

IN THE SUPREME COURT OF OHIO

LORRI TURNER, ADMINISTRATRIX, ETC.,

Appellee,

-vs-

OHIO BELL TELEPHONE COMPANY, ET AL.,

Appellants.

07-0112

On Appeal from the Cuyahoga County  
Court of Appeals, Eighth Appellate  
District

Court of Appeals  
Case No. CA-05-087541

NOTICE OF APPELLANT SOUTH CENTRAL  
POWER COMPANY OF CERTIFIED CONFLICT

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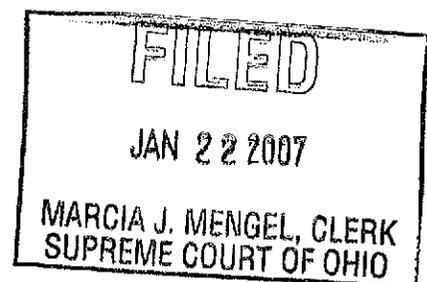
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**NOTICE OF APPELLANT SOUTH CENTRAL  
POWER COMPANY OF CERTIFIED CONFLICT**

Pursuant to Ohio Supreme Court Rule IV, Sections 1 and 4, Appellant South Central Power Company (“South Central”) hereby gives notice to the Ohio Supreme Court that on January 12, 2007, the Cuyahoga County Court of Appeals, Eighth Appellate District, in Case No. CA-05-87541, certified to this Court a conflict among the Ohio courts of appeals on two questions of law. Copies of the Eighth Appellate District’s three Journal Entries to that effect are attached at Appendix pages A-1 through A-4. The Eighth Appellate District’s decision in this case follows those Journal Entries, at Appendix pages A-5 through A-20. The Eighth Appellate District, in its entry certifying a conflict, certified its decision as being in conflict with decisions of the First, Second, Fifth, and Ninth Appellate Districts, including the following (each of which is also attached):

- *Ferguson v. Cincinnati Gas & Electric Co.* (1st Dist. 1990), 69 Ohio App.3d 460 (Appendix pages A-21 through A-22);
- *Neiderbrach v. Dayton Power and Light Co.* (2d Dist. 1994), 94 Ohio App.3d 334 (Appendix pages A-23 through A-27);
- *Ohio Postal Telegraph-Cable Co. v. Yant* (5th Dist. 1940), 64 Ohio App. 189 (Appendix pages A-28 through A-30); and
- *Jocek v. GTE North, Inc.* (9th Dist., Sept. 27, 1995), Summit App. No. 17097, 1995 Ohio App. LEXIS 4343 (Appendix pages A-31 through A-34).

On January 8, 2007, South Central filed with this Court a notice of appeal and a memorandum in support of jurisdiction pursuant to Ohio Supreme Court Rule II, which appeal has been assigned Case No. 07-0035 (the “Discretionary Appeal”). On that same date, South Central filed with this Court a notice of the pendency in the court of appeals of its motion to certify a conflict. Defendant Ohio Bell Telephone Company, which also moved to certify a conflict following the appeals court’s decision in this case, filed a notice of appeal and a

memorandum in support of jurisdiction pursuant to Ohio Supreme Court Rule II on January 18, 2007, which discretionary appeal was also assigned Case No. 07-0035.

The two questions certified to this Court by the Eighth District are:

- 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.

(Journal Entry at 2, Appendix p. A-4 (emphasis added).) These questions differ from those which South Central asked the appeals court to certify, which were as follows:

- Whether a utility pole which is located beyond both the paved portion and the berm of a public roadway, *in an area not intended or used for travel*, constitutes a danger or obstruction to those properly using the roadway.
- Whether a utility company lawfully placing its facilities within a public road right-of-way, beyond the pavement and berm, *in an area not intended or used for travel*, owes any duty to motorists who leave the roadway.

(Motion of Defendant-Appellee South Central Power Company to Certify a Conflict to the Ohio Supreme Court, at 1 (emphasis added).)

Pursuant to Supreme Court Rule III, Section 1, and *Drake v. Bucher* (1966), 5 Ohio St. 37, 38, in its Discretionary Appeal to this Court, South Central proposed the following 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.

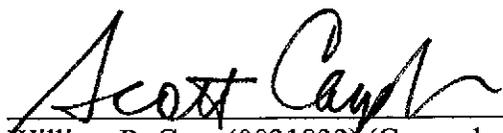
(Memorandum in Support of Jurisdiction of Appellant South Central Power Company, Ohio Supreme Court Discretionary Appeal, at 5 (Jan. 8, 2007) (emphasis added).)

This Court should accept South Central's Discretionary Appeal, in addition to the certified conflict case, for two reasons. First, as denoted by the emphasis added above, the court of appeals framed the questions certified in terms of the proximity of utility poles to the improved portion of a roadway. With all due respect to the court of appeals, in the decisions of the four appellate courts whose decisions have been certified as being in conflict with the appellate decision in this case, the dispositive question is not proximity to the roadway. Rather, as again denoted by the added emphasis, the dispositive questions are whether the utility pole is within or outside of that part of the right-of-way intended or used for travel, and whether the motorist is properly using the roadway. Second, the appeals court introduced into its characterization of the second question to be certified the issue of foreseeability—in a manner that assumes the answer instead of presenting the question—which issue South Central respectfully believes is altogether absent from the several decisions in conflict with the Eighth District's decision in this case.

South Central and the Eighth District agree that the decisions of the Eighth District on the one hand, and the First, Second, Fifth, and Ninth Districts on the other hand, are in conflict on the issue of when a utility company can be held liable in negligence for the placement of its utility poles within public road right-of-way; and differ only on how the question should be framed for this Court. South Central respectfully submits that, while the means of framing the issue will not have an effect on the arguments to be made and considered by this Court, because of the divergence between the appeals court's characterization of the issue and South Central's

framing of the issue, this Court should allow both the certified conflict case and South Central's Discretionary Appeal.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing, *Notice of Appellant South Central Power Company of Certified Conflict*, was served upon the following by regular U.S. mail, postage pre-paid, on January 22, 2007:

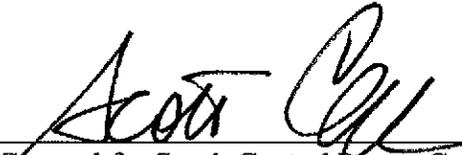
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~~Court of Appeals of Ohio, Eighth District~~

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

LORRI TURNER, ADMINISTRATRIX, ETC.

Appellant

COA NO.  
87541

LOWER COURT NO.  
CP CV-555394

COMMON PLEAS COURT

-vs-

OHIO BELL TELEPHONE COMPANY, ET AL.

Appellee

MOTION NO. 391244

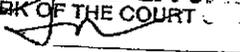
Date 01/12/2007

Journal Entry

MOTION BY APPELLEE, THE OHIO BELL TELEPHONE COMPANY, TO CERTIFY A CONFLICT IS GRANTED SUBJECT TO THE LIMITATIONS OUTLINED IN THE ATTACHED JOURNAL ENTRY. SEE JOURNAL ENTRY OF SAME DATE.

