

STATE OF MICHIGAN

IN THE 30TH CIRCUIT COURT FOR THE COUNTY OF INGHAM

CITY OF LANSING'S BOARD OF WATER
AND LIGHT, a municipal corporation,

Plaintiff,

v

RICHARD R. CRITTENDEN and
CONSTANCE A. CRITTENDEN,
co-trustees of the CRITTENDEN FAMILY
TRUST,

Defendants.

ORDER

HON. CLINTON CANADY III

Docket No.: 15-212-CZ

At a session of said Court held in the City of
Lansing, County of Ingham, State of Michigan,
this 1st day of August, 2016

**PRESENT: The Honorable Clinton Canady III
30th Circuit Court Judge**

This matter was previously before the Court on Plaintiff's *Renewed Motion for Summary Disposition* pursuant to MCR 2.116(C)(10). A hearing on the Motion was held on July 18, 2016. At the conclusion of the hearing, the Court granted the Motion in part and denied in part for the reasons stated on the record. An Order reflecting the Court's decision was entered on July 27, 2016. As a result of the Court's ruling, there were only two issues remaining: (1) the extent to which the limb on the 26" Maple presently overhanging Plaintiff's electric power line would be trimmed and (2) Plaintiff's claim for a money judgment against Defendants. The Court and the parties agreed that these issues would be resolved following the Court's in-person view of the Property. The Court visited the Property to view the 26-foot Maple on July 18, 2016. All parties were present during the viewing.

I. Background Facts and Procedural History

In December of 2013, there was a major ice storm in the Lansing area. BWL customers experienced power outages lasting for days and, in some cases, weeks. According to BWL, most of the outages were caused by electric power lines being damaged by tree branches loaded with ice and snow. After the storm, BWL stepped up its maintenance, specifically including tree trimming under its Vegetation Management Program to improve safety and reliability and reduce outages caused by trees. Defendants, as co-trustees of the Crittenden Family Trust, own residential property located at 603 Ardson Rd in East Lansing, Michigan. BWL has a pole, transformer, and secondary power line on the Property. The equipment has been in the same location since at least 1926 and serves several homes in the neighborhood. BWL has an express written easement over the Property for placement of, maintenance of, and access to its Equipment. In July 2014, BWL was trimming in the vicinity of the Property as part of its Vegetation Management Program. BWL developed a plan for the area which called for trimming of “overhang” from trees near the power lines. According to BWL, overhang is the single largest threat to the electric power lines and the integrity of BWL’s electric power system.

On July 2, 2014, BWL entered and began work on the Property, but was forced to leave the Property by Defendants. BWL then filed the instant lawsuit on March 10, 2015, seeking to enforce its easements, including its right of maintenance (tree trimming) and access. Specifically, the Complaint set forth the following allegations: (1) Interference with Express Easement, (2) Interference with Easement by Prescription, (3) Easement by Necessity, (4) Injunction, and (5) Damages. Since the date the Complaint was filed, BWL has not been allowed back onto the Property to perform its trimming. BWL claimed that Defendants not only denied access to the easement, but also asserted that BWL must obtain their express permission

and approval in order to maintain the easement. Alternatively, Defendants argued that the express easement requires “renewal” and that it is now expired.

On March 30, 2016, Plaintiff brought a motion for summary disposition, which the Court granted in part. Specifically, the Court made the following determination: as part of the ruling, Defendants were allowed to trim the trees at issue (i.e., the 26-foot Maple and the 8-foot Elm) at 603 Ardson Road on or before July 15, 2016. Thereafter, BWL was permitted to inspect the trimming, and if it was found to be acceptable, the issue of whether any further trimming was necessary would become moot. Likewise, if BWL found that the trimming was not acceptable, the Court ruled that the motion for summary disposition could be renewed for a final determination regarding the trimming and any remaining issues.

On May 2, 2016, counsel for BWL prepared and submitted a proposed order that purported to summarize the Court’s ruling. Defendants’ counsel objected to the proposed order and submitted a new proposed order for the Court’s review. At the hearing to settle the order, the Court acknowledged that BWL’s proposed order was accurate. However, the Court reconsidered the ruling and modified it to give Defendants the opportunity to first submit a written proposal, to avoid expense in the event Defendants’ proposed trimming was unacceptable to BWL. The proposal needed to give BWL a clear description of the work to be performed (and presumably the cost to perform the work) in order to allow BWL to make an informed decision whether the proposed trimming would meet BWL’s safety and reliability concerns. On June 29, 2016, BWL filed a rejection and response to Defendants’ trimming proposal and renewed its Motion for Summary Disposition. As noted above, the Court granted BWL’s Motion for Summary Disposition in part, which disposed of the majority of the issues in dispute.

