline with the consent and acquiescence of the grantor, the extent of the grantor's easement rights thereby became fixed and certain; Houston Pipeline could not replace it with a line of substantially greater size. *Id.* at 666.

Here, as in the *Dwyer* case, the 1949 right-of-way deeds granted SWEPCO an easement that did not specify the easement's width. *See id.* at 665–66. SWEPCO's interpretation of the 1949 right-of-way deeds would result in the same "growing" easement urged and rejected in the *Dwyer* case. *See id.* Therefore, we find that once SWEPCO built and maintained the transmission lines, its rights became fixed and certain. *See id.* Because the trial court was within its discretion to admit extrinsic evidence and SWEPCO does not dispute that the extrinsic evidence supports the trial court's determination that a thirty-foot easement is reasonable and necessary, we overrule this point of error.

We affirm the trial court's judgment.[5]

Bailey C. Moseley
Justice

Date Submitted: May 2, 2018
Date Decided: June 12, 2018

[5]In its final point of error, SWEPCO contends that the trial court erred in awarding attorney fees because it lacked subject-matter jurisdiction. Having found hereinabove that the trial court had subject-matter jurisdiction over the case, we need not address this point of error.