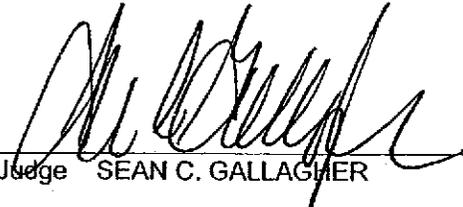
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JAN 12 2007

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY  DEP.

Presiding Judge JAMES J. SWEENEY, Concurs

Judge CHRISTINE T. MCMONAGLE, Concurs

  
Judge SEAN C. GALLAGHER

NOTICE MAILED TO COUNSEL  
FOR ALL PARTIES-COSTS TAXED

**Court of Appeals of Ohio, Eighth District**

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

LORRI TURNER, ADMINISTRATRIX, ETC.

Appellant

COA NO.  
87541

LOWER COURT NO.  
CP CV-555394

COMMON PLEAS COURT

-vs-

OHIO BELL TELEPHONE COMPANY, ET AL.

Appellee

MOTION NO. 391245

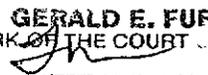
Date 01/12/2007

Journal Entry

MOTION BY APPELLEE, SOUTH CENTRAL POWER COMPANY TO CERTIFY A CONFLICT TO THE OHIO SUPREME COURT IS GRANTED SUBJECT TO THE LIMITATIONS IN THE ATTACHED JOURNAL ENTRY. SEE JOURNAL ENTRY OF SAME DATE.

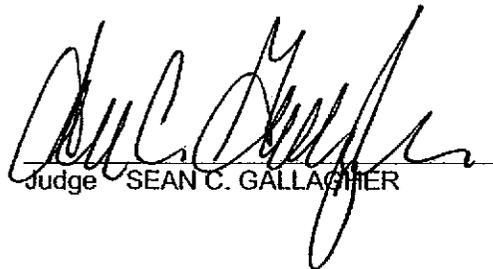
**RECEIVED FOR FILING**

JAN 12 2007

GERALD E. FUERST  
CLERK OF THE COURT APPEALS  
BY  DEP.

Presiding Judge JAMES J. SWEENEY, Concurs

Judge CHRISTINE T. MCMONAGLE, Concurs

  
Judge SEAN C. GALLAGHER

NOTICE FILED TO COUNSEL.  
FOR ALL PARTIES-COSTS TAXED

# Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

LORRI TURNER, ADMINISTRATRIX, ETC.

Appellant

COA NO.  
87541

LOWER COURT NO.  
CP CV-555394

COMMON PLEAS COURT

-vs-

OHIO BELL TELEPHONE COMPANY, ET AL.  
Appellee

MOTION NO. 391244  
MOTION NO. 391245

Date January 12, 2007

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Journal Entry

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Motions to certify a conflict by appellees, The Ohio Bell Telephone Company and South Central Power Company, are granted. However, because we do not believe appellees' proposed questions of law accurately reflect the rule of law upon which the conflict exists, we certify the matter only as to the issues as they are defined herein.

This court's decision in the present matter accepted the principle set forth in *The Cambridge Home Telephone Co. v. Harrington* (1933), 127 Ohio St.1, that "a company lawfully maintaining [a utility pole] 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." We further found that "there is no requirement that a utility pole must be located on the traveled and improved portion of the highway in order for liability to be imposed." We concluded that under the facts of the case presented, it was for a jury to determine whether the utility pole in question was in such close proximity to the roadway as to create a foreseeable and unreasonable risk of harm to the traveling public.

We find that our decision is in conflict with *Jocek v. GTE North, Inc.* (9<sup>th</sup> Dist. Sep. 27, 1995), Summit App. No. 17097; *Neiderbrach v. Dayton Power and Light Co.* (2<sup>nd</sup> Dist. 1994), 94 Ohio App.3d 334; *Ferguson v. Cincinnati Gas & Electric*

*Co.* (1<sup>st</sup> Dist. 1990), 69 Ohio App.3d 460; *Crank v. The Ohio Postal Telegraph-Cable Co. v. Yant* (5<sup>th</sup> Dist. Apr. 8, 1940), 64 Ohio App. 189.<sup>1</sup> These cases appear to stand for the proposition that a utility company may not be found liable for the placement of a pole along a roadway unless the pole actually incommodes the traveling public while properly using the improved portion of the roadway. According to appellees, pursuant to these cases, a utility company cannot be held liable when the utility pole is placed beyond the improved portion of the roadway and berm, in an area not intended for travel.

We certify the following questions to the Supreme Court of Ohio 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.



SEAN C. GALLAGHER, JUDGE

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

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JAN 12 2007

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY \_\_\_\_\_ DEP.

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<sup>1</sup> Although appellees cite additional cases, we cite to the most recent case appellees rely upon from each district.

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 87541

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**LORRI TURNER, ADMINISTRATRIX, ETC.**

PLAINTIFF-APPELLANT

vs.

**OHIO BELL TELEPHONE COMPANY, ET AL.**

DEFENDANTS-APPELLEES

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**JUDGMENT:  
AFFIRMED IN PART, REVERSED IN PART  
AND REMANDED**

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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

42716160

**JOURNALIZED:** DEC - 4 2006



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

DEC - 4 2006

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

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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.

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“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

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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

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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.

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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

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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); *Vigreux 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 *Vigreux*, 535 So.2d at 519;

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*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

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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**

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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

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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.<sup>1</sup>

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<sup>1</sup> 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.

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Turner's negligence per se claim is based on R.C. 4931.01, a statute that was repealed in 1999.<sup>2</sup> 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.

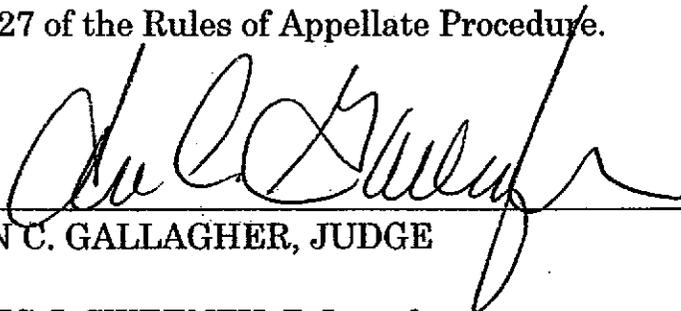
It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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<sup>2</sup> 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

LEXSEE



Positive

As of: Jan 16, 2007

**FERGUSON et al., Appellants, v. CINCINNATI GAS & ELECTRIC CO. et al., Appellees**

No. C-890617

Court of Appeals of Ohio, First Appellate District, Hamilton County

69 Ohio App. 3d 460; 590 N.E.2d 1332; 1990 Ohio App. LEXIS 4065

September 19, 1990, Decided

September 19, 1990, Filed

**PRIOR HISTORY:** [\*\*\*1]

Civil Appeal from: Hamilton County Court of Common Pleas; Trial No. A-8802462.

**DISPOSITION:**

*Judgment affirmed.*

**COUNSEL:**

*Gerald Nuckols*, for appellants.

*Kohnen, Patton & Hunt, K. Roger Schoeni and Rob S. Hoopes*, for appellee Cincinnati Gas & Electric Co.

