ORAL ARGUMENT — 12/10/98
98-0446
DEWITT COUNTY ELECTRIC CO-OP V. PARKS

LAWRENCE: This is a contract construction case that the respondents have disguised and masqueraded as a DTPA case. Now I say this, because the threshold issue in this case is how this easement contract is to be construed. They admitted in the TC that if the co-op had the right under the contract to cut down the three trees that they cut down, then they have no claims. So therefore, the threshold issue is, What does this contract mean?

I have provided each of you with a copy of the easement as well as a document that extracts the language from the easement giving the co-op the right to cut down trees.

PHILLIPS: Could there be a bad faith - is this the kind of contract in which a good faith obligation might be reasonably implied?

LAWRENCE: No, it's not. This is not a case where any kind of a relationship like that would apply. They contend that, but they have cited the court to no cases involving electric co-ops that do hold that.

ENOCH: It seemed to me, it was unclear in the record, whether one of the trees may or may not have been inside the easement. But you're saying that everybody concedes that if this contract permitted them the right to cut down all three trees, then all three trees were subject to being cut down?

LAWRENCE: That's correct. Two trees there's no question were inside the easement. The other one, the base, is halfway in and halfway out, but the branches and the leaves were in the easement. And they have conceded when asked specifically that question by the trial judge: were the trees in the easement? Yes, they were. So it's our contention that, yes, they were all in the easement. But under our construction of the easement, the co-op has the blanket right to cut down trees within the easement. The easement has three separate distinct clauses, each of which conveys a specific right to the co-op. The first one gives them the clear right to clear the right-of-way of all obstructions. The second one gives them the right to cut and trim trees within the right-of-way or chemically use herbicides on shrubbery or trees. And the third one, gives them the right to cut down from time to time all dead, weak, leaning or dangerous trees that are tall enough to strike the wires from falling. And what's unusual about this case is neither side contends that this is an ambiguous contract. Both sides say that it is unambiguous. It's just a construction difference.

The first clause, which is three clauses that are connected with a comma and the word "and." The first clause is limited to the right-of-way. The second clause is limited to the right-of-way. The third clause is not limited to the right-of-way. So the first clause gives the co-op the clear right within the right-of-way to clear the easement of all obstructions. Now obstruction is not defined within the easement. But the court gives words their plain ordinary meaning, and can look to a dictionary to determine what obstruction means. Now the Merriam Webster dictionary

defines obstruction as something that blocks or impedes passage, action or operation. Now a tree generally can block or impede passage, action or operation. And in an electrical context it can also impede or obstruct the passage of electricity. There is evidence of that in the record, although it's our contention you don't even need to look at the record, because everything is - this contract is unambiguous. Everybody agrees to that.

HECHT: It could obstruct the passage of electricity, but does it have to be before you can remove it?

LAWRENCE: That's correct. Under our construction it could - it always could be a obstruction. And under the easement if it's in the right-of-way we can remove it.

HECHT: My question to you is: does it have to be obstructing the passage of electricity for you to remove it?

LAWRENCE: No, it does not.

HECHT: Why not? It's not an obstruction if it's not.

LAWRENCE: It may be an obstruction for the electrical context, and there's nothing in this contract that shows that they meant the electrical meaning. They just say obstructions generally. Now one of the purposes of an easement is to allow the utility company to go in the easement with their trucks and maintain the wires, makes sure the wires are okay, check the poles, change out the wires, put up the wires, put up the poles, and they can't do that if their trucks can't pass through the easement.

HECHT: Is there evidence that that was the case with these trees?

LAWRENCE: There is no evidence of that. But under the easement, it doesn't matter as long as it's an obstruction because it's not - there's no indication within the contract that it was intended to be the electrical context as far as obstruction goes. In fact, earlier in the contract it talks about buildings and other obstructions. So it's not just a tree that can be an obstruction. It could be a building.

HANKINSON: Is there any evidence in the record as to whether or not the trees that were in the right-of-way were obstructions, or is that a fact issue?

LAWRENCE: Yes, there is. There was testimony that the trees were burning because they were touching the wires.

HANKINSON: Is that controverted? Was that a fact issue?

LAWRENCE: It was controverted. It was a fact issue.

ABBOTT: But it's not a fact issue, but they were in the right-of-way?

LAWRENCE: Right, that is not a fact issue at all.

