IN THE SUPREME COURT OF OHIO

LORRI TURNER, ADMINISTRATRIX, ETC.,	:	**07-0035**
Appellee,	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
-vs-	:	
OHIO BELL TELEPHONE COMPANY, ET AL.,	:	Court of Appeals Case No. CA-05-087541
Appellants.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT SOUTH CENTRAL POWER COMPANY

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EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST

Utility poles are omnipresent alongside Ohio's state, county, township, and municipal roads. Appellant South Central Power Company ("South Central") is one of twenty-five Ohio electric distribution cooperatives, which collectively own 60,710 miles of line. At one pole every 314 feet—the average span length on South Central's system—and thus 16.8 poles per mile, the electric cooperative system in Ohio alone accounts for more than a million utility poles. The Ohio electric cooperatives serve approximately 40% of the land area of the state, and so the electric system statewide comprises some 2.5 million poles, the vast majority of which are alongside Ohio's roadways, within the right-of-way. The value of this state's utility pole inventory is in the hundreds of millions of dollars, and the cost of relocating those 2.5 million poles outside the road right-of-way—at South Central's average replacement cost of $966.10—would be well over $2 billion.

Many, many years ago, the Ohio General Assembly decided that because of the unique public function served by electric, telephone, and other utility companies, those utility companies should be allowed to place their poles and related facilities within the right-of-way of Ohio's public roadways. *See* R.C. 4931.01 (repealed Sept. 29, 1999); R.C. 4931.03; R.C. 4933.14. Until this case, Ohio law has been clear on the circumstances when a utility company can be held liable in tort for the placement of its utility poles within the road right-of-way. With the exception of the appeals court decision in this case, every Ohio appellate court which has reached the question has adopted a bright-line test, which asks simply whether the utility facility was within the improved, traveled portion of the roadway or berm. If the pole is within the right-of-way, but in an area not intended for lawful travel, then as a matter of law the utility company cannot be held liable.

The Eighth Appellate District in this case charted a new course, holding that where a motor vehicle leaves a public roadway and strikes a utility pole located off the roadway and beyond the berm, but lawfully within the public road right-of-way, the liability inquiry is a factual one. *Turner v. Ohio Bell Telephone Co.*, Cuyahoga App. No. CA-05-087541, 2006-Ohio-6168, at ¶¶ 9-12 (copy attached). Among the eight factors to be considered are (1) proximity to the road, (2) the condition of the road, (3) the direction of the road, (4) the curvature of the road, (5) the width of the road, (6) the grade of the road, (7) the slope of the road, and (8) the position of side drains or ditches. *Id.*, at ¶¶ 10, 12. In short, whereas every Ohio intermediate appellate court presented with the question of a utility company's liability for the placement of its utility poles—including the First, Second, Fifth, and Ninth Appellate Districts—eschews consideration of the specific facts of a lawful pole placement, the Eighth Appellate District focuses exclusively on those facts.

The Eighth District's new proposition of law presents utility companies with a conundrum. They must place their utility facilities somewhere. Only two options exist: road right-of-way, or private property. The legislature's judgment that road right-of-way should be made available to utility companies for utility facility placement is a recognition that such public space is the most appropriate location for utility facilities, for reasons both practical and economic. If the option of locating utility facilities within public road right-of-way were not available, utility companies would have to negotiate, obtain—voluntarily or by eminent domain—and pay for innumerable private easements from property owners whose land abuts Ohio's roadways; and then would have to manage and maintain their pole inventory amidst a patchwork of hundreds of thousands of individually negotiated easements, each potentially with its own terms. As a practical matter, the Eighth District decision in this case forces utilities to do

just that, for virtually any pole placement within a road right-of-way can be challenged under the new eight-factor test adopted by the court below. Because every pole located within a road right-of-way is now a potential source of tort liability in Cuyahoga County—or, as in this case, which arises from events in Fairfield County, in *any* Ohio county to the extent that venue can be obtained in Cuyahoga County—prudent utility companies will be forced to relocate their poles from road right-of-way onto private easements, or face liability exposure for every one of their poles. Simply put, as a result of this major change in the law, a change with statewide consequences for all utilities, Ohio's roadways are now lined with 2.5 million liability magnets, and, as a consequence, 2.5 million pole relocations are in order. The relocation of such poles would cost billions of dollars, an expense which would ultimately be borne by utility ratepayers; and would impose an unprecedented burden on the utility companies and private landowners involved.

STATEMENT OF THE CASE AND FACTS

On September 10, 2003, Bryan Hittle, while traveling southbound on State Route 188 in Pleasant Township, Fairfield County, Ohio, lost control of his Ford Mustang and drove it off the road, striking a utility pole. Hittle's front seat passenger, Robert Turner, died as a result of the accident. Hittle subsequently was convicted of vehicular manslaughter. It is undisputed that the pole at issue was located in a grassy area three feet, nine inches from the roadway's edge, and two feet, five inches from the berm. It is also undisputed that Hittle was not properly using the roadway, but rather had lost control and left the roadway. The state troopers who investigated the accident testified that a vehicle traveling southbound on State Route 188 that stayed within the painted white lines, as it should during normal lawful travel, would never make contact with the utility pole.