II. The Site Visit

On July 18, 2016, the Court and the parties visited the Property to view the trees at issue. Attorneys for both parties were present along with various BWL employees: (1) John Rademacher – Forester, (2) Diana Paul – Supervisor of Forestry, (3) Dave Bolan – Director of Operations, and (4) Dick Peffley – General Manager. The homeowners – Richard and Constance Crittenden – were also present along with their Arborist – Alex Ellis. At the outset, it was brought to the Court’s attention that, although formerly in dispute, the parties had resolved the issues pertaining to the 8-foot Elm tree. Therefore, the only remaining issue was the 26-foot Maple tree. The Court was able to view the Maple extensively and its position in relation to the power lines. In addition, the Court was able to observe firsthand where the Maple stood in relation to the other vegetation located on the Property.

John Rademacher, Forester for BWL, began by explaining that the line in question was a secondary power line, and BWL proposed that all overhanging branches over the power line be removed. BWL conceded that the portion of the limb that would need to be removed was substantial; however, it was BWL’s position that it was necessary to remove the entire limb at the base in order to reduce the risk of branches falling on the lines during a snow or ice storm. Dave Bolan then explained BWL’s perspective regarding the necessity of trimming the overhanging limbs:

MR BOLAN: From an engineering reliability perspective, when those tree limbs come down, they hit our lines. Our lines are not designed to handle the impact of that type of a limb coming down on them. That’s what we see as primarily a reason during some of these storms is causing outages, the significant amount of outages, in particular, the storm we had last week is due to storm damage. There’s researchers out there that have opined that basically that if you take that overhang away, then basically your reliability improves tremendously and you are not subject to this degree of outages that we had during the storm.¹

¹ Tr 7/18/16, p 7

Defendants' Arborist, Alex Ellis, then explained that, although BWL's proposed plan would reduce some of the mechanical stress and would take away some of the material over the lines, it would not be an ideal long-term solution because making such a large cut would precipitate a column of decay on the remaining portion of the tree. In response to a question by the Court, Mr. Ellis explained what he meant by "column of decay":

MR. ELLIS: [T]ypically on a tree of this maturity, when you get to a larger diameter deciduous tree, if you make a large cut like that, that's well over 12 inches in diameter. I would guess that's probably 20 inches, plus or minus, in diameter. Most arborists will tell you that prior to that wound covering with callus wood, that wood that's exposed at the cut's surface will begin to decay, and that decay works its way down into the base, and if you eliminated this which is counterbalancing the rest of the tree and you have all the weight leaning towards that house, and then on top of it in the future this becomes hollow, you kind of catalyze it a disaster for this thing tipping that way.²

Mr. Ellis went on to further explain his alternative proposal to minimize the risk of tree limbs falling on the power lines:

So, alternatively, how could we minimize risk and reconcile that with trying to preserve the tree's integrity, and the solution that I thought would be good would be to come up into this area and come up to some of these branches up there and take some of them out, possibly cutting up here right across there, reducing the length of these, and not so much working to make everything lighter at one point but collectively throughout this whole branch structure area, going out on every one of these limbs and going out to the ends of each one and shortening some things like this back, keeping maybe this, taking this back, keeping some of the shorter parts, taking out longer components of each limb's branch structure, and collectively what that does is reduces the drag significantly. And in addition, it does shorten the length. I would estimate that the length could come back approximately five to eight feet, in portions perhaps a bit longer, so that the overall length will be less of a mechanical lever that the wind, snow or ice could act upon.

There's no guarantee in either solution that the tree couldn't fail. It's just always possible. Nothing is tornado proof. The only way to completely eliminate any risk is to remove the tree entirely, but if the goal is to preserve the tree, then it seems like it would be in the tree's and neighbor's best interest and the homeowner's best interest and also serve to benefit the Board of Water & Light and reduce their risk if we preserved the large limb and reduce the length back by

² Tr 7/18/16, p 10

taking weight off and length off. That's a standard kind of pruning called end weight reduction or reduction pruning.

* * *

We're fully in support of removing some limbs and trying to improve the safety for the lines. I just feel that it needs to be done in a thoughtful manner where we don't arbitrarily just fulfill some criteria of chopping everything off that comes over the line.³

Although the parties clearly disagree on the extent to which the tree limbs must be trimmed in order to minimize the risk of destroying the power lines, both parties agree that, regardless of which approach is ultimately chosen, continued maintenance will be required to maintain a safe distance from the line. The difference between the two approaches is that with BWL's proposed plan of action, less frequent maintenance will be required.

III. Summary Disposition

A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim.⁴ The moving party must first "specifically identify the issues as to which [it] believes there is no genuine issue as to any material fact,"⁵ and has the initial burden of supporting its position with affidavits, depositions, admissions, or other admissible documentary evidence.⁶ In determining whether a genuine issue of material fact exists, the court must consider all documentary evidence in a light most favorable to the nonmoving party.⁷ "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ."⁸ "Summary disposition is proper under MCR 2.116(C)(10) if the affidavits and other documentary evidence show that there is no genuine issue concerning any material fact and that

³ Tr 7/18/16, p 10-11

⁴ *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999)

⁵ MCR 2.116(G)(4)

⁶ MCR 2.116(G)(3)(b); MCR 2.116(G)(6); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996)

⁷ *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001).