ENOCH: Is it possible that even though this contract is unambiguous, that the parties would have a different understanding of the conduct of the parties under the contract? In this case, one of the arguments that's being put forth is, we have this property. We've got some trees on it. We want electricity brought to the property. The electric company says, here gives us this. I understand you've got to have access. You understand you've got to have access. I understand my trees can't be knocking down your wires. You understand the trees can't be knocking the wires, but I had clearly no understanding that you use easements as a way to get free firewood. Is there a problem under this where the co-op says, Once we get access to easements, then we get all this firewood that has absolutely nothing to do with access to, or safety, or anything else. So it is really a failure of the mines to meet over what we intend to do with the language in this contract?

LAWRENCE: First of all, it's disputed that the co-op went in to get free firewood.

ENOCH: I understand it's disputed. But my point is, what's the significance of that where we have the object of a contract to be one thing, but the understanding of the parties of how they will apply the contract coming from totally different directions?

LAWRENCE: Right. Under the easement in the right-of-way an - it doesn't say it has to be obstructing something specifically. It just has to be an obstruction within the easement for them to be able to remove it. And then they can cut and trim or use herbicides on any tree or any shrubbery. It's not limited to an obstruction. It's not limited to something being dead, weak, leaning or dangerous. And so in a herbicide, although that's not an issue in this case, it does show that they had the right to go in there and kill a tree. And if you use herbicide, you are going to kill a tree.

PHILLIPS: Do you contend that cut and cut down are identical?

LAWRENCE: We contend that cut down is a subset of cut. If you harmonize the entire contract and they cut and trim - if you said that cut was the same thing as trim honestly that would be redundant and you would be rendering a word meaningless. And so, in that context, they are very similar. We don't contend that they are different, just that one is a subset of the other.

PHILLIPS: So the utility has less options with a dead, weak, leaning or dangerous tree than it does...

LAWRENCE: That are outside of the right-of-way, because that clause is not limited to the right-of-way like the first two clauses are. And if you think about it, a tree doesn't decide it's going to grow within 30 feet of an easement. And there could be a tree 1 inch outside the easement. It could be dead, it could be weak, leaning and dangerous, and tall enough to take out the wires from falling. Now obviously it would not be the intent of the co-op to let such a tree just stay there. And knowing that the next storm or the next storm, the tree might blow over and take out the wires, and when it does hundreds of people could be without electricity, which is one of their purposes is to provide electricity to their customers. It could also put a live wire down on the ground. It could injure somebody. It could start a fire. And so, I think it's clear from the intent of the contract that that

would not be what they intended. They intended to have the right to go in an area where they normally wouldn't have a right to go in order to take out a tree that could pose a danger.

HANKINSON: Would you address their DTPA arguments?

LAWRENCE: We contend first of all that they don't have any DTPA claims. They've even conceded in the TC that if our interpretation of this easement is as we say it is, that the co-op had the right to do what they did, then they don't have any claims. So that's the first reason they don't have a DTPA claim. The second reason is they're not consumers under the easement contract. They are consumers for the purchase of electricity, but they are not consumers when it comes to entering this contract.

ABBOTT: But the contract was entered into because they sought to purchase electricity?

LAWRENCE: Correct.

ABBOTT: The contract was somewhat ancillary to what they were consumers of.

LAWRENCE: I see your point. I think an example that might clear up my position is: If a person went to a car body shop to have their car repaired they would be a consumer if the car is not repaired properly. However, if while they were at the car repair shop, the car repairman threw a wrench and hit the person on the head and had a bodily injury claim, they are not a consumer under that claim. Now they are not a consumer under this case. This is a breach of contract case.

ABBOTT: Let's go back to your first point though about the DTPA. You make it seem as though because they had this contract none of the representations that were made could be a viable DTPA claim?

LAWRENCE: Their man misrepresentation that they are claiming was made, is that there was this policy. And under this policy, the co-op had the right, or they claim they had the right to go in and strip the land - and they did. There's controverting testimony in the record that shows that they didn't just go and strip the right-of-way of everybody.

ABBOTT: Is it a fact, or is it at least a disputed fact that the co-op had this policy?

LAWRENCE: It's disputed.

ABBOTT: So it would be a fact issue?

LAWRENCE: Right.

ABBOTT: And it's at least a fact issue that the policy was not disclosed?

LAWRENCE: Correct.

ABBOTT: And a failure to disclose a policy why could that not rise to the level of a DTPA violation?

