

CASE NO. _____ **07 - 0035**
IN THE SUPREME COURT OF OHIO

THE OHIO BELL TELEPHONE COMPANY, et al.,
Defendants-Appellants,

v.

LORRI TURNER, ADMINISTRATRIX, etc.,
Plaintiff-Appellee.

ON APPEAL FROM THE CUYAHOGA COUNTY COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CASE NO. CA-05-087541

MEMORANDUM IN SUPPORT OF JURISDICTION OF
DEFENDANT-APPELLANT,
THE OHIO BELL TELEPHONE COMPANY, d/b/a SBC OHIO

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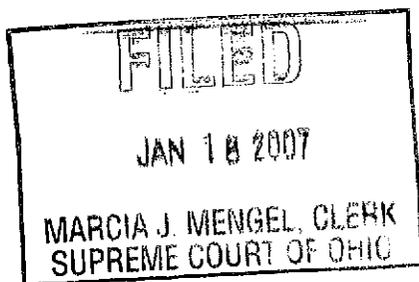


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**I. THIS CASE INVOLVES AN ISSUE OF PUBLIC
AND GREAT GENERAL INTEREST.**

This Court should accept this appeal to decide a fundamental issue of vital importance to all public utilities operating in Ohio. This issue also will have a significant impact on utility customers and all operations of motor vehicles in Ohio. The issue relates to the rule of law and liability applicable to the placement of utility poles. The Eighth District Court of Appeals has espoused a rule of law that is unprecedented in this state and contrary to decisions reached by other Courts of Appeals in Ohio. This new rule of law is premised on the notion of foreseeability (i.e., whether it is foreseeable that a vehicle could run off the road and strike a pole). Up to now, no Ohio court has applied a foreseeability standard to a pole accident case. Because of the conflict between the Eighth District's decision and the decisions of other Ohio Courts of Appeals, the Eighth District recently granted SBC Ohio's Motion to Certify a Conflict.

It has long been the law of Ohio that a public utility, such as SBC Ohio, enjoys the right to place and maintain utility poles within the right-of-way for public roads so long as its poles do not incommode the public in its proper use of the roads. See Curry v. The Ohio Power Co., 1980 Ohio App. LEXIS 11996, *3 (Licking Cty., Feb. 14, 1980). Under this rule of law, when an individual drives his or her vehicle off the road and strikes a utility pole, the utility company will not be liable for any resulting damages to person or property so long as the pole is not placed on the traveled portion of the road or in such close proximity thereto as to constitute an obstruction dangerous to anyone **properly** using the road. See Mattucci v. The Ohio Edison Co., 79 Ohio App. 367, 369 (Summit Cty. 1946). In other words, the pole must obstruct or interfere with the **proper** use of the road in order to hold the utility company liable. See Neiderbrach v. Dayton Power & Light Co., 94 Ohio App. 3d 334, 339 (Miami Cty. 1994).

The Eighth District's new foreseeability standard unravels this bright line rule of law and establishes a new rule of law that is gray and subject to inconsistent judicial interpretation. Under the Eighth District's decision, it is no longer adequate to lawfully place utility poles off the roadway, in the public right-of-way, in a location that does not obstruct or interfere with individuals properly using the roadway. According to the Eighth District, public utilities must now consider possible driver error, such as the drunken driver who drives off the road and strikes a utility pole or the driver who falls asleep at the wheel and drives off the road and strikes a utility pole. Or, as in this case, public utilities must now consider the driver who, due to fog and poor visibility, recklessly follows the tail lights of another vehicle while driving ten miles over the speed limit and runs his car off the road, striking a utility pole. Each of these incidents is arguably foreseeable and, under the Eighth District's ruling, could subject the public utility to liability even though its pole is lawfully located off the roadway.

The impact of this new rule of law is far reaching and effectively will change the way in which public utilities conduct business in Ohio. It will make it tantamount to legal malpractice if an attorney does not sue the utility company when a vehicle hits a utility pole. It will eliminate any potential for summary judgment because foreseeability and proximate cause are typically jury questions. To satisfy the new standard and to avoid liability, public utilities will have little choice but to undertake the enormous and costly burden of reevaluating and, most likely, relocating the hundreds of thousands of utility poles lawfully located in this state. Relocation most likely will require the utilities to procure easements from private landowners. Otherwise, the utilities will be exposed to potential liability.