*McCaslin, Imbus & McCaslin and John M. McCaslin, Jr.*, for appellees Janyce Thompson Cruz and Southwest Ohio Regional Transit Authority.

**JUDGES:**

Shannon, P.J., Hildebrandt and Gorman, JJ., concur.

**OPINION BY:**

PER CURIAM

**OPINION:**

[\*462] [\*\*1333] Plaintiff-appellant, Carmaletha Ferguson, appeals from the trial court's order granting summary judgment against her on her claim alleging that defendants-appellees, Southwest Ohio Regional Transit Authority ("SORTA") and Cincinnati Gas & Electric

Company ("CG & E"), negligently caused her to sustain personal injuries. The substance of her single assignment of error is that, despite the trial court's finding that she assumed the risk, plaintiff was entitled to have her negligence compared to the defendants' negligence as provided by R.C. 2315.19. The assignment of error is not well taken.

Plaintiff boarded a SORTA bus, which she had ridden daily for six months, and sat in the next to last seat. The window [\*\*\*2] was open, and she rested her arm on the frame with her elbow extending, as she described it, no more than six inches outside the bus. She fell asleep, but suddenly awoke screaming because of severe pain caused by a fracture of her elbow. Although no witnesses, including plaintiff herself, actually saw what her elbow struck, both plaintiff and the bus driver concluded that her injuries could have only been caused as the bus passed by a leaning utility pole owned by CG & E and located adjacent to the street at the curb line.

In its written decision, the trial court granted summary judgment for SORTA and CG & E, employing the doctrine of primary assumption of the risk. We find, however, that the uncontradicted facts do not support the trial court's application of this defense.

The defense of primary assumption of the risk, as a matter of law, supposes that the defendant owes no duty to the injured plaintiff. It is an absolute bar to plaintiff's claim of negligence upon the proposition that some known risks are inherent in a particular activity or situation. Accordingly, the risk is not created by the defendant's negligence, but by the nature of the activity, such as when a spectator [\*\*\*3] sitting in the unscreened

seats at a baseball game is struck by a foul ball. See Stanton v. Miller (1990), 66 Ohio App.3d 201, 583 N.E.2d 1080; Collier v. Northland Swim Club (1987), 35 Ohio App.3d 35, 518 N.E.2d 1226. In such an instance the plaintiff enters into the relationship knowing that the defendant will not protect him against the risk.

[\*\*1334] By contrast, implied assumption of the risk involves a plaintiff who consents to or acquiesces in an appreciated, known, or obvious risk to his safety. Wever v. Hicks (1967), 11 Ohio St.2d 230, 40 O.O.2d 203, 228 N.E.2d 315. An example is an injury suffered by a plaintiff diving into a swimming pool. See Stanton v. Miller, supra. Under these circumstances, the pool owner or the manufacturer owes a duty of reasonable care because its negligence created the risks by implication. Collier v. Northland Swim Club, supra. See Woods, Comparative Fault (2 Ed.1987) 134-135, Section [\*\*\*4] 6.1; Prosser, Law of Torts (4 Ed.1971) 440, fn. 10. Unlike the absolute bar to liability under primary assumption of the risk, the Supreme Court has merged the defense of implied assumption of the risk with the defense of contributory negligence, thereby requiring it to be compared by the trier of the facts with the defendant's negligence. See R.C. 2315.19; Anderson v. Ceccardi (1983), 6 Ohio St.3d 110, 6 OBR 170, 451 N.E.2d 780.

The trial court erroneously concluded that the case *sub judice* was subject to the doctrine of primary assumption of the risk. Despite a common carrier's duty to exercise the highest degree of care consistent with its operation, a passenger is negligent, as a matter of law, when he extends his arm or body through the window beyond the side of the bus. Cincinnati Traction Co. v. Kroger (1926), 114 Ohio St. 303, 151 N.E. 127. However, the risk of injury to a passenger with his arm resting on the window frame is not so inherent as to relieve these defendants from any duty to the passenger. Such a rule, without regard to proximate cause, would bar [\*\*\*5] all claims by the passenger, no matter how negligently the driver operated the bus or how negligently the utility pole may have been maintained.

While the trial court erroneously applied these concepts, it correctly concluded that plaintiff failed to establish a breach of duty. Therefore, the trial court properly granted defendants' motion for summary judgment based upon the uncontradicted facts in the answers to interrogatories, depositions, affidavits, and exhibits. Plaintiff acknowledges that there was no contact between any part of the bus and the utility pole. Furthermore, there is no suggestion that the driver left the travelled portion of the street or operated the bus in a negligent manner. Finally, plaintiff did not offer any regulation or rule prohibiting open windows or any fact to contradict the driver's statement that she was unaware that plaintiff's arm or elbow was outside the bus.

As to CG & E, the record does not demonstrate that the utility pole obstructed the travelled portion of the street even though it leaned into the street. Plaintiff's measurements relative to the height of the bus window and the height of a sign purportedly on the pole on the date of [\*\*\*6] the accident fail to establish that the utility pole extended past the curb line and into the travelled portion of the street at the height of the window. Plaintiff's photographs are likewise inconclusive. Evidence that a utility pole is adjacent to the travelled portion of a street does not, without more, create an inference that the street was unsafe or reflect any breach of duty. See Strunk v. Dayton Power & Light Co. (1983), 6 Ohio St.3d 429, 6 OBR 473, 453 N.E.2d 604.

[\*464] The mere happening of an injury does not create an inference of another's negligence. Parras v. Standard Oil Co. (1953), 160 Ohio St. 315, 116 N.E.2d 300. After reviewing the evidentiary materials presented by the parties in light of Civ.R. 56, we hold that no genuine issue of material fact remained for the trial court concerning breach of a duty by defendants. Therefore, SORTA and CG & E were entitled to judgment as a matter of law.

The judgment of the trial court is affirmed.

*Judgment affirmed.*

Shannon, P.J., Hildebrandt and Gorman, JJ., concur.

LEXSEE



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As of: Jan 16, 2007

**NEIDERBRACH, Admr., Appellant, v. DAYTON POWER AND LIGHT COM-  
PANY et al., Appellees**

No. 93-CA-12

Court of Appeals of Ohio, Second Appellate District, Miami County

94 Ohio App. 3d 334; 640 N.E.2d 891; 1994 Ohio App. LEXIS 1537

April 13, 1994, Decided

**PRIOR HISTORY:** [\*\*\*1] T.C. Case No. 91-483.

**DISPOSITION:**

*Judgment affirmed.*

**COUNSEL:**

*Craig Denmead and Deborah A. Bonarrigo, for ap-  
pellant.*

*James R. Greene III, David C. Greer and Michael  
W. Krumholtz, for appellee Dayton Power and Light Co.*

*James D. Utrecht, for appellees Lou Havenar, Don  
Hart, Wade Westfall, and Miami County Board of  
Commissioners.*

**JUDGES:**

Brogan, Judge. Grady, P.J., and Wolff, J., concur.

**OPINION BY:**

BROGAN

**OPINION:**

[\*336] [\*\*892] Kenneth Neiderbrach, as Admin-  
istrator of the Estate of James Siler, appeals from the  
judgment of the Miami County Common Pleas Court  
which granted summary judgment to Dayton Power and  
Light Company (hereinafter "DP & L").