LAWRENCE: This policy is a construction of what the easement says. It's the co-op's position that they had the right to go in and clear right-of-way. And that's what they did here. They went in and took out three trees. They didn't completely clear the right-of-way, but they took out three trees.

ENOCH: If you view the first clause: The right to clear all obstructions, to apply to anything that could be an obstruction, why would you need the second phrase: To cut and trim trees within the right-of-way, because they would always be obstruction, so you would always have the right to do anything with them that you wanted to?

LAWRENCE: Well trimming is different from removing.

ENOCH: But cutting a tree is exactly the same thing as clearing the right-of-way of an obstruction, which you claim is a tree?

LAWRENCE: If you do hold that cut is cutting down, you are probably right. But if you hold as they have contended that cut is with an electric saw and that trim is with hand clippers, then they are different. And so it's not necessarily redundant and doesn't render it meaningless.

ENOCH: So you would say if you retain only the right to clear the right-of-way of all obstructions, the clearing of the right-of-way would be exclusive of trimming back things to clear the right-of-way?

LAWRENCE: Well it's just different. Removing and trimming are different things. You can trim back a tree...

ENOCH: Which would be clearing the right-of-way of obstructions.

LAWRENCE: It would be clearing the right-of-way where the wire is, but it may not be clearing the right-of-way that's on the ground, because it goes from the ground...

ENOCH: But if you need to do that, you still have the provision that says, we can clear the right-of-way?

LAWRENCE: Exactly, that's my point.

HANKINSON: So as to the first two trees, you're relying on the first clause?

LAWRENCE: We're relying on the first two clauses for all three trees. The first clause or the second clause, however, you want to read it.

HANKINSON: I know. But the third tree is the one that may or may not be in the right-of-

way, so it gets subject to a little bit different consideration?

LAWRENCE: Right. But I don't think that's a fact issue, because they've conceded it in the record, that it was in the right-of-way when asked that specific question.

HANKINSON: So your position then is if they've conceded as to the third tree that it was in the right-of-way, then we don't have to worry about the third clause, we could look to one of the first two clauses as a matter of law to decide with respect to that tree?

LAWRENCE: Correct.

HANKINSON: Now as to the first two trees though, you said that whether or not those trees were obstructions was the subject of controverting evidence at trial?

LAWRENCE: It was.

HANKINSON: Then how can the directed verdict have been proper even if we agree with your interpretation? If there is a question about whether or not these two trees that were in the right-of-way were an obstruction or not why wouldn't a jury get to decide whether they really had the right to clear those trees?

LAWRENCE: Obstruction is one of those terms when you look at the clear and plain meaning, it clearly impedes the passage.

HANKINSON: I understand if we agree with your interpretation that as a matter of law this is what the easement means. And the cooperative goes to trial and puts on evidence that these leaves were burning on the trees and that they really were an obstruction in the right-of-way, and the plaintiff comes in and puts on testimony that says, no, the leaves were not burning and they really weren't doing anything to obstruct in the right-of-way, in fact, you cut them down because you wanted them for firewood. Why isn't there then a question for the jury to decide as to whether or not you could remove those trees assuming your interpretation?

LAWRENCE: Well first of all, the definition of obstruction, because it's in the dictionary could be decided as a matter of law.

HANKINSON: Well I understand that the definition can be decided as a matter of law. And we say this is what it means.

LAWRENCE: Well secondly, the easement is not just where the wires are. The easement is 30 feet on either side and it goes from under the ground to a certain footage above the ground. And so obstruction doesn't necessarily have to be in the wires. It could be on the ground if it prevented them from doing what it is they needed to do.

HANKINSON: But as I understand the DeWitt's argument in this case, they say these trees were not obstructing anything. So, therefore, even if your meaning is the correct one, under the law

you didn't have any right to take them down. They were minding their own business sitting there, they have been located in the right-of-way, but they weren't doing anything.

LAWRENCE: Well it's out position that anything in the right-of-way is an obstruction.

HANKINSON: Just as a matter of law, if it's in the right-of-way it can go?

LAWRENCE: Exactly,

HANKINSON: Just the fact that it's in the right-of-way makes it an obstruction?

LAWRENCE: No, the fact that it's an obstruction in the right-of-way...

HANKINSON: But that's my question. As I understand it they say that even if we agree with your definition of obstruction, that these trees were not obstructions. They may have been in the right, but they weren't obstructing anything.