Finally, the impact of the Eighth District's new rule of law extends far beyond utility poles. As noted by one Ohio court, every object typically placed off the roadway would become a potential source of liability:

If the rule of law of the Harrington case . . . is extendable to objects clearly without the roadway and not in close proximity to the improved portion, then guard and bridge rails, trees, roads and railway signs of all description, mail boxes, road-lighting poles, plantings for esthetic purposes, parked cars, hydrants and numerous other appliances are obstructions which 'incommode the public in the use thereof.' If this be the law, then the responsible public body or individual acts, or fails to act, at its, or his, peril.

See The Ohio Postal Telegraph-Cable Co. v. Yant, 64 Ohio App. 189, 192 (Licking Cty. 1940).

II. STATEMENT OF THE CASE AND FACTS

In the early morning hours of September 10, 2003, while traveling southbound on State Route 188 in Pleasant Township, Ohio, a Ford Mustang driven by Bryan Hittle was involved in an automobile accident. Robert Turner was a passenger inside Hittle's vehicle, as the two were commuting to work together that morning. At the time of the accident, due to fog and poor visibility, Hittle could not clearly see 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, Hittle drove his Mustang off the road, striking a utility pole. The utility pole was located in a grassy area three feet, nine inches from the roadway's edge and two feet, five inches from the berm. It was undisputed that the pole did not obstruct or interfere with anyone **properly** using the roadway. Mr. Turner died as a result of the accident. Mr. Hittle was later convicted of vehicular manslaughter.

On February 22, 2005, Plaintiff-Appellant ("Turner") filed a Complaint against Defendants-Appellees, South Central Power Company ("South Central") and The Ohio Bell Telephone Company, d/b/a SBC Ohio ("SBC Ohio"), asserting claims for negligence, negligence

per se, and nuisance. On September 30, 2005, South Central and SBC Ohio each filed a Motion for Summary Judgment. On November 9, 2005, Turner filed an Opposition to the Motions. South Central and SBC Ohio each filed a Reply Brief on November 21 and 22, respectively. On December 2, 2005 Turner filed a Supplemental Opposition to the Motions. That same day, the trial court granted the Motions. On December 7, 2005, Turner filed a Motion for Relief from Judgment. On December 22, 2005, the trial court denied Turner's Motion. One week later, Turner filed a Notice of Appeal.

On appeal, the Eighth District reversed the trial court's grant of summary judgment. In its decision, the Eighth District acknowledged 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." The Court stated that "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." Notwithstanding the undisputed fact that the subject utility pole did not obstruct or interfere with anyone *properly* using the road, the Court concluded that it was for a jury to decide "whether it was foreseeable that a car would veer off the road and strike the pole, causing injury to a passenger."

Based on a clear conflict between the Eighth District's decision and the decisions of several other Courts of Appeals of this state, SBC Ohio filed a Motion to Certify a Conflict. The Eighth District recently granted this Motion, certifying the following questions to this Court for resolution:

1. Whether a utility pole that is located off the improved portion of the roadway, but in close proximity to the improved portion thereof and within the right-of-way, may constitute an obstruction dangerous to anyone properly using the highway.

2. Whether a utility company may be held liable in negligence to motorists who strike a utility pole located in close proximity to the improved portion of a roadway and within the right-of-way when it presents a foreseeable and unreasonable risk of harm to users of the roadway.

III. ARGUMENT

PROPOSITION OF LAW: A utility company is not liable for damage to persons or property resulting from a vehicle striking a utility pole so long as the pole is not placed on the traveled portion of the road or placed such that it is an obstruction dangerous to anyone properly using the road.

The aforementioned proposition of law is not new. In fact, it has been the law of this state for decades. Ohio courts consistently and uniformly have followed this law in cases involving utility pole accidents. These cases primarily emanate from the First and Ninth Appellate Districts.

A. First Appellate District Cases Are In Accord With The Foregoing Proposition Of Law.

In Ferguson v. Cincinnati Gas & Electric Co.,¹ the plaintiff was seated in a bus with her arm rested on a window frame and elbow extending no more than six inches outside the bus. As the bus passed a leaning utility pole located adjacent to the street at the curb line, the plaintiff's elbow contacted the pole causing her injury. The record demonstrated that the pole did not obstruct the traveled portion of the road even though it leaned into the road. For this reason, the appellate court affirmed the lower court's grant of summary judgment in favor of the utility.

In Cincinnati Gas & Electric Co. v. Bayer,² the plaintiff's vehicle ran off the road and struck a utility pole located eleven inches from the road's surface. The appellate court affirmed judgment in favor of the utility, finding that the pole was not a hazard to anyone operating a

¹ 69 Ohio App. 3d 460 (Hamilton Cty. 1990).