On February 22, 2005, Plaintiff-Appellee Lorri Turner, on behalf of the estate of her late son Robert Turner, sued South Central and The Ohio Bell Telephone Company, d/b/a SBC Ohio ("SBC Ohio"), asserting claims for negligence, negligence *per se*, and absolute and qualified nuisance. On September 30, 2005, South Central and SBC Ohio each moved for summary judgment, which motions Ms. Turner timely opposed. South Central and SBC Ohio each timely filed a reply brief in support of their respective motions. On December 2, 2005, without leave, Turner filed a supplemental memorandum in opposition to the summary judgment motions (the "Second Memorandum"), supplying deposition testimony from a local resident concerning the purported accident history of the pole at issue in this case. Plaintiff's Second Memorandum was filed several hours after the trial court granted the Defendants' summary judgment motions, also on December 2, 2005 (the "Summary Judgment Decision"). On December 7, 2005, Ms. Turner filed a motion for relief from judgment pursuant to Civil Rule 60(B)(2), restating the argument made in her Second Memorandum. On December 22, 2005, the trial court overruled Ms. Turner's Rule 60(B) motion (the "Rule 60(B) Denial"), rejecting the "new" evidence as both untimely (because Plaintiff had met with the resident three times before she sued, and so had known what his testimony would be and how to obtain it) and irrelevant (because the other accidents involved a drunk driver, a sleeping driver, and a driver whose accident was not reported and for which the resident could supply no driver name or date). One week later, Ms. Turner timely filed a notice of appeal of the Summary Judgment Decision (though not of the Rule 60(B) Denial) with the Cuyahoga County Court of Appeals, Eighth Appellate District.

Following briefing and oral argument, the Cuyahoga County Court of Appeals on November 22, 2006 released an opinion, journalized on December 4, 2006, (a) reversing the judgments in favor of the Defendants as to Plaintiff's negligence and qualified nuisance claims,

(b) affirming as to the negligence per se and absolute nuisance claims, and (c) remanding the case for trial. *See generally Turner*, 2006-Ohio-6168. Specifically, the court below held in this case that a utility company can be held liable in negligence for its placement of a utility pole beyond both the pavement and the berm of a public roadway, in an area not intended or used for travel, and that the question of whether a utility pole located beyond the pavement and berm, in an area not intended or used for travel, constitutes an obstruction dangerous to anyone properly using the roadway, is a fact question. *See Turner*, 2006-Ohio-6168, at ¶¶ 9, 12, 16. The court further held that the fact-finder must consider the proximity, condition, direction, curvature, width, grade, and slope of the road, as well as the position of side drains or ditches, at the point where the pole is located, in determining a utility company's liability. *Id.*, at ¶ 10 (following dicta in *Curry v. Ohio Power Co.* (5th Dist., Feb. 14, 1980), Licking App. No. CA-2671, 1980 Ohio App. LEXIS 11996, at *10 n.4). Both South Central and SBC Ohio timely moved the Cuyahoga County Court of Appeals to certify a conflict to this Court, which motions remain pending as of this writing.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

First Proposition Of Law: As a matter of law, a utility pole which is located within the public road right-of-way, beyond both the paved portion and berm of the roadway, in an area not intended or used for travel, does not constitute a danger or obstruction to those properly using the roadway, and therefore a utility company whose pole is struck by a vehicle cannot be held liable in negligence or nuisance for the placement of its pole within such space.

Second Proposition Of Law: A utility company which lawfully places its facilities within a public road right-of-way, beyond the pavement and berm, in an area not intended or used for travel, owes no duty, in tort, nuisance, or otherwise, to motorists who leave the roadway.

I. The Ohio Appellate Courts Are Now In Conflict On The Precise Question Presented By This Case.

The propositions of law which South Central asks this Court to adopt are not new to Ohio jurisprudence. The Eighth District stands alone among Ohio appellate courts in its holdings in this case, which are in direct conflict with the holdings of at least seven other cases in four other appellate districts in Ohio (the First, Second, Fifth, and Ninth Appellate Districts). Those cases in conflict with the decision in this case—and which support South Central's proposed propositions of law—include the following.[1]

A. *Cincinnati Gas & Electric Co. v. Bayer* (1st Dist., Nov. 3, 1975), Hamilton App. Nos. C-74627, C-74628, 1975 Ohio App. LEXIS 6305

In *Bayer*, the motorist struck a utility pole located just eleven inches from the roadway. *Id.* at *2. The First Appellate District held as a matter of law that the utility company "was not negligent in the placement of the light pole" because "[t]he pole would not have been a hazard to anyone operating a motor vehicle on the paved portion of Clifton Avenue normally used for vehicular traffic." *Id.* at *8. The court explained further that the driver's "right to use the public street did not give him a right to run his vehicle over the curb onto the sidewalk and adjacent lawn." *Id.* at *8-9; *see also id.* at *11-12 (reasoning that the dispositive question is whether the area where the pole was located was fit and used for travel).

[1] Notably, although all seven of these cases were cited in the Defendants' appellate briefs, the appeals court discussed only one—the case in which the pole was most distant from the road—and instead relied upon authority—never cited by any party—from Louisiana, Pennsylvania, Kentucky, and Oklahoma in making new Ohio law. *See Turner*, 2006-Ohio-6168, at ¶ 13 (discussing *Niederbrach v. Dayton Power & Light Co.*, *infra*); *id.*, at ¶¶ 17-18 (discussing and relying upon four other states' authority).