LAWRENCE: What I am saying is the easement is not just up in the air with the wires. The easement is on the ground. And if it is in the middle even of where the wires are because the easement goes 15 feet on either side of the wires, if the tree is anywhere in there it could prevent the trucks from going in and doing the other job that they do: repairing wires, putting up wires, maintaining wires. And, so, therefore, it's our position that anything in the easement is an obstruction or a potential obstruction.

HANKINSON: Well but it doesn't read potential obstruction. It says: clear the right-of-way of all obstructions. So wouldn't you factually have to prove that something was in fact an obstruction to support your right to remove it?

LAWRENCE: I don't think so. It's the co-op's position that anything in the right-of-way is an obstruction.

HANKINSON: As a matter of law? If it's in the right-of-way as a matter of law it's an obstruction, so you can take it out?

LAWRENCE: Right.

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RESPONDENTS

MILLER: As the court is aware, we are also up here on our own petition for review. So we're asking for affirmative relief here as opposed to just protecting what happened below. Also, we think that as a summary of what we've asked the court to do, you can find that on our brief in response to the co-op's brief on page XI, we've listed what we think are rulings this court can do as a matter of law on the evidence in this case. Some are pure law, some involve undisputed facts.

ENOCH: In this clause that's in the agreement it says: the cooperative shall have the right to cut trees within the right-of way. I assume cut means something different than simply trim. It seems to me why aren't the Parks simply saying: Well I know that was our agreement, but I believed them when they said they weren't going to do that. Isn't that what's going on here?

MILLER: That clause is in the same sentence with the immediate following clause, not even separated by a comma that says: But you can only cut them down when they meet certain criteria, the same sentence, no comma. So clearly cut meant something different than cut down.

We're not here today on a breach of contract argument, which: Did the co-op go broader than reasonably necessary? That's another clause that's in this easement that's at issue. Certainly if there was no language about cutting the trees down that limited them, if the only issue was could they cut them down based on a cut language as you're focusing on, we would say if they went no broader than necessary to do the electrical work that was at issue, then perhaps they could cut the trees down. But this has limiting language that says: But you can't do that.

ENOCH: The limiting language they can do that for?

MILLER: If there was no language here restricting when they could cut a tree down if that third clause was not there, then if the question was: Could they under the cut and trim language cut a tree down, or clear an obstruction, it would be a fact-driven issue. And it would be factually driven and connected to the prior language that says: The co-op says it will go no broader than reasonably necessary to provide electrical service. So in a given case if that were the issue, which is not what we have, that would be a fact-driven question that would have to be a jury decision.

ENOCH: So you're arguing this clause does not permit them to cut down a tree within the easement unless it's an obstruction?

MILLER: Precisely. The first clause which says: clear an obstruction, we're saying...

ENOCH: You agree a tree could be an obstruction?

MILLER: A tree can be an obstruction. But we're saying that unless factually it was an obstruction, they can't use the clear language. So we're saying since these trees were not an obstruction that's not an issue.

ENOCH: In the second phrase: to cut and trim - you're saying cut means something different than cut down, because cut down is referred to later in that clause?

MILLER: Yes.

ENOCH: Then does cut mean the same thing as trim?

MILLER: It can except to us - you know again we heard two weeks of testimony from a whole variety of folks, and basically the trim seemed to be something smaller than cut. You've go

to go and cut-off big branches or something. But we could not - there was not as far as I am aware a specific industry definition as to how far you go when it quits being a trim and it now goes into a cut.

OWEN: Now under your construction of the easement, if it has to be an obstruction before they can cut or trim, is that your position?

MILLER: That's correct.

OWEN: So we've always got a fact question on when they go out and even trim the trees as to whether it's an obstruction?

MILLER: If they are going to try to use obstruction as an excuse for what they did, then, yes.

OWEN: Under your theory, they can't even trim the trees until there's an obstruction, is that correct?

MILLER: No, you can cut and trim a tree. We had industry testimony that trimming...

OWEN: But even if it's not an obstruction?

MILLER: Yes. Six feet is sort of the normal - a lot of people do about 6 feet. They are trying to get the branches away from the pole lines.

OWEN: If your whole argument centers around what the word 'cut' means, whether it's just the equivalent of trimming or whether it means cut down?

MILLER: No. Cut down, yes. We're saying they cut down these trees. It's not disputed. There's no issue...

OWEN: If we decide that cut means cut down, you agree there doesn't have to be an obstruction to cut down?

MILLER: Yes.