⁸ *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003)

the moving party is entitled to judgment as a matter of law.”⁹ However, if it appears to the Court that the opposing party, rather than the moving party, is entitled to judgment, the Court may render judgment in favor of the opposing party.¹⁰

IV. Analysis

In the instant case, there is no question that both parties have significant competing interests that the Court must balance in an effort to reach a solution that takes into account the BWL’s safety concerns as well as the homeowners’ interest in preserving the integrity and aesthetic value of the Property as a whole. One of the concerns the Court expressed during the site visit was that the homeowner had lived on the Property for over forty years, and the Maple appeared to a major source of shade in the backyard. Thus, if large limbs were to be removed from the Maple, the amount of shade would be substantially diminished. Also, during the site visit, BWL pointed out a tree next to the Maple which had essentially the same type of trimming as BWL proposed to perform on the Maple at issue, and frankly, the condition of the tree significantly altered the aesthetic character and overall appearance of the Property. Moreover, the Court must take note of the fact that the homeowners have cooperated with BWL’s demands to the extent that they have agreed to allow BWL onto the Property and have given their consent for BWL to cut the Elm tree down, which will eliminate another source of shade in the backyard.

After a thorough consideration of the parties’ respective positions, the Court finds that the least intrusive way of addressing the interests of both parties would be to allow the homeowners to trim the Maple in accordance with the Arborist (Mr. Ellis)’s recommendation for end weight reduction pruning. Specifically, in accordance with their stated plan of action, the homeowners

⁹ *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 474-75; 776 NW2d 398, 404-05 (2009) quoting *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007)

¹⁰ MCR 2.116(I)(2)

shall trim both limbs of the Maple as proposed by Mr. Ellis, and they must trim – to the extent feasible – any remaining tree limbs/branches that cross over the power line.¹¹ Although the Court is cognizant of the BWL's concerns regarding the risk of branches falling on the power lines, the Court finds that the Arborist's proposal would adequately address those concerns while allowing the Maple's integrity to remain preserved. In addition, BWL did not appear to dispute that cutting off the large limb at the base would pose risk of decay forming that would substantially weaken the strength of the tree and create a significant risk of branches falling off the tree; thus, the Court's proposed solution of end weight reduction pruning would lessen the risk of decay forming as well.

THEREFORE, IT IS ORDERED that Plaintiff's *Renewed Motion for Summary Disposition*, as it pertains to the trimming of the 26-foot Maple, is hereby **DENIED**.

IT IS FURTHER ORDERED that summary disposition is hereby **GRANTED** in favor of Defendants pursuant to MCR 2.116(I)(2), as it pertains to the trimming of the 26-foot Maple, because it appears to the Court that Defendants are entitled to judgment as a matter of law.

IT IS FURTHER ORDERED that, for the reasons stated herein, Defendants shall be permitted to trim the Maple in accordance with their Arborist, Mr. Ellis's plan for end weight reduction pruning.

IT IS FURTHER ORDERED that Defendants Richard and Constance Crittenden, the homeowners, shall bear the costs of the proposed trimming in full.

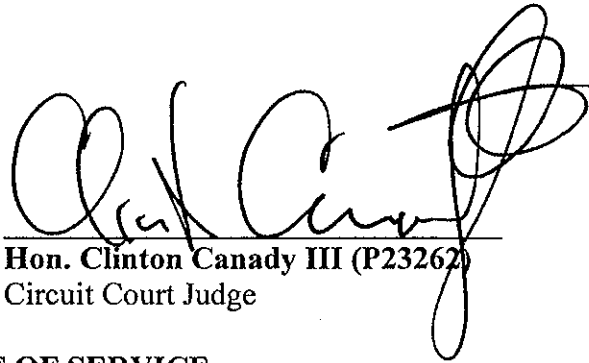
IT IS FURTHER ORDERED that Plaintiff's *Renewed Motion for Summary Disposition* regarding money damages is hereby **DENIED**.

¹¹ This would allow any limbs at the crown of the Maple to remain intact, while preserving shade provided by the tree.

IT IS FURTHER ORDERED that any objections shall be filed within 14-days of this Order and scheduled for a hearing.

IT IS SO ORDERED.

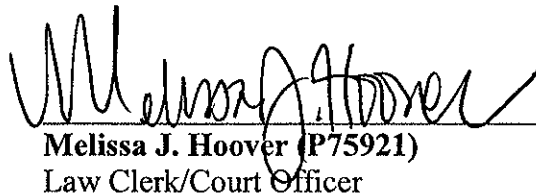
IT IS FURTHER ORDERED that in compliance with MCR 2.602(A)(3), this Court finds that this decision resolves the last pending claims and closes the case.



Hon. Clinton Canady III (P23262)
Circuit Court Judge

PROOF OF SERVICE

I hereby certify I served a copy of the above Order upon Plaintiff and Defendants by placing the Order in sealed envelopes addressed to attorney for Plaintiff and attorney for Defendants and depositing for mailing with the United States Mail at Lansing, Michigan, on August 1, 2016.



Melissa J. Hoover (P75921)
Law Clerk/Court Officer