B. *Ferguson v. Cincinnati Gas & Electric Co.* (1st Dist. 1990), 69 Ohio App.3d 460

In *Ferguson*, the plaintiff was injured when her elbow, which was hanging just six inches out the window of a moving city bus, struck a utility pole. *See id.* at 462. The First Appellate District held as a matter of law that because the pole was located off the traveled portion of the street, the utility company could not be held liable. *Id.* at 463. Indeed, the court in *Ferguson* went further, noting that even though the pole leaned toward the road, because there was no evidence that the pole pierced the vertical plane of the edge of the roadway, the utility company could not be held liable for its placement or its maintenance in a leaning position. *Id.*

C. *Neiderbrach v. Dayton Power & Light Co.* (2d Dist. 1994), 94 Ohio App.3d 334

In *Neiderbrach*, a motorist struck a utility pole located approximately sixteen feet, three inches from the edge of the roadway. *Id.* at 336. Reasoning that the utility pole "was located properly in the utility right-of-way," and therefore "did not interfere with the proper use of the roadway," the Second Appellate District followed *Yant*, *infra*, as well as a 1990 Ninth District decision and an Ohio Supreme Court case concerning municipal liability for utility pole placement (*Strunk*, discussed *infra*), and held that the defendant electric utility had no duty to locate its pole in a different location than where it had been located. *See id.* at 338-39, 343.

D. *Ohio Postal Telegraph-Cable Co. v. Yant* (5th Dist. 1940), 64 Ohio App. 189

In *Yant*, the pole in question was located thirteen feet beyond the edge of the pavement, and eleven feet beyond "that part of the highway improved for vehicular travel and use at that point." *Id.* at 190. The court explained that "[n]either the top of the berm, nor the slope of the bank to the pole, was intended or improved for travel." *Id.* The Fifth Appellate District focused on the word "use," and observed that "the traveling public has no superior right to misuse the highways," by leaving them. *Id.* at 192. The court then held as a matter of law that the

dispositive question in a pole-collision case is whether the portion of the right-of-way where the accident happened is dedicated to vehicular use; and that public utilities have a superior right to place their equipment within the road right-of-way where the ground is not dedicated to vehicular use. As the *Yant* court explained:

> It seems crystal clear that the traveling public has no right to drive upon that portion of a public highway which is not dedicated, improved and made passable for vehicular use. To accord him preeminence is to deny the statutory right of occupancy given to public utilities, and to withhold from public authority the right to regulate public thoroughfares. We grant that emergencies may arise where such use is permissive. But we do not recognize any such unqualified superior right to a negligent traveler who abuses his privilege.

Id. at 193.

E. *Mattucci v. Ohio Edison Co.* (9th Dist. 1946), 79 Ohio App. 367

In *Mattucci*, the pole which was hit was located off and slightly above the traveled portion of the brick street, close to the curb. *Id.* at 368. Construing the then-applicable code provisions (today, R.C. 4931.03), the Ninth Appellate District focused on the question of whether a vehicle which has left the highway is "properly using the highway," and held that the pole "was not maintained so as to incommode the public in the reasonable and proper use of the street." *Id.* at 369-70.

F. *Crank v. Ohio Edison Co.* (9th Dist., Feb. 2, 1977), Wayne App. No. 1446, 1977 Ohio App. LEXIS 9020

In *Crank*, the handlebar of an out-of-control motorcycle caught a guy wire supporting a utility pole, which guy wire was situated less than two feet from the curb, in the "tree lawn," which is the area between the curb and the sidewalk, alongside the road. *Id.* at *2. The Ninth Appellate District held that because the guy wire was not located on an improved, traveled portion of the roadway, the trial court properly granted a directed verdict in favor of the defendant utility company. *Id.* at *3.

G. *Jocek v. GTE North, Inc.* (9th Dist., Sept. 27, 1995), Summit App. No. 17097, 1995 Ohio App. LEXIS 4343

In *Jocek*, the decedent's vehicle went off the road and into the median, where it struck a utility pole. *Id.* at *2. The Ninth Appellate District held that because the median was not improved for travel, the utility company could not be held liable:

> GTE's pole was located on the median strip, which was not improved for travel. It was situated no less than eleven feet from the improved roadway. The location of the pole did not affect the public's travel on the road. We conclude that GTE's duty to not incommode the public in its use of State Route 21 was not implicated by its placement of the pole. Because no duty existed, [plaintiff's] negligence claim fails as a matter of law.

Id. at *9 (following *Mattucci*, *Neiderbrach*, and *Yant*).

H. The Law Developed By Ohio's Intermediate Appellate Courts Is Good Public Policy.

The result reached in every Ohio case but this one makes good policy sense, and appropriately balances the respective duties of motorists and utility companies. Motorists have a duty to remain on the road. *See, e.g.*, R.C. 4511.33; R.C. 4511.25; *see also Yant, supra*; *Mattucci, supra*. They have no right to careen out of control. Utilities, meanwhile, have the responsibility to place their facilities outside that portion of the right-of-way improved and intended for travel—nothing less, and importantly, nothing more. In this case, it has never been disputed that Mr. Hittle was not properly operating his vehicle and was not properly using the roadway (or berm) at the time of the accident.