OWEN: So it centers around basically what does the word 'cut' mean?

MILLER: You can cut and trim a tree without it being an obstruction, or you can cut down a tree without it being an obstruction provided it's dead, weak, leaning, or dangerous. So there are three different categories of focal points here.

HECHT: But you think all are governed by the provision of the easement that says, the co-op won't do anymore than is necessary?

MILLER: Yes.

HECHT: All three clauses?

MILLER: Yes.

HECHT: So if you cut back on a tree 7 foot instead of 6 foot, 8 foot instead of 4 foot, you would have a jury issue?

MILLER: In theory, yes. It would be again, what is the industry standard. And presumably a lawyer talking with an expert, as we did, would not mount an action based on 7 foot verses 6 or something like that, because the 6 feet is not cast in wholly writ. That's sort of a rule of thumb.

HECHT: But if were 9 foot, that would be 50% more and that might?

MILLER: Potentially. It could be.

OWEN: Let's make sure we understand too about where these trees were. Do you now concede that all three trees at least had their trunks in the easement?

MILLER: No. The trunks of two were inside the easement, the third one was outside. In our statement of facts it's a foot or two outside, but branches did grow into the easement. And what the co-op did is is they cut it off approximately at the dotted line, at the extremity of the right-of-way. So anything that was inside that 30 foot swat, they wacked off.

OWEN: So they didn't cut the tree down totally, the third tree?

MILLER: In the photographs it's got a foot or two sticking above the ground outside the easement. It grew a couple of feet up and it bent into. They cut it off leaving the stump outside the...

OWEN: The only thing they cut was what was physically in the easement?

MILLER: Yes. To clear up what counsel was saying is herbicides is not an issue before this court. It is not part of this contract in dispute. As we pointed out, the cooperative before the Parks came into the office and signed this, which we learned during discovery, had investigated, done a study, concluded they would never use herbicides. They made a policy board decision. And when Mr. Parks came in, he specifically inquired about herbicides, and was advised that that was not going to ever be used. And this is not disputed in the record. We pointed that out in the CA below. We pointed it out in our statement of facts here. It has never been disputed. And it isn't disputed. So, herbicides, even though written in the form in 1985, subsequent to that and before the Parks' signed this document - when they signed it it was decided it was not a part of the contract. So we don't think that the herbicide language has anything to do with how this ought to be interpreted.

We think that the context and the special relationship of this is important. We

have a cooperative which is presumably owned by its consumer members. The assets, the trucks, the wagons, everything is owned by its own membership. To become and get electricity you've got to sign up and become a consumer, you sign documents that says you are a consumer. We had a formal admission by the cooperative saying, that for all purposes of this case, the Parks were consumers.

OWEN: Let me ask you on this issue. Ms. Lawrence says that if we adopt the utility company's construction of the easement, you don't have a DTPA claim. Do you agree with that?

MILLER: What we said below, and admitted to the trial judge, we said: Had there been an express declaration in this easement that said, we can cut out any tree, every branch within the right-of-way, or if we can clear and remove all trees and branches within the right-of-way, it had been clear that said that, then yes, we would not have a DTPA action. But that's basically what our complaint is here is they've got a document and a representation that says: we're concerned about landowners' trees. We don't cut them down unless they are dead, weak, or leaning. We send somebody out to your property to meet with you and take your needs into concern. We eyeball the place before we do the work. All of this is a representation that says, landowner counts, his land counts, whatever his concerns are count. Jim Springs, the manager, admitted, so did Sylvester Butler.

OWEN: Assuming that we say that the easement is unambiguous, and it allows you to cut any tree that's in the right-of-way, whether it's an obstruction or not, you can clear the right-of-way, you say you would not have a DTPA claim?

MILLER: If this court concludes that this easement says they can do what they want in a right-of-way, then I will admit, we would not have a DTPA action.

OWEN: Why not?

MILLER: Because then the easement would clearly say they can do what they want.

OWEN: So your DTPA claim is basically based on the ambiguities and the unclearness of the easement agreement?

MILLER: No. Ours is based on the fact that they've got an undisclosed policy, which the CA found, that says: we can do whatever we want in the right-of-way. Contrast that with several things: one is the written easement that says we only cut trees down if they are dead, weak or leaning. That's not a we own everything in the right-of-way representation. We also have nobody at the front office telling us they claim the right to strip everything in the right-of-way if they want to. We have Butler, the engineering coordinator, meeting them on their property. He admits, I didn't tell them that we claim the right that we can do whatever we want in a right-of-way.