² 1975 Ohio App. LEXIS 6305, Case No. C-74627 (Hamilton Cty., Nov. 3, 1975).

vehicle on the paved portion of the road normally used for vehicular traffic. The court distinguished Harrington³ and Lung⁴ on the basis that the poles in those cases were located in areas fit for travel and in areas that were used by the traveling public. The court also noted that the plaintiff's right to use the road "did not give him the right to run his vehicle over the curb onto the sidewalk and adjacent lawn." The court found that the proximate cause of the collision was the plaintiff's driving and not the location of the pole.

B. Ninth Appellate District Cases Are In Accord With The Foregoing Proposition Of Law.

In Turowski v. Johnson,⁵ the plaintiff's decedent was a passenger in a vehicle that ran off the road and struck a utility pole located thirty-one inches from the road. The appellate court affirmed summary judgment in favor of the utility. In Crank v. Ohio Edison Company,⁶ the plaintiff was a passenger on a motorcycle that ran off the road and struck a utility pole and guy wire located in the tree lawn (the area between the curb and sidewalk) approximately two feet from the road. The appellate court affirmed a directed verdict in favor of the utility on the grounds that the pole and wire did not incommode the public in the reasonable and proper use of the road, and that the proximate cause of the collision was the driver's failure to properly control the motorcycle, not the location of the pole and wire.

In Mattucci v. The Ohio Edison Co.,⁷ the plaintiff's decedent was a passenger in a vehicle that ran off the road and struck a utility pole located in a grass strip, six feet wide, between the sidewalk and curb. The appellate court affirmed a directed verdict in favor of the utility, finding that the pole did not constitute an obstruction dangerous to anyone *properly* using the road. As

³ 127 Ohio St. 1 (1933).

⁴ 129 Ohio St. 505 (1935).

⁵ 68 Ohio App. 3d 704 (Summit Cty. 1990).

⁶ 1977 Ohio App. LEXIS 9020, Case No. 1446 (Wayne Cty., Feb. 2, 1977).

⁷ 79 Ohio App. 367 (Summit Cty. 1946).

with Bayer and Crank, the court also concluded that the proximate cause of the collision was driver error and not the location of the pole.

Finally, in Jocek v. GTE North,⁸ the plaintiff's decedent's vehicle crashed into a telephone pole located on the median strip, which was not improved for travel and no less than eleven feet from the improved roadway. The appellate court affirmed a grant of summary judgment in favor of the utility, finding that the location of the pole did not affect the public's travel on the road.

C. Other Ohio Appellate Cases Also Are In Accord with The Foregoing Proposition Of Law.

In Neiderbrach v. Dayton Power & Light Co.,⁹ a vehicle driven by the plaintiff's decedent skidded off the road and struck a utility pole located approximately sixteen feet, three inches from the edge of the road. After the accident, it was revealed that the plaintiff's decedent had a blood alcohol content of 0.224 percent (well in excess of the legal limit). The appellate court affirmed a grant of summary judgment in favor of the utility, finding that the pole did not interfere with the proper use of the roadway.

In The Ohio Postal Telegraph-Cable Co. v. Yant,¹⁰ the plaintiff negligently drove his vehicle off the road striking a utility pole located eleven feet from the improved portion of the roadway. In a tort action against the utility, the lower court found in favor of the plaintiffs. On appeal, the appellate court reversed the lower court's finding and entered judgment in favor of the utility. The court concluded that the pole was located in an area off the roadway not intended nor improved for travel. In addition, the court found that the location of the pole was not the proximate cause of the accident. Rather, the proximate cause was driver error.

⁸ 1995 Ohio App. LEXIS 4343, Case No. 17097 (Summit Cty., Sep. 27, 1995).

⁹ 94 Ohio App. 3d 334 (Miami Cty. 1994).

¹⁰ 64 Ohio App. 189 (Licking Cty. 1940).

D. The Harrington and Lung Cases Are Consistent With SBC Ohio's Proposition Of Law.

In Harrington and Lung, this Court reviewed the law applicable to the placement of utility poles and found in favor of the plaintiffs. In both cases, the utility pole was a danger to individuals **properly** using the roadway. Each pole was located in the improved portion of the roadway, which was usable and was being used for vehicular traffic. In Harrington, the pole was located in the macadam berm, which was fit for travel and in use. In Lung, the pole was located in a "Y" intersection. There was a filling station located within this intersection. From the station to both highways, cinders were packed filling the "Y" up to the pavement. This Court noted: "The cindered part of the highway around the pole was used for a long time prior to the accident by autoists going into and coming out of the gas station." The drivers who struck the poles in both cases were **properly** using the roadway. Here, it is undisputed that Hittle was **not** properly using the roadway at the time of the accident.