Under the foregoing authority, utilities considering where within public road right-of-way to place their facilities need only pose one question to themselves: Is the space where a pole is placed, or is expected to be placed, within the traveled, improved portion of the roadway or berm? If the answer to that question is no, the analysis ends. Under the new rule adopted in this case, the answer to that question is only the beginning of the analysis. That the same facts would

lead to different results—analytically or legally—is the paradigmatic circumstance where this Court's guidance is both appropriate and necessary.

II. This Court Has Already Established A Rule, Applicable to Municipal Utilities, Which Is Contrary To The Rule Adopted By The Eighth District In This Case.

South Central's request that this Court adopt its propositions of law is consistent with this Court's holdings in the municipal utility pole context.

In *Strunk v. Dayton Power & Light Co.* (1983), 6 Ohio St.3d 429, 453 N.E.2d 604, the plaintiff's automobile left the highway and collided with a light pole located off the traveled portion of the highway. *Id.* at 605 (court's statement of facts). The plaintiff's complaint alleged that the municipality had purchased, installed, and approved the light pole, and that the pole constituted an unreasonably dangerous hazard. *Id.* The court of appeals affirmed the trial court's decision, holding that an automobile collision with a light pole located outside the traveled portion of a municipal roadway cannot serve as a basis for municipal liability. *Id.* at 431. Affirming the two lower courts' decisions sustaining the municipality's Civil Rule 12(B)(6) motion, this Court held:

> We are unwilling to extend a municipality's duty past the portion of the highway considered the berm or shoulder. Therefore, we hold as a matter of law, a light pole located adjacent to a roadway and the shoulder thereof is not a portion of the highway as interpreted in R.C. 723.01.

Strunk, 6 Ohio St.3d at 431 (emphasis added). The court further held that a municipal corporation's duty to keep the roads free from nuisance "includes only those aspects which affect the physical conditions of such roadways and does not extend to adjacent property." *Id.*

This Court's decision in *Strunk*, like the seven intermediate appellate decisions discussed above, recognizes the balance of duties and responsibilities between drivers and those whose public or quasi-public function depends on the use of the right-of-way. Fixtures of all kinds abound within road right-of-way in Ohio (*e.g.*, concrete barriers, mailboxes, signs, streetlights,

traffic lights, etc.) and indeed even within the roadway itself (*e.g.*, bridge abutments). Beyond the boundaries of the pavement and berm, it is the motorist's duty to stay on the road and thereby avoid those fixtures, not the utility company's duty to foresee the path that every possible wayward motorist who flies off the pavement may take.

Strunk both provides further support for the proposition that a utility pole owner should not be held liable when a motorist strikes a utility pole located off the traveled and improved portion of the road, and, more importantly, demonstrates why this Court's guidance is in order. If the pole struck in this case had been owned by a municipal utility, *Strunk* would indisputably bar the claim. South Central respectfully submits that there is no legal or policy basis for refusing recovery if the pole belongs to a municipality (which after all has a statutory duty to keep its streets "open and free from nuisance"), yet allowing recovery if the same pole is owned by a private utility company. Just as the result in a tort action should not depend on the happenstance of where in Ohio the tort occurs, this Court's intervention and guidance is particularly important when the law reaches a different result based not on the actions of the tortfeasor or the circumstances of the tort, but instead on the happenstance of an immutable and irrelevant fact, such as whether the pole had been placed by a public or private entity. This Court should accept jurisdiction of this case in order to extend this holding from the municipal context to all Ohio utilities.[2]

III. There Is A Disconnect Between This Court's 1930s Decisions On Utility Pole Placement And Every Intermediate Appellate Decision Since Then.

The Cuyahoga County Court of Appeals relied in its opinion on two decisions by this Court, each more than seventy years old: *Cambridge Home Telephone Co. v. Harrington* (1933),

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[2] Just as the appeals court ignored all but one of the seven Ohio appellate cases relied upon by Defendants, the court also simply ignored *Strunk*, even though it had been briefed at some length by the parties, and was discussed extensively at oral argument.

127 Ohio St. 1, 186 N.E. 611, and *Ohio Bell Telephone Co. v. Lung* (1935), 129 Ohio St. 505, 196 N.E. 371. *See Turner*, 2006-Ohio-6168, at ¶¶ 11, 14-16. As several of the cases cited above point out, *Harrington* and *Lung* are clearly distinguishable from those cases, and this case as well. Specifically, *Harrington* and *Lung* did not involve poles located outside the traveled and improved portion of the road. In *Harrington*, the utility pole was located within the improved portion of the road on a water-bound macadam berm fit for travel and in use, according to plaintiff's own witnesses. *Harrington*, 127 Ohio St. at 1. In *Lung*, the utility pole was located within an improved portion of the highway that was used by the driving public and was 5.1 feet from the paved road. *Lung*, 129 Ohio St. at 509.

By contrast, every one of the decisions which South Central has cited stands for the proposition that utilities have the right to place poles off the traveled portion of the roadway, in areas that are not so close to the roadway that they impede the motorist in the proper use *of the roadway*. For example, the *Yant* court pointed out that the syllabi of *Harrington* and *Lung* have to be considered in the context of the facts presented before the court (*i.e.*, that the poles in those cases were on improved parts of the roadway). The court in *Yant* explained:

> If the rule of the *Harrington* case, *supra*, is extendable to objects clearly without the roadway and not in close proximity to the improved portion, then guard and bridge rails, trees, road and railway signs of all descriptions, mail boxes, road-lighting poles, plantings for esthetic [sic] purposes, parked cars, hydrants, and numerous other appliances are obstructions which 'incommode the public in the use thereof.' . . .
>
> It is significant that the statute uses the word 'use.' To our notion, the traveling public has no superior right to misuse the highways. It is inconceivable that a traveler may destroy warning signs placed thereon for his protection and safety, or that, under a claim of superior right, one may negligently or wantonly drive through and ruin costly shrubbery placed along roads for their beautification.