OWEN: So it's a failure to disclose?

MILLER: Failure to disclose, which we indicated in the context of a special relationship, this fiduciary relationship, there is a mandatory obligation to disclose material facts, the failure to

which is deception.

HANKINSON: What's the basis for the fiduciary relationship?

MILLER: The fiduciary relationship is, this is not an arms-length transaction. This isn't a third-party pipeline company coming onto your land saying: Hey, pretty please can I put a pipe across it. This is your co-op, your membership, your representation, they own your assets. Everything is owned by the landowners.

HECHT: So if you own stock in the pipeline company they couldn't do it?

MILLER: They don't come in in that capacity.

HECHT: But if you own stock in Exxon, then they've got a fiduciary duty to you?

MILLER: No. There's a different base of ownership in the stock. The stock company is nationwide, and you're talking about a focal on one landowner. Here you've got a co-op that is geographically regulated to a certain area. Everybody in that area can only get the electricity if they become a member of that co-op. They sign-up papers that says: you're a consumer. They've admitted there's a special relationship. They run the assets for the benefit of their landowner/member/consumers. It's a much more close relationship than something like owning stock in Exxon.

ABBOTT: If they had not obtained electricity from this co-op, where would they have obtained it from?

MILLER: They could have in theory used solar. In the trial testimony they had looked at solar, they had looked at getting a diesel generator.

ABBOTT: But there's no other provider?

MILLER: Not a third-party provider, no. You can't get it from the city that I know of.

ABBOTT: So they wanted electricity from a provider even if they had to get it from the co-op or they couldn't get it?

MILLER: Correct.

ENOCH: If we read the contract the way you say the contract ought to be read, then they've breached the contract by cutting down the trees, correct?

MILLER: We would say it goes beyond that. If they've got a contract, as we've indicated, the DTPA can include an assertion of a legal right that they don't have. Somebody says: I have the right to clear-up. And if that's a claim that is not supported in the document this SC has held in *Delaney* and others and said: you can't do that. You cannot claim a right that doesn't exist

in the contract. If you claim a right that isn't there, that's deceptive as a matter of law. That's what we're asserting here. They've got "this strip the right-of-way" policy that nobody knew about until after it was too late to take protective action. Had it been disclosed up front, the Parks and the PUC tariff have options: hey can move the poles, they can put higher poles, they can put sidearms on the things to push wires against trees, they could relocate the poles. Granted at the Parks' additional expense above what they would normally pay. But you've got to have disclosure to do that. We didn't get disclosure. It's the failure to disclose that is a key deceptive act...

ENOCH: They would not have executed this agreement but for their being misled into believing that there was not a clear-cut policy on the easement?

MILLER: Correct. They got an easement document which says, we only touch trees under certain limited circumstances.

ENOCH: So it really doesn't matter what this agreement says. Their argument really is that we don't care what the agreement says. We would not have signed this agreement but for the fact that they failed to disclose to us what their policy was about clear-cutting easements, and based on their duty to disclose because they had already disclosed to us that they don't do that, we were then misled into executing this.

MILLER: That's true to a point. If they have a document that limits their legal rights and they don't disclose a conflicting policy, they basically we don't do anything that's in the document, we do what we want, that in and of itself is a failure to disclose, that's the _____. Second, if they then claim a legal right under a contract that isn't in there, if the contract clearly says we can't do this and they nevertheless say yes we can, that is a claimed right under an ambiguous contract that isn't in there. That's a second cause of action under the DTPA.

SPECTOR: Did I understand you to say that there's also a policy that landowner can try to save trees by paying additional money?

MILLER: Yes. We had Jim Springs, the manager, testified: Of course, we try to have a meeting of the minds before we take out trees. That's normal. We had Sylvester Butler, the engineering coordinator, admit: We normally talk with landowners about trees.

SPECTOR: No. I'm saying that when you're giving the easement that you can have it in a different place if you will bear the cost?

MILLER: Yes. There was evidence in my brief. In one case, they moved the lines 187 feet to get them away from some pine trees that are fast growing. They've had burning in the branches. We included I think photographs where the line went through that burned them brown. There was admitted burning obviously involving trees, but there they moved them instead of cutting them down. Our's got cut down. There was testimony that they co-op has 60 foot poles. They were going to remove all, they left one or two in place. They could have put in 60 foot poles, which would have given them 20 foot more clearance. Granted, you would have had to run a longer line or do something to increase it, but the PUC tariff says, and we think it ought to be part of the contract: The

co-op shall modify and move its facilities if the landowner pays for it. The Parks didn't know they had a problem. Nobody told them. They could have done that.