Appellant alleges that on or about December 9, 1989  
at approximately 10:00 p.m., decedent was driving his  
1987 Chevrolet Blazer west on Brown Road in Miami

County. Siler's automobile skidded off the road and vio-  
lently struck a utility pole, which is owned, maintained  
and controlled by DP & L. The utility pole is approxi-  
mately sixteen feet, three inches from the edge of Brown  
Road. It was installed at its present location in 1947.  
The complaint further alleged that as a sole result of the  
collision with the utility pole, [\*\*\*2] Siler suffered se-  
vere head injuries and multiple trauma, which eventually  
resulted in his death on June 24, 1990. A blood-alcohol  
test performed on the decedent following the accident  
revealed 0.224 percent alcohol by weight.

The complainant alleged that the defendant Miami  
County Board of Commissioners maintained Brown  
Road and its right-of-way. The complainant further al-  
leged that the injuries suffered by James Siler were  
caused directly by the negligence of DP & L and the  
Miami County Board of Commissioners.

In its motion for summary judgment, DP & L argued  
that the distance of the utility pole from the edge of  
Brown Road warranted judgment in its favor based upon  
R.C. 4931.01, as expanded by R.C. 4933.14. The trial  
court granted summary judgment to the defendants with-  
out elaboration.

Appellant contends, in his sole assignment, that the  
trial court erred in granting summary judgment because  
the placement of the utility pole in the highway right-of-  
way by DP & L created an unreasonable hazard to mo-  
torists using Brown Road.

In his first argument, appellant contends the Ohio  
Supreme Court's recent opinion in *Mfr's. Natl. Bank of  
Detroit v. Erie Cty. Rd. Comm.* (1992), 63 [\*\*\*3] Ohio

St.3d 318, 587 N.E.2d 819, mandates that we reverse the judgment of the trial court.

In *Manufacturer's*, the Ohio Supreme Court held that a permanent obstruction to visibility, within the highway right-of-way, which renders the regularly travelled portions of the highway unsafe for the usual and ordinary course of travel, can be a nuisance for which a political subdivision may be liable under R.C. 2744.02(B)(3). The court held that where an abutting landowner or occupier uses the highway right-of-way in a manner inconsistent with a highway purpose and where such usage constitutes an unreasonable hazard to users of the highway, the [\*337] landowner or occupier may be liable for damages proximately caused by the improper use of the right-of-way.

In *Manufacturer's*, the petitioners claimed that a cornfield, growing in a right of way, constituted an actionable nuisance because it obstructed the driver's vision to the extent that it rendered the intersection unsafe. [\*\*893] Justice Herbert R. Brown wrote at 323, 581 N.E.2d at 823-824:

"A permanent obstruction to a driver's visibility can be a nuisance which makes the usual and ordinary course of travel on the roadway [\*\*\*4] unsafe. A visibility obstruction can be as hazardous to the highway's safety as a malfunctioning traffic light, a pothole in the roadway, or a rut in the shoulder. This is particularly true where a driver, stopped at an intersection, is unable to see approaching cross-traffic. The relevant focus is on the effect of the obstruction on the highway's safety, not on the nature of the particular obstruction. Whether the alleged obstruction in the present case (a cornfield) constitutes a nuisance which makes the highway unsafe and whether this was the proximate cause of the accident which occurred are questions upon which we express no opinion because such determinations require findings of fact."

In considering the duty of care owed by an owner or possessor of agricultural rural land to persons travelling on public roads abutting the land, the court noted:

"Growing crops in the right-of-way serves no highway purpose. Furthermore, if the crops obstruct a driver's vision in a way that creates a hazard to safe travel on the highway, the usage is inconsistent with the right-of-way's purpose. Again we make no factual determination with respect to whether the crops grown by Boos constitute [\*\*\*5] such an obstruction. Nor do we impose any duty upon a landowner for obstructions to visibility located on land that is not within the right-of-way." *Id.* at 324, 587 N.E.2d at 824-825.

Appellees assert that *Manufacturer's* does not mandate a reversal of the trial court's judgment in this case. Appellees argue that R.C. 4931.01 and 4933.14 essen-

tially grant licenses to utility companies to erect structures along public highways so long as they do not "incommode" the public in the use of those highways.

In support of its motion for summary judgment, DP & L relied on R.C. 4931.01, when read in conjunction with R.C. 4933.14. R.C. 4931.01 provides, in pertinent part, as follows:

"A telegraph company or any person may construct telegraph lines upon and along any of the public roads and highways, and across any waters, within this state, by the erection of the necessary fixtures, including posts, piers, or abutments for sustaining the cords or wires of such lines. Such lines shall be [\*338] constructed so as not to incommode the public in the use of the roads or highways \* \* \*." (Emphasis added.)

This statute is equally applicable to DP & L by virtue of R.C. 4933.14, which [\*\*\*6] states:

"Sections 4931.01 to 4931.23, inclusive, \* \* \* of the Revised Code, apply to companies organized for supplying public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares, and public places with electric light and power \* \* \*." (Emphasis added.)

DP & L argues that *Manufacturer's* is distinguishable from the facts in this case because it is not an abutting landowner using the highway right of way inconsistent with highway purposes, and case law establishes as a matter of law that the utility pole was not an unreasonable hazard to users of the highway. We agree.

DP & L is a public utility using the highway right-of-way in a manner explicitly approved by the Ohio legislature. See R.C. 4931.01 and 4933.14. In *Manufacturer's*, the abutting landowner planted corn on the highway right-of-way in such a manner that it obstructed the view of a passing motorist of a nearby intersection. The utility pole struck by the plaintiff's decedent was located properly in the utility right-of-way sixteen feet, three inches from the edge of the roadway. The utility pole did not interfere with the proper use of the roadway. There was no evidence [\*\*\*7] that the utility pole interfered with the victim's ability to see in his lawful use of the roadway.

In *Strunk v. Dayton Power & Light Co.* (1983), 6 Ohio St.3d 429, 6 OBR 473, 453 N.E.2d 604, the Ohio Supreme Court held that a municipality's duty to keep streets and highways free from nuisance does not extend to a driver of an automobile which collides with a light pole off the traveled portion of the roadway. Justice Brown noted in *Manufacturer's*, [\*\*894] 63 Ohio St.3d at 322, 587 N.E.2d at 823:

"The township directs our attention to *Strunk, supra*, in which we refused to extend a municipality's duty under R.C. 723.01 past the portion of the highway considered the berm or shoulder, and held that as a matter of law a light pole located adjacent to a roadway or the shoulder was not a portion of the highway within the meaning of R.C. 723.01.

"On closer examination, however, the court in *Strunk* focused on whether the light pole was a condition that made the roadway unsafe for the usual and ordinary course of travel. In *Strunk*, the placement of the light pole adjacent to the roadway's shoulder did not jeopardize the safety of ordinary traffic on the highway. [\*\*\*8] To the extent the language in *Strunk* is inconsistent with our holding today, our opinion in *Strunk* is hereby modified." (Emphasis added.)