Yant, 64 Ohio App. at 192; *see also Bayer*, 1975 Ohio App. LEXIS 6305, at *10 ("[*Harrington* and *Lung*] are both distinguishable from the instant case. In both the *Harrington* and the *Lung*

case, the utility pole was placed on the highway, which is usable and was being used for vehicular traffic."); *Ohio Bell Telephone Co. v. Short* (1941), 35 Ohio L. Abs. 375, 376, 37 N.E.2d 439 (noting that its decision was not in conflict with *Harrington* and *Lung* because the pole at issue was located off the traveled portion of the road, whereas the poles in *Harrington* and *Lung* were located on the improved and traveled portion of the road); *Jocek*, 1995 Ohio App. LEXIS 4343, at *9-10 (same).

South Central fully expects that in her memorandum in opposition to jurisdiction, Ms. Turner will argue that the appeals court decision in this case is wholly consistent with *Harrington* and *Lung*, as the appeals court itself suggested, and that therefore there is nothing for this Court to decide. But at this stage of these proceedings, it is not for this Court to decide what *Harrington* and *Lung* really mean, and whether they do or do not control the outcome in this case. Rather, for the purposes of considering whether to accept jurisdiction of this case, the fact that intermediate appellate courts in this state disagree on the import of *Harrington* and *Lung* is precisely why this Court's intervention is both necessary and appropriate.[3]

CONCLUSION

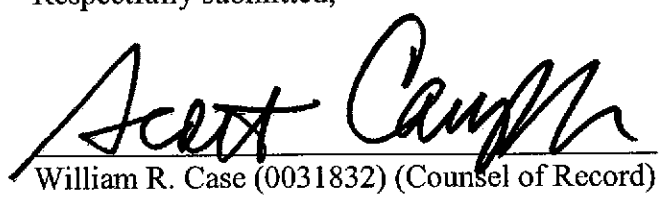
This case is that rare lawsuit where the outcome literally affects just about every Ohio citizen, in every county. The outcome will affect the driving public which passes by utility poles within road right-of-way on a daily basis; it will affect utility ratepayers, as their rates will undoubtedly increase if millions of poles within road right-of-way have to be relocated; and it

[3] South Central also expects that Plaintiff will rely in its memorandum in opposition to jurisdiction on certain "evidence" concerning the purported accident history of the pole at issue in this case. In fact, that "evidence"—cited by the appeals court in ¶ 19 of its opinion—was submitted out of time, and was considered and rejected by the trial court in connection with Plaintiff's Rule 60(B) motion, the denial of which Plaintiff did not appeal.

will affect property owners located along Ohio roads, as they will now be asked to grant—or be forced by eminent domain to provide—private easements to accommodate relocated utility poles.

As a result of the Eighth Appellate District's decision, tort law relating to utility pole placement is now unsettled in Ohio, and this Court should accept jurisdiction in order to resolve this issue definitively.

Respectfully submitted,



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South Central Power Company

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing, *Memorandum in Support of Jurisdiction of Appellant South Central Power Company*, was served upon the following by regular U.S. mail, postage pre-paid, on January 8, 2007:

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DEC - 4 2006

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87541

LORRI TURNER, ADMINISTRATRIX, ETC.

PLAINTIFF-APPELLANT

vs.

OHIO BELL TELEPHONE COMPANY, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-555394

BEFORE: Gallagher, J., Sweeney, P.J., and McMonagle, J.

RELEASED: November 22, 2006

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JOURNALIZED: DEC - 4 2006

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FILED A... ...LIZED
PER APP. R. 22(E)
DEC - 4 2006
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

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ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
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BY _____ DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

VOL 0625 PG 0397

SEAN C. GALLAGHER, J.:

Plaintiff-appellant, Lorri Turner, appeals from the decision of the Cuyahoga County Court of Common Pleas that granted summary judgment in favor of defendants-appellees, Ohio Bell Telephone Company and South Central Power Company. For the reasons stated below, we affirm in part, reverse in part and remand the matter for further proceedings.

The facts of this case are undisputed and were succinctly set forth by the trial court as follows:

"In the early morning of September 10, 2003, while traveling southbound on State Route 188 in Pleasant Township, Ohio, a Ford Mustang driven by Mr. Bryan Hittle was involved in an automobile accident. Mr. Robert Turner was a passenger inside Mr. Hittle's vehicle, as the two were commuting to work together that morning. At the time of the accident, because of fog and poor visibility, Mr. Hittle could not see clearly the center and edge lines of the road. Instead, he followed the taillights of the pick-up truck immediately in front of his vehicle. While trailing the truck around a curve in the road, Mr. Hittle drove his Mustang off the highway, striking a utility pole. The utility pole was located in a grassy area three feet, nine inches from the highway's edge line and two feet, five inches from the road's berm. Mr. Turner died as a result of the accident. Mr. Hittle was later convicted of vehicular manslaughter.