We said repeatedly this is not just a breach of contract case. If the issue were they should have gone 8 feet instead of 6, or 9 feet instead of 6, that might or might not be a breach of contract case. Did they do something that is allowed in the language and they went broader than reasonably necessary? That would be a breach of contract case.

Hopefully I've shown we're not focusing on that. Although that was part of the trial below.

OWEN: When you say breach of contract, an easement is more than a contract isn't it? Isn't it interest in real property?

MILLER: Yes.

OWEN: And the utility company owns the dominant estate?

MILLER: They are the holder of the easement, that's correct.

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REBUTTAL

LAWRENCE: With regard to the reasonably and necessary language, the respondents contend that that serves as a check for all rights granted in this easement. I remind the court that under the contract construction rules specific clauses control general. And in this case, the granting of the right to cut down and trim trees is a very specific clause. So, therefore, it controls the reasonably and necessary. Also if the court were to adopt their interpretation and use the reasonably and necessary language to restrict the rights the co-op has, what would prevent a landowner from later coming on and saying: Well 30 feet, which is also a specific provision in the easement, is broader than reasonably necessary. You only need 10 feet or 20 feet in order to conduct electric services.

I remind the court to keep all this in mind when construing the contract as far as the reasonably necessary language.

ENOCH: Mr. Miller makes an issue of the fact that this co-op seems to have a tree friendly policy that it announces to potential members when it talks about the easement. Then the next part of his argument is, because they announce this a tree friendly policy they then have a duty to disclose the clear cutting policy of their easements. How do you respond to that?

LAWRENCE: Well the humanistic policy that he's talking about in the record is referred to "close to homes", "close to the buildings," "close to houses," and that's not what we have here. This was right off the road, off the main road onto the Parks' property. So it's not the same thing.

ENOCH: That's clear in the tree policy? Our tree friendly policy only applies to trees next to homes?

LAWRENCE: They said in the record that we try _____ homes to work with the landowner and figure out what we can do with the trees. As far as this undisclosed policy, it's not undisclosed. It's what the easement says. It gives them the right, the unlimited right to cut down trees within the right-of-way. So there's no undisclosed policy. Had the Parks really studied the easement, they would have seen that. They had the right to go in and cut down these trees.

I also wanted to point out that when Mr. McNabb was up here addressing you awhile ago, he talked about the dead, weak, leaning or dangerous provision. In _____ and falling provision it says that also applies within the right-of-way. It does not. His interpretation ignores the comma, that follows the word obstructions, and the word 'and' that comes after herbicides and before to cut down. This shows that there are three clauses. The first one is that the co-op shall have the right to clear the right-of-way of all obstructions. The second one, is to cut and trim trees within the right-of-way or chemically treat trees or shrubbery with herbicides. And three, to cut down from time to time all dead, weak, leaning or dangerous trees that are tall enough to strike the wires and falling.

As I've told you earlier it's the co-op's position that the last clause, the third clause about dead, weak, leaning, or dangerous trees, because it doesn't have the right-of-way language in it specifically as the first two clauses do, it applies to trees that are outside the easement, and I gave you the example of the tree that was outside the easement and it was dangerous and could take out the wires from falling.

His definition of trim that he said earlier, that trim was with hand clippers and cut was with an electric saw, that's not in the record anywhere. There's no testimony as to what trim means at all.

ABBOTT: What evidence is there in the record that the only time that the co-op would make accommodations to wire around trees or other things is when it's close to a house?

LAWRENCE: There is testimony from Jim Springs, who works for the co-op, who did discuss that.

ABBOTT: Is there evidence to the contrary?

LAWRENCE: Not that I recall. He also says that the tariff in the Electric Services Agreement needs to be considered as part of the easement, but the Texas law says that if another document that's not referred to in a signed document is not specifically referred to it cannot be part of that document. So I urge you not to consider the Tariff and Electric Services Agreement as part of the easement. The easement is a document that stands alone.

ABBOTT: But is not the easement subject to the tariff agreement?

LAWRENCE: It doesn't say it is specifically in its terms. And so, therefore, under Texas law, no, it's not.