[\*339] The Licking County Court of Appeals in *Ohio Postal Telegraph-Cable Co. v. Yant* (1940), 64 Ohio App. 189, 18 O.O. 57, 28 N.E.2d 646, held that as a matter of law a telegraph pole located eleven feet from a road in the right-of-way did not "incommode" the public in the use of the public highway. The court noted:

"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 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 regular 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 192-193, 18 O.O. at 58-59, [\*\*\*9] 28 N.E.2d at 647.

Recently, the Court of Appeals for Summit County in *Turowski v. Johnson* (1990), 68 Ohio App.3d 704, 589 N.E.2d 462, affirmed the grant of summary judgment in favor of Ohio Edison Company when the plaintiff's decedent alleged wilful misconduct on Ohio Edison's part in erecting a utility pole thirty-one inches from a street curb, which pole the decedent struck while driving in an intoxicated state. Appellant's first argument is without merit.

Second, appellant argues that DP & L had a duty to erect or relocate the utility pole in question beyond the appropriate "clear zone of Brown Road" pursuant to available state-of-the-art methods and standards.

Appellant argues that summary judgment should not have been granted to DP & L because it failed to meet certain standards of the United States Department of

Transportation in its placement of the utility pole in question alongside Brown Road. Specifically, appellant refers to Highway Safety Program Guideline No. 12 and the Highway Safety Program Manual issued by the United States Department of Transportation.

Highway Safety Program Guideline No. 12 is embodied in Section 1204.4, Title 23, C.F.R. That guideline [\*\*\*10] provides:

"Highway Design, Construction and Maintenance

"Every State in cooperation with county and local governments should have a program of highway design, construction, and maintenance to improve highway safety. Guidelines applicable to specific programs are those issued or endorsed by the Federal Highway Administrator.

\* \* \*

"I. The program should provide, as a minimum that:

[\*340] "J. There are highway design and construction features wherever possible for accident prevention and survivability including at least the following:

"1. *Roadsides clear of obstacles*, with clear distance being determined on the basis of traffic volumes, prevailing speeds, and the nature of developing along the street or highway." (Emphasis added.)

[\*\*895] The Program Manual, Vol. 12, further supplementing those standards under Guideline No. 12, states at pages IV-12 through IV-13:

"VI. CRASH SURVIVABILITY

"Whereas a vital part of the overall safety effort in highway design, construction, and maintenance is to reduce the likelihood of vehicles going out of control, no less important are the aspects of highway engineering that increase survivability when drivers lose control [\*\*\*11] of their vehicles. \* \* \* Every State and local agency, therefore, should have an active program in all phases of highway design, construction, and maintenance to protect the occupants of an out-of-control vehicle and to avoid collisions with other vehicles and pedestrians. *The program should, as a minimum, center on the following general principles, based on accepted practice.*

"A. Provisions should be made on all expressways and on *high speed highways in rural areas* to reduce the possibility that out-of-control vehicles will crash into fixed objects or to increase survivability if they crash.

"1. *Roadsides should be clear of obstacles that could be struck by out-of-control vehicles. There should be a driver-control recovery area clear of obstructions as wide as practicable for the conditions of traffic volume, prevailing speeds and the nature of development along*

the street or highway. Wherever practicable it is desirable that a driver-control recovery area, clear of obstructions for a distance of 30 feet or more from the edge of the traveled way, be provided in rural areas. The recovery area should contain gentle slopes that can be safely negotiated by an out-of-control [\*\*\*12] vehicle. Ditch sections should be fully rounded and have gentle side slopes.

"2. In cases where roadside obstacles, such as sign and light posts, cannot be located in an unexposed position and may constitute a hazard to an out-of-control vehicle, yielding or breakaway supports should be used.

"3. To assure at least minimum protection to the occupants of vehicles striking fixed objects that cannot be removed easily or designed so as to yield, provision should be made to install energy absorbing barriers such as guardrails or other similar protective devices." (Emphasis added.)

Appellant concedes that although these particular standards are specifically directed toward states and their political subdivisions, they create an existing [\*341] body of knowledge constituting state-of-the-art technology in the area of roadside safety.

Appellant argues that DP & L's standard of care should be evaluated in light of the AASHTO Guide, a guide issued by an organization called the "American Association of State Highway and Transportation Officials." The United States Department of Transportation requires the Federal Highway Administration to use this guide in evaluating the adequacy [\*\*\*13] of state highway agency utility-accommodation policies. Section 645.211, Title 23, C.F.R. The AASHTO Guide provides in pertinent part:

#### "GENERAL CONSIDERATIONS

"The following general considerations are suggested for the location and design of all utility installations within the highway right-of-way:

##### "Location

\*\* \*\*

"4. The horizontal and vertical location of utility lines within the highway right-of-way limits should conform with the clear zone policies applicable for the system, type of highway, and specific conditions for the particular highway section involved. The location of above-ground utilities should be consistent with the clearances applicable to all roadside obstacles for the type of highway involved. \* \* \* (Emphasis added.)

Furthermore, page 19 of the AASHTO Guide sets forth the following recommendations:

#### "OVERHEAD POWER AND COMMUNICATION LINES

##### "Location

"On and along highways in rural areas poles and related facilities should be located at or as near as practical to the right-of-way line. At a minimum, these facilities should [\*\*896] be located outside the appropriate clear zone." (Emphasis added.)

The term "clear zone" is defined [\*\*\*14] in the AASHTO Guide, on page 3, as:

"Clear Zone -- That roadside border area, starting at the edge of the traveled way, available for use by errant vehicles." (Emphasis added.)

Appellant thus argues that the appropriate "clear zone" for Brown Road was thirty feet from the traveled roadway and thus the utility pole in question was not in the clear zone.

DP & L argues that these guidelines are inapplicable to it, and are discretionary and subordinate to the controlling case law. DP & L notes that the Introduction of the AASHTO Guide states at page 2:

[\*342] "These guidelines make no reference to the legal rights of utilities to use or occupy a highway right-of-way. \* \* \* These matters are governed by state law. These guidelines should be interpreted and applied to the extent consistent with state laws which give utilities the right to use or occupy highway right-of-way." (Emphasis added.)

DP & L also notes that the AASHTO Guide and the Program Manual are replete with discretionary rather than mandatory language.

In *Curry v. Ohio Power Co.* (Feb. 14, 1980), Stark App. No. CA-2671, unreported, the Stark County Court of Appeals affirmed a summary judgment for Ohio [\*\*\*15] Power where the car in which plaintiff was a passenger collided with an Ohio Power utility pole located fifteen feet, six inches from the edge of the two-lane rural road. Judge Dowd noted at page 10 of the court's opinion:

"Can it be contended that the telephone company when it placed its pole where it did could foresee that there would be some object placed on the macadamized part of the highway at this particular place that would deflect an automobile to such an extent that it would cross the ditch and strike the pole fifteen feet from the macadam portion thereof? If the Legislature of Ohio gave telephone companies a right to construct and maintain their telephone lines and poles upon public highways, could we say that they were negligent in placing their pole as they did in this particular instance? The

poles, if they have this right, must be placed somewhere, and could they assume that this would be any more dangerous than if they had placed it fifty or a hundred feet from this particular spot and fifteen feet from the edge of the macadam part of the highway?