"On February 22, 2005, Plaintiff Lorri Turner, individually and as administrator of the estate of Robert Turner, instituted this action against Defendants The Ohio Bell Telephone Company, d/b/a SBC Ohio, and South Central Power Company. Plaintiff's Complaint alleges that Defendants were negligent in placing, maintaining and utilizing the utility pole 'in such close proximity to the traveled portion of State Route 188.' The Complaint further asserts a claim of negligence *per se*, stating that 'the presence of the utility pole in such close proximity to the traveled portion of State Route 188' violated Ohio Revised Code § 4931.01. Lastly, Plaintiff's Complaint alleges, 'the presence of the utility pole in such close proximity to the traveled portion of State Route 188 constituted an absolute and/or qualified nuisance.' Both Defendants have moved for summary judgment on all claims."

In ruling on the motions for summary judgment, the trial court declined to apply the doctrine of negligence per se without further specifics in R.C. 4931.01, such as where a utility pole should be positioned. With respect to the negligence claim, the trial court found that the placement of the pole in this case did not incommode the public in its proper use of the traveled portion of State Route 188. Additionally, the trial court stated that "the record demonstrates that the pole was neither placed on the traveled and improved portion of the road nor in such close proximity as to constitute an obstruction dangerous to

anyone properly using the highway." Consequently, the trial court concluded that Turner could not demonstrate a breach of the duty of care. Finally, the trial court found that the qualified and/or absolute immunity claim failed. The trial court granted the motions for summary judgment.

Turner has appealed the trial court's decision and has raised one assignment of error for our review that provides:

"I. The trial court erred in granting defendant-appellees' motions for summary judgment."

This court reviews a trial court's grant of summary judgment de novo. *Ekstrom v. Cuyahoga County Comm. College*, 150 Ohio App.3d 169, 2002-Ohio-6228. Before summary judgment may be granted, a court must determine that "(1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party." *State ex rel. Dussell v. Lakewood Police Depart.*, 99 Ohio St.3d 299, 300-301, 2003-Ohio-3652, citing *State ex rel. Duganitz v. Ohio Adult Parole Auth.*, 77 Ohio St.3d 190, 191, 1996-Ohio-326.

Turner argues that the issue of whether the utility pole in question "incommodes" the public's use of the roadway and/or constitutes a nuisance

presents an issue of fact that cannot be resolved on summary judgment. Turner also claims that the question as to whether the utility pole was a proximate cause of Robert Turner's death is a factual issue for the jury to determine. Under the circumstances of this case, we agree with Turner.

Public utility companies enjoy the right to place and maintain utility lines and poles within the right of way for public roads; however, in doing so they must not unnecessarily or unreasonably interfere with or obstruct the public in the reasonable and ordinary use of the road for the purpose of public travel. *Curry v. The Ohio Power Co.* (Feb. 14, 1980), Licking App. No. CA-2671. As explained in *Curry*, a utility company that decides to maintain a pole within the right of way has "'the duty of seeing that its poles are so placed that they will not unreasonably or unnecessarily interfere with, obstruct or endanger the public travel upon such road. * * * In placing a particular pole within the limits of a public road, the company is bound to consider the condition of the road at that point, its direction, its curvature, if any, its width, its grade, its slope, the position of its side drains or ditches, if any, and in view of all the facts to so locate the pole as not to unnecessarily or unreasonably interfere with or obstruct the public in the reasonable and ordinary use of the road for the purpose of public travel.'" Id., quoting *Martin Monahan v. The Miami Telephone Co.* (1899), 7 Ohio N.P. 95, 96.

Likewise, the Ohio Supreme Court has recognized that the superior right of the traveling public must not be prejudiced by the placement of utility poles within the right of way. In *The Cambridge Home Telephone Co. v. Harrington* (1933), 127 Ohio St. 1, 5, the court stated as follows:

> **"The traveling public has the right to the use of the highway to the entire width of the right of way as against all other persons using such highway for purposes other than travel, except those upon whom devolves the legal duty to maintain and repair such highway.**
>
> **"The highway is primarily constructed for purposes of travel, and not as a site for monuments, billboards, telephone or telegraph poles, or any other device that may create an obstruction within the limits of the right of way. * * * The last clause [of the applicable law], 'but shall not incommode the public in the use thereof,' is a danger signal to public utilities using the highways for their own private purposes. They are placed upon notice, to the effect that if they erect 'posts, piers, and/or abutments' within the right of way of the highway, they must not prejudice the superior rights of the traveling public in so doing."**

In considering whether a utility pole located within the right of way unnecessarily or unreasonably interferes with or obstructs the traveling public in the reasonable and ordinary use of the road, it is generally accepted that "a company lawfully maintaining poles near a public highway will not be held liable for the damages resulting from a vehicle striking such a pole unless it is located in the traveled portion of the highway or *in such close proximity thereto* as to constitute an obstruction dangerous to anyone properly using the highway." Id.

(emphasis added). There is no requirement, as appellees suggest, that a pole must be located on the traveled and improved portion of the highway in order for liability to be imposed. As long as the pole is within the right of way and in such close proximity to the road as to create an unreasonable danger to the traveling public, liability may exist.

In reaching its decision in this case, the trial court relied on a number of cases that involved a pole located at least ten feet from the edge of the roadway. See *Niederbach v. Dayton Power & Light Co.* (1994), 94 Ohio App.3d 334 (utility pole was sixteen feet off the traveled portion of the roadway); *Jocek v. GTE North* (Sep. 27, 1995), Summit App. No. 17097 (pole located no less than eleven feet from the improved portion of the roadway); *Curry v. Ohio Power Co.* (Feb. 14, 1980), Licking App. No. CA-2671 (pole located more than twelve feet from the berm). These cases are distinguishable from the present case, where the pole was located only three feet nine inches from the edge line of the road, and two feet five inches from the berm.

In *Harrington*, 127 Ohio St. 1, the accident victim, who was a passenger, was injured when her sister was driving around a curve and crashed into a pole maintained by a telephone company. The pole was within eleven inches of the macadam surface of the road. Id. Under those circumstances, the Ohio Supreme Court affirmed a decision to uphold a jury verdict in favor of the accident victim.

Id.

In *The Ohio Bell Telephone Co. v. Lung* (1935), 129 Ohio St. 505, the Ohio Supreme Court affirmed a judgment against a telephone company that was found guilty of negligence by placing a telephone pole on an improved portion of the right of way, 5.1 feet from the brick pavement. Under these circumstances, the court held that it was a question of fact for the jury to determine whether the pole was where it would incommode the traveling public, and, if so, whether the telephone company was guilty of negligence in placing and maintaining the pole in that location. Id. at 509.

In this case, South Central argues that unlike *Harrington* and *Lung,* the utility pole was located outside the traveled and improved portion of the road. South Central claims that it can never be liable when a driver strikes a utility pole outside the traveled and improved portion of the road, even where the pole is relatively close to the road. As already indicated, we do not agree that the law creates such a stringent rule. Indeed, the relevant inquiry is whether the pole is *in such close proximity* to the road as to constitute an obstruction dangerous to anyone properly using the highway. *Curry*, supra. There is no requirement that the pole must be on an improved portion of the road for liability to be imposed.

Indeed, numerous other jurisdictions have found that liability may be

imposed where the placement of a pole in close proximity to the edge of a roadway constitutes a foreseeable and unreasonable risk of harm to users of the roadway. *Boteler v. Rivera* (LA App. 1997), 700 So.2d 913 (finding location of utility pole three feet, and less than a car's width, from the road's edge poses an unreasonable risk of harm to users of the road); *Vigreaux v. Louisiana Dept. of Transp. and Development* (La. App. 1988), 535 So.2d 518 (finding summary judgment improper where pole was located eight inches from the street and near a curve in the road); *Scheel v. Tremblay* (Pa. Super. 1973), 312 A.2d 45 (reversing summary judgment upon finding question of whether placement of pole close to the edge of a highway and near a curve constituted an unreasonable risk of harm to users of the road); *Kentucky Utilities Co. v. Sapp's Adm'r* (KY App. 1933), 60 S.W.2d 976 (determining it was for the jury to decide whether the utility negligently placed its pole against or so close to the road as to make it dangerous or unsafe for the traveling public); see, also, *Blackmer v. Cookson Hills Electric Coop., Inc.* (OK App. 2000), 18 P.3d 381 (recognizing a utility company may be held liable if it maintains a utility pole so near the highway as to interfere with or obstruct the ordinary use thereof).

In cases such as this, the conditions of the highway are critical in determining whether the location of the pole adjacent thereto constitutes an unreasonable risk of harm to users of the road. See *Vigreaux*, 535 So.2d at 519;

Scheel, 312 A.2d at 47. Factors which may be considered include, but are not limited to, the narrowness and general contours of the road, the presence of sharp curves in the road, the illumination of the pole, any warning signs of the placement of the pole, the presence or absence of reflective markers, the proximity of the pole to the highway, whether the utility company had notice of previous accidents at the location of the pole and the availability of less dangerous locations. *Vigreaux*, 535 So.2d at 519-520; *Scheel*, 312 A.2d at 47.

In this case, the accident occurred while Bryan Hittle and Robert Turner were commuting to work and using the highway in the ordinary course of travel. Evidence was presented of the following: the pole was less than three feet from the berm of the road; a portion of Bryan Hittle's vehicle was still located on an improved portion of the road at impact; the berm of the road was composed of loose gravel and sloped steeply away from the roadway; the pole was located along a left-bearing curve in the road; there had been previous crashes along this section of the roadway involving a utility pole or fixed object; a nearby property owner was aware of at least six collisions involving this particular pole occurring during 2002-2003; and it was feasible to move the pole farther back from the improved portion of the roadway.

Under the circumstances of this case, we find that it is for the jury to decide whether the appellees placed or maintained the pole so close to the road

as to create an unreasonable risk of harm for the traveling public; whether it was foreseeable that a car would veer off the road and strike the pole, causing injury to a passenger; and whether the negligent placement of the pole, if any, was a proximate cause of the injury.

Nonetheless, Ohio Bell argues that the sole, proximate cause of Robert Turner's death was Bryan Hittle's negligent driving. Proximate cause is a question for the jury, not the court. *Lung*, 129 Ohio St. at 510. Further, the fact that the driver of the vehicle that struck the pole may have been negligent does not relieve a utility company from liability for its own negligence. Indeed, a jury could find that a utility company's negligence in the placement of a pole proximately caused the harm where but for the placement of the pole, the accident and resulting injury could have been avoided. As stated in *Lung*, 129 Ohio St. at 510:

> **"If Kreiger, the driver of the car, was guilty of negligence in running into the pole and the telephone company was guilty of negligence in maintaining the pole where it was, that is, if the negligence of both together was the proximate cause of the death of plaintiff's decedent, actionable negligence on the part of the telephone company would exist; and, again, if the negligence of the telephone company was a proximate cause of the death of plaintiff's decedent, the fact that some other cause for which neither party to the action was to blame proximately contributed to the harm would not avail to relieve the telephone company from liability. * * *[T]he question whether the negligence of the telephone company, if any, in placing and maintaining the pole where it was, was**

a proximate cause of the fatalities, was one of fact for the jury."

See, also, *Harrington*, 127 Ohio St. at 5-6 (finding no error in jury charge indicating that negligence of driver and utility company could be concurrent); *Kentucky Utilities*, 60 S.W.2d at 981 (finding utility company was not relieved of liability if, as a matter of fact, the injury would not have resulted but for the negligent obstruction of the road); *Blackmer*, 18 P.3d at 385 (finding negligence of driver and of utility company could be concurrent proximate causes of the accident for which both could be held liable); *Boteler*, 700 So.2d at 920 (apportioning liability between driver and utility company). In this case, an issue of fact was presented as to whether the utility companies' negligence, if any, was a proximate and concurrent cause of Turner's death.

Insofar as appellees claim that they cannot be held liable since they did not originally place the pole, we find no merit to this argument, as an issue of fact remains as to whether they maintained the pole. Further, the appellees themselves each claim the other is responsible for the pole.

For the reasons stated herein, we find the trial court improperly granted summary judgment on the negligence claim. We also find the trial court improperly granted summary judgment on the qualified nuisance claim. "A qualified nuisance is essentially a tort of negligent maintenance of a condition

that creates an unreasonable risk of harm, ultimately resulting in injury." *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St.3d 1, 13, 2002-Ohio-6716; see, also, *Metzger v. Pennsylvania, O. & D. R. Co.*, 146 Ohio St. 406, at paragraph two of the syllabus (stating a qualified nuisance "consists of an act lawfully but so negligently or carelessly done as to create a potential and unreasonable risk of harm, which in due course results in injury to another"). We find that issues of fact have been presented in this case as to whether maintaining the utility pole in its location at the point of the accident constituted a qualified nuisance.

However, we find summary judgment was properly granted on the claims for absolute nuisance and negligence per se. The facts of this case do not support an absolute nuisance claim. The Ohio Supreme Court has stated, "[a]n absolute nuisance is based on either intentional conduct or an abnormally dangerous condition that cannot be maintained without injury to property, no matter what care is taken." *State ex rel. R.T.G., Inc.*, 90 Ohio St.3d at 13. Here, there is no evidence that the placement or maintenance of a utility pole within a right of way is so abnormally dangerous that it cannot ever be performed safely.[1]

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[1] The Ohio Supreme Court has also stated that an absolute nuisance "consists of either a culpable and intentional act resulting in harm, or an act involving culpable and unlawful conduct causing unintentional harm, or a nonculpable act resulting in accidental harm, for which, because of the hazards involved, absolute liability attaches notwithstanding the absence of fault." *Metzger*, 146 Ohio St. 406, at paragraph one of the syllabus. Here again, we do not find the facts of this case support a claim for absolute nuisance.

Turner's negligence per se claim is based on R.C. 4931.01, a statute that was repealed in 1999.[2] That statute included a duty that a utility company constructing posts along public roads do so in a manner "not to incommode the public in the use of the roads or highways." Because the duty "not to incommode the public" is a general, abstract description of a duty, negligence per se has no application, and the elements of negligence must be proved in order to prevail. See *Sikora v. Wenzel*, 88 Ohio St.3d 493, 395, 2000-Ohio-406; *Mussivand v. David* (1989), 45 Ohio St.3d 314, 319.

Turner's sole assignment of error is sustained in part and overruled in part. We affirm on the claims of negligence per se and absolute nuisance. We reverse on the claims of negligence and qualified nuisance.

This cause is affirmed in part, reversed in part and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellees share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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[2] But, see, R.C. 4931.03, containing similar language.

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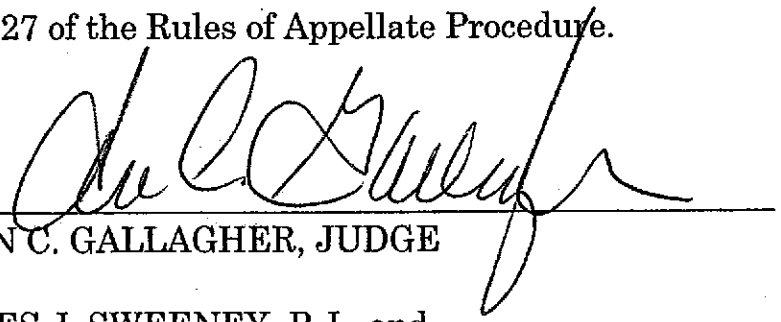
A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



SEAN C. GALLAGHER, JUDGE

JAMES J. SWEENEY, P.J., and
CHRISTINE T. MCMONAGLE, J., CONCUR