E. SBC Ohio's Proposition Of Law Promotes Good Public Policy.

With respect to the placement of utility poles, there are two competing public policy interests: (1) the traveling public's right to use the state's roadways and public right-of-ways and (2) the public utilities' right to place their poles in the public right-of-ways. The Eighth District's rule of law fails to address these policy interests. It elevates one policy interest over the other; specifically, it confers to the traveling public an unqualified, superior right to the roadways and public right-of-ways without any recognition of the utilities' right to use the public right-of-ways. As one Ohio court noted, this makes for bad public policy:

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.¹¹ But we do not recognize any such unqualified superior right to a negligent traveler who abuses his privilege.

See Yant, 64 Ohio App. at 193.

Unlike the Eighth District's rule of law, SBC Ohio's proposition of law strikes an effective balance between the two policy interests. It permits utilities to place their poles in public right-of-ways so long as the poles do not interfere with the traveling public's right to **properly** use the roadways. The key word is "properly." As the court in Yant acknowledged, the traveling public has no right to misuse the roadways. In fact, the laws of this state require the public to use the roadways properly. SBC Ohio's proposition of law is consistent with these laws and balances the competing policy interests at play.

In addition, SBC Ohio's proposition of law provides a bright line standard that allows utilities to conduct their business within a clearly defined framework. Similarly, the traveling public, who regularly utilize Ohio's roadways and public right-of-ways, are entitled to a clear and uniformly-applied rule of law. SBC Ohio's proposition of law provides these things. The Eighth District's rule of law does not. To the contrary, it is a very gray rule of law that inevitably will lead to inconsistent and ambiguous interpretation and results. Clearly, public policy favors the bright line standard provided by SBC Ohio's proposition of law. Consequently, this is the rule of law that Ohio should adopt.

¹¹ In this action, it is undisputed that there was ample room before and after the subject utility pole for vehicles to pull off the road in the case of an emergency.

IV. CONCLUSION

This case involves an issue of public and great general interest --- the rule of law applicable to the placement of utility poles in the State of Ohio. This issue affects all public utilities operating in Ohio, their customers, and Ohio's traveling public. Based on the Eighth District's rule of law, the hundreds of thousands of utility poles lawfully located throughout the state are now potential sources of liability. To avoid this exposure, public utilities will have little choice but to undertake the enormous and costly burden of evaluating and, most likely, relocating these poles. Any relocation most likely will require the utilities to procure easements from private landowners.

In addition, the Eighth District's rule of law will eliminate any potential for summary judgment as foreseeability and proximate cause are typically jury questions. Because this rule of law is gray and unclear, it provides no level of certainty for public utilities and the traveling public. There is no bright line standard to which utilities and the traveling public can conform their actions. Finally, the Eighth District's rule of law and the rule of law consistently and uniformly applied by other intermediate appellate courts of this state are in direct and irreconcilable conflict. Because this case involves an issue of public and great general interest, the Court should accept jurisdiction.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Defendant-Appellant, The Ohio Bell Telephone Company, d/b/a SBC Ohio was served this 17th day of January, 2007, by First Class U.S. Mail, postage pre-paid upon:

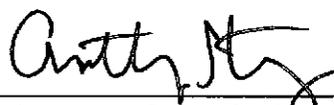
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Court of Appeals of Ohio

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

CA05087541

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JOURNALIZED: DEC - 4 2006



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FILED AND JOURNALIZED
PER APP. R. 22(E)

DEC - 4 2006

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CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

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

NOV 22 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] 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

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 “incommodates” 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. *Vigreux*, 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

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.

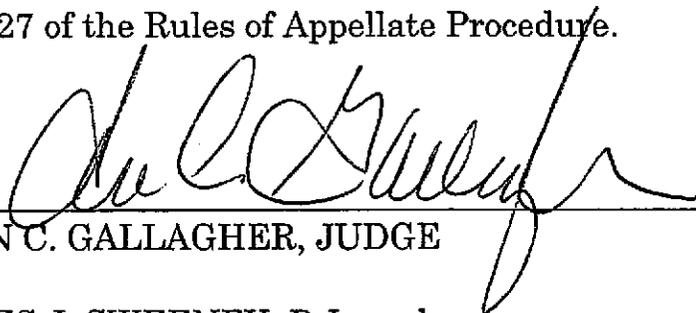
The court finds there were reasonable grounds for this appeal.

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

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

A certified copy of this entry shall constitute the mandate pursuant to

Rule 27 of the Rules of Appellate Procedure.

A handwritten signature in black ink, appearing to read "Sean C. Gallagher", written over a horizontal line.

SEAN C. GALLAGHER, JUDGE

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