"The public as a general rule does not use or travel upon the entire limits of the right-of-way of a road, but there [\*\*\*16] is a certain portion of it prepared by public authorities to be used to travel over, and in this case eighteen feet of it was prepared and improved for that purpose, and we can fairly assume that in addition thereto there was a berm. We can, therefore, conclude that in the event the pole as complained of herein would not incommode the public in the use of that part of the road then in active use by the public. And we find no other fact contained in the petition that would indicate the public had been incommoded in the use of this road by the maintenance of the telephone line; neither is there anything to show that the pole was not in a proper place, inasmuch as it was a safe distance from the macadam part thereof, and we can't say that the defendant was negligent by reason of the same. \* \* \*"

We agree with the appellee that the standards set by the United States Department of Highway Safety are suggestive and not mandatory. The utility pole was properly located in the utilities' right of way and was not incommodious to highway travelers.

[\*343] Last, appellant argues that DP & L had an obligation to relocate its utility pole erected in 1947 to meet the requirements of the [\*\*\*17] Ohio Department of Transportation Location and Design Manual ("ODOT Manual"). The ODOT Manual provides that "in all cases, the preferred alternative is to keep the entire Design Clear Zone free of fixed objects wherever economi-

cally feasible." Appellant argues the "design clear zone" must mean the same as "clear zone" in the AASHTO Guide.

Appellees argue that the ODOT Manual does not provide mandatory requirements. [\*\*897] Rather, appellees note that the ODOT Manual reads:

"It is recognized that costs for mass relocation of hydrants, *poles*, light standards, and other utilities or appurtenances, *plus additional right-of-way costs would be excessive and would preclude the construction of many desirable road improvements.*" (Emphasis added.)

Furthermore, the ODOT Manual states that "in all cases, the *preferred* alternative is to keep the entire design clear zone free of fixed objects *wherever economically feasible.*" (Emphasis added.) *Id.* at 1.

In *Strunk v. Dayton Power & Light Co.* (Feb. 5, 1986), Montgomery App. No. CA-9457, unreported, 1986 WL 1702, we held that DP & L did not owe the appellant the duty to safely upgrade the light pole by either providing [\*\*\*18] a guardrail or retrofitting it with breakaway devices.

We conclude that DP & L did not have a duty to remove the utility poles located within the utility right-of-way along Brown Road and reset them thirty feet from the travelled portion of Brown Road.

The trial court properly granted summary judgment to the appellees. Appellant's assignment of error is overruled. The judgment of the trial court will be affirmed.

*Judgment affirmed.*

Grady, P.J., and Wolff, J., concur.

## LEXSEE

**I**

Cited

As of: Jan 16, 2007

**THE OHIO POSTAL TELEGRAPH-CABLE CO., APPELLANT, v. YANT ET  
AL., APPELLEES**

[NO NUMBER IN ORIGINAL]

Court of Appeals of Ohio, Fifth Appellate District, Licking County

64 Ohio App. 189; 28 N.E.2d 646; 1940 Ohio App. LEXIS 945; 18 Ohio Op. 57

April 8, 1940, Decided

**DISPOSITION:** [\*\*\*1]

*Judgment reversed.*

**SYLLABUS:**

A motorist, who negligently drives off the improved portion of a highway and collides with and damages a telegraph pole located in the highway 13 feet from the hard surface thereof and 11 feet from the portion improved for vehicular travel, there being a two-foot gravel strip on either side of the hard surface, is liable for damages sustained in replacements and repairs by the telegraph company, the pole not being in such close proximity to the roadway as to "incommode the public in the use thereof" (Section 9170, General Code), and its location in the right of way not being a proximate and contributing cause of the collision.

**COUNSEL:**

*Messrs. Kibler & Kibler and Messrs. Henderson, Burr, Randall & Porter*, for appellant.

*Mr. T. B. Mateer*, for appellees.

**JUDGES:**

SHERICK, P. J. MONTGOMERY, J., concurs.  
LEMERT, J., not participating.

**OPINION BY:**

SHERICK

**OPINION:**

[\*189] [\*\*646] This is a pole-in-the-road case, [\*\*\*2] instituted by the telegraph company for damages to its equipment. Its solution, in view of the pronouncements found in *Cambridge Home Telephone Co. v. Harrington*, 127 Ohio St., 1, 186 N. E., 611, and *Ohio Bell Tel. Co. v. Lung, Admx.*, 129 Ohio St., 505, 196 N. E., 371, is approached with the usual deference, but without diffidence in the soundness of our conclusion herein reached.

The defendant, Yant, was the owner of a Ford roadster. Defendant, Dye, was its driver. They, with two other grown people, occupied the car's only seat. While proceeding northeasterly on Route 79, south of Newark, where the road bears to the right on a 7 degree [\*190] curve, the car was driven across the center line of the highway upon the left side thereof and proceeded upon a tangent with the center line until it crossed the road's west berm. From this point the car's course continued upon the tangent over the grass and slope 165 feet to a point where the automobile collided with appellant's pole, which was broken near its base and rendered 17 of its principal circuits inoperative for a period of eight hours.

The roadway at the points of departure and impact is 70 feet in width. [\*\*\*3] It is improved with bituminous macadam to a width of 22.4 feet and a gravel strip on each side thereof two feet in width. The road is banked on the west side. The pole is definitely located within the highway. It stood five feet east of the west right of way line and 13 feet west of the west edge of the bituminous pavement, that is, 11 feet west of that part of the highway improved for vehicular travel and use at that point. The ground line of the pole is 3.3 feet below the

level of the west edge of the bituminous macadam. Neither the top of the berm, nor the slope of the bank to the pole, was intended or improved for travel. The slope was wet and soggy and grown up with grass and weeds.

The defendants defended upon the theory of the *Harrington* and *Lung* cases, *supra*, which is to say, in the language of Section 9170, General Code, that the pole incommoded them in the use of the road, and that its erection and maintenance was an act of static negligence and the proximate cause of the collision, by reason of which, even though defendants be found negligent, plaintiff could not recover, because it was guilty of contributory negligence.

Upon defendants' motion plaintiff [\*\*\*4] was required to elect. It chose to proceed against the driver of the car. No question is made concerning the propriety of the court's ruling. At the conclusion of plaintiff's [\*\*647] case both parties moved for an instructed verdict. Neither [\*191] desired submission of the cause to the jury. Thereupon, the jury was discharged and upon request the court separately stated its finding of facts and conclusion of law. It was found that the defendant driver was negligent, but plaintiff was denied recovery upon defendant's theory of the case. The claimed errors upon which this review is predicated are susceptible of division into two propositions, first, in that the court erred in its conclusion of law in holding that plaintiff was negligent in maintaining its pole, and second, in its finding that the pole's maintenance was a proximate and contributing cause. One further fact, as yet unrelated, is of prime importance. It is proven and conceded that the company had the statutory right and authoritative permission to erect and maintain its poles within the limits of the highway.

This tribunal was the intermediate court which considered the *Lung* case, *supra*. We unhesitatingly [\*\*\*5] therein subscribed to the rule of the *Harrington* case, *supra*, for the particular reason that the pole in both cases was within, or in close proximity to, the improved portion of the highway. In both cases there not only existed a possibility of injury to those who used the roads, but also a self-evident probability which might have been fairly contemplated. Such being true, it naturally followed that a jury question was presented, first, as to whether or not the maintenance of these poles amounted to an invasion of that portion of the roadway improved and intended for vehicular traffic. If it was within, or in close proximity to, the improved portion, it was an obstruction which incommoded the public and was a nuisance. There also existed the question of proximate and contributing cause. But do we have a like situation presented by the facts of this case?

We are cognizant of the admonition that the syllabus of a case is only the law in so far as it pertains to the facts of the case. We, therefore, feel at liberty to consider [\*192] our facts, and the law applicable, as one of first impression. The same view is taken with respect to the construction to be placed upon [\*\*\*6] that portion of Section 9170, General Code, which recites, "but shall not incommode the public in the use thereof." If the traveling public has a right of user of the entire highway, then, as pointed out by Judge Matthias, some public body has the duty cast upon it of making and keeping it fit for public travel. Surely, such was never intended. 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, roads and railway signs of all descriptions, 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.

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 [\*\*\*7] drive through and ruin costly shrubbery placed along roads for their beautification.

The Legislature has by statute, fortified by much judicial construction, recognized the right of *quasi*-private corporations, who serve the public generally, to place an additional servitude upon public thoroughfares. Messages by wire relieve traffic congestion. Modern business and the business of living demand and require these luxuries which have now become necessities. The fact that these companies derive a profit from their operation is not important or of any consequence.

We believe the law is, and should be, as found succinctly [\*193] stated in the annotation found in 82 A. L. R., 395, which we quote and adopt:

"It may be stated as a general proposition that a company lawfully maintaining poles in or near a public highway is not liable for the damage to person or property resulting from a road vehicle striking such pole, unless it is erected on the traveled portion of the highway or in such close proximity thereto as to constitute an obstruction dangerous to anyone properly using the highway, and the location of the pole is the proximate cause of the collision."

It is a poor rule [\*\*\*8] which fails to work both ways. When the plaintiff is found to be lawfully using the highway, and its pole is not upon or in close prox-

imity to the portion thereof improved and set aside for vehicular travel, and in all common foreseeable probability not an instrumentality [\*\*648] liable to injure a traveler, and when, on the other hand, we find a motorist who admits his negligence, or is proven to have been negligent, and who misuses the highway and invades that portion thereof reserved for other lawful purposes, and who by his own carelessness injures the property of another, is, and should be, liable for the damage which he does to such property which is lawfully upon the highway.

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 [\*\*\*9] traveler who abuses his privilege.

Section 9170, General Code, contemplates a lawful use of the improved portion of a highway and that portion thereof which is in close proximity to its [\*194] proper use. This constitutes that portion of the roadway in which the traveling public has a superior right, and in the use of which the public may not be incommoded. Surely, the word "use" does not include its misuse, which is evident, even as to the improved portion thereof, by our statutes which regulate its use in many respects, of which vehicles with lugs are excellent illustrations. This section of the General Code is not a go sign to the public, but a grant of a right of user to a magnetic telegraph util-

ity, with a restriction upon its accorded privilege to not incommode the public in the lawful use of that portion of the road provided for public travel.

Was the pole's position in this state of facts the proximate cause of the collision? The answer is emphatically, no. The defendants' car got out of control. Had it gone through the fence and run into a dwelling house, it would be then just as illogical to say that the house caused the injury. The proximate cause was defendants' [\*\*\*10] negligence. Clearly, the plaintiff could not have anticipated that its pole would or could be struck by a passing vehicle. There were no questions of disputed fact and no jury question. The law was misapplied. The judgment should have been for the plaintiff.

If our judgment needs fortification by authorities, such may be found listed with hardly a dissenting murmur in 82 A. L. R., 395, and 98 A. L. R., 487.

Examination of the evidence discloses that the plaintiff made no proof of damage because of interruption of service. It proved the cost of by-pass service upon parallel telephone lines, but it was not shown that it incurred any expense, or that it resorted to this channel for delivery of a single message. It may not recover for any such claimed damages. It is, however, proven that plaintiff sustained damages in replacements and repairs in the sum of \$ 91.46.

The judgment is reversed and final judgment is [\*195] entered in plaintiff's favor in the sum of \$ 91.46, costs to be taxed in accordance with the statute.

*Judgment reversed.*

LEXSEE



Positive  
As of: Jan 16, 2007

**MARGARET M. JOCEK, ETC., Appellant v. GTE NORTH, INC., et al., Appellees**

**C.A. NO. 17097**

**COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT  
COUNTY**

**1995 Ohio App. LEXIS 4343**

**September 27, 1995, Decided**

**September 27, 1995, Filed**

**NOTICE:** [\*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

**PRIOR HISTORY:**

APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT. COUNTY OF SUMMIT, OHIO. CASE NO. 91-05-1784.

**DISPOSITION:**

Judgment affirmed.

**COUNSEL:**

HAMILTON DESAUSSURE, Buckingham, Doolittle & Burroughs, Attorney for Appellees, Akron, OH.

TIMOTHY G. KASPAREK, Reminger & Reminger Co., L.P.A., Attorney for Appellant, Cleveland, OH.

**JUDGES:** LYNN C. SLABY. BAIRD, P.J., MAHONEY, J., CONCUR. (Mahney, J., retired Judge of the Ninth District Court of Appeals, sitting by assignment pursuant to Article IV, § 6(C), Constitution.)

**OPINION BY:** LYNN C. SLABY

**OPINION:**

DECISION AND JOURNAL ENTRY

Dated: September 27, 1995

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

SLABY, Judge.

Appellant, Margaret Jocek ("Jocek"), appeals from a trial court order granting summary judgment for the appellees, GTE Corporation and GTE North, Inc. (collectively, "GTE"). We affirm.

Jocek is the widow of Paul Jocek ("the decedent"), who was killed in an automobile accident. The accident occurred at the intersection of [\*2] State Route 21 and Minor Road in Copley Township. The decedent was traveling southbound on State Route 21, which is a four lane road that has a grass median strip separating the northbound and southbound lanes.

As the decedent approached the intersection, his car was hit by a car driven by Mildred Perry ("Perry"). Perry had stopped her car in the right-hand berm of southbound State Route 21. Desiring to make a left-hand turn onto eastbound Minor Road, she cut across the southbound lanes of State Route 21. She hit the right rear of the decedent's car, which was traveling in the left-hand lane. The impact forced the decedent's car to spin off the road and into the median immediately south of the Minor Road intersection. The decedent suffered fatal injuries when his car crashed into a telephone pole in the median.

Jocek, as administratrix of the decedent's estate, brought a wrongful death action against GTE, the owner of the telephone pole, and several other defendants. n1 GTE answered and moved for summary judgment. It

argued that it was not liable, as a matter of law, because its telephone pole was not located on the road and, therefore, did not "incommode the public in the use" of [\*3] the road pursuant to R.C. 4931.01. The trial court granted GTE's motion.

n1 The claims against the other defendants are not at issue in this appeal.

Jocek assigns one error in her appeal from the trial court's judgment.

#### Assignment of Error

"The lower Court committed reversible and prejudicial error by granting [GTE's] Motion for Summary Judgment, as a matter of law, pursuant to the Court's Order dated December 9, 1994."

Jocek raises several arguments in her assignment of error. She claims that the trial court failed to consider two Ohio Supreme Court cases, Cambridge Home Tel. Co. v. Harrington (1933), 127 Ohio St. 1, 186 N.E. 611, and Ohio Bell Tel. Co. v. Lung (1935), 129 Ohio St. 505, 196 N.E. 371, that allegedly would have mandated a different result. Jocek also notes that in the early 1970s, GTE prepared, but canceled, an internal work order that would have removed the pole from the State Route 21 median. The order was prepared soon after an accident involving a pole at the same location [\*4] as that in the case *sub judice*. Jocek cites to the affidavits of her expert witness, Dr. Ronald Eck ("Dr. Eck"), which concluded that GTE's telephone pole represented an unreasonable hazard to traffic. Finally, Jocek argues that GTE's placement of the telephone pole was negligent because it violated standards mandated by the Ohio Department of Transportation ("ODOT").

This court applies the same standard as that used by the trial court in reviewing a trial court's entry of summary judgment. Parenti v. Goodyear Tire & Rubber Co. (1990), 66 Ohio App.3d 826, 829, 586 N.E.2d 1121. Summary judgment, pursuant to Civ.R. 56(C), is proper if:

"(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 non-

moving party, that conclusion is adverse to the nonmoving party."

State ex rel. Howard v. Ferreri (1994), 70 Ohio St.3d 587, 589; see, also, Temple v. Wean United, Inc. (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

The elements of actionable [\*5] negligence are a duty, a breach of that duty, and an injury proximately resulting therefrom. Menifee v. Ohio Welding Prod. (1984), 15 Ohio St.3d 75, 77, 472 N.E.2d 707. In this case, any duty of GTE's was created by R.C. 4931.01, which states:

"A telegraph company or any person may construct telegraph lines upon and along any of the public roads and highways, and across any waters, within this state, by the erection of the necessary fixtures, including posts, piers, or abutments for sustaining the cords or wires of such lines. Such lines shall be constructed so as not to incommode the public in the use of the roads or highways \*\*\*."

The issue of whether a duty exists is a question of law. Mussivand v. David (1989), 45 Ohio St.3d 314, 318, 544 N.E.2d 265. We accord no deference to the trial court in deciding legal questions. Ohio Bell Tel. Co. v. Pub. Util. Comm. (1992), 64 Ohio St.3d 145, 147, 593 N.E.2d 286.

In Harrington, the Ohio Supreme Court affirmed a verdict for the plaintiff, a passenger in an automobile that struck a telephone pole. The pole was placed immediately to the side of the road; some of the testimony indicated that the pole was [\*6] within the edge of the improved roadway. The court stated that "the traveling public has a right to the use of a public highway, to the entire width of the right of way, as against all other persons using such highway for public purposes." Harrington, 127 Ohio St. 1, 186 N.E. 611, paragraph one of the syllabus.

Lung, the other Ohio Supreme Court case upon which Jocek primarily relies, involved a fatal accident at a Y-shaped intersection. The decedent was a passenger in the car, which crashed into a telephone pole located in the middle of the "Y." The pole was 5.1 feet from the road; the area in which the pole was located was packed with cinders. The court held that a jury question existed as to whether the placement of the pole would incommode the public in the use of the road. Lung, 129 Ohio St. at 509.

Several Ohio appellate courts have considered the issue presented in this case. In its opinion, the trial court discussed *Curry v. Ohio Power Co.* (Feb. 14, 1980), Licking App. No. CA-2671, unreported. In *Curry*, the defendant, an electric company, had placed a pole on unimproved land. The pole was situated twelve feet, six inches from the berm of the highway. [\*7] As a result of an accident on the road, the car carrying the plaintiff was forced into the utility pole. The court upheld summary judgment granted for the defendant. Noting that the pole was located much further from the road than the pole in *Harrington*, the court "did not consider *Harrington* \*\*\* to require the finding that a jury question with respect to negligence is presented whenever a motorist collides with a pole located in the right of way regardless of the distance from the pole to the improved portion of the highway." *Id.*

In *Ohio Postal Telegraph-Cable Co. v. Yant* (1940), 64 Ohio App. 189, 28 N.E.2d 646, the court reversed a judgment in favor of the plaintiff, who was injured when his car crashed into a utility pole located eleven feet from the improved road. After discussing *Harrington* and *Lung*, which involved utility poles located "within, or in close proximity to, the improved portion of the highway," the court concluded that the facts of *Yant* were distinguishable. *Id.* at 191-92.

Most recently, in *Neiderbrach v. Dayton Power & Light Co.* (1994), 94 Ohio App.3d 334, 640 N.E.2d 891, the court affirmed summary judgment for the defendant [\*8] utility company. The plaintiff's decedent skidded off a road and struck a utility pole located sixteen feet, three inches from the road. Noting that the utility pole did not interfere with the proper use of the roadway, the court upheld summary judgment for the utility company. *Id.* at 338-39.

This court has considered the issue of whether a utility company may be liable for an accident involving a pole located off of the improved road. *Mattucci v. Ohio Edison Co.* (1946), 79 Ohio App. 367, 73 N.E.2d 809; *Crank v. Ohio Edison Co.* (Feb. 2, 1977), Wayne App. No. 1446, unreported. In *Mattucci*, the car in which the plaintiff was riding collided with a pole located on a six-foot-wide grass strip between the curb and the sidewalk. *Mattucci*, 79 Ohio App. at 368. We found that the pole did not incommode the public in its use of the road and, therefore, affirmed a directed verdict for the utility company. *Id.* at 370. *Crank* involved an accident with a utility pole and guide wire located on a tree lawn. Finding that the pole and guide wire did not incommode the public's use of the street, we affirmed a directed verdict for the utility company. *Crank*, unreported [\*9] at 3.

We find that the trial court did not err by granting GTE's motion for summary judgment. The cases dis-

cussed above indicate that a utility company's duty under R.C. 4931.01 is not triggered if the company places a pole alongside a roadway, but not on or immediately adjacent to the portion that is improved for travel. 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, Jocek's negligence claim fails as a matter of law.

Jocek argues that *Harrington* and *Lung* mandate reversal of the trial court's judgment. Those cases are distinguishable. In *Harrington*, evidence existed to indicate that the utility pole was located within the edge of the improved road. As Jocek notes, the first paragraph of *Harrington's* syllabus refers to the traveling public's right to use "the entire width of the right of way." The Ohio Supreme Court, however, has repeatedly [\*10] cautioned that the syllabus of a decision must be read with reference to the facts and issues presented therein. See *Williamson Heater Co. v. Radich* (1934), 128 Ohio St. 124, 190 N.E. 403, paragraph one of the syllabus; *Rauhaus v. Buckeye Local School Dist. Bd. of Edn.* (1983), 6 Ohio St.3d 320, 323, 453 N.E.2d 624. Doing so, we will not stretch *Harrington* to permit liability in this case, in which the pole was much further from the improved road than that in *Harrington*. Similarly, the utility pole in *Lung* was located in an improved portion of the right of way and accordingly distinguishes that case from the case *sub judice*.

Jocek argues that her case is distinguishable from the appellate decisions previously discussed because the decedent's accident occurred on a median strip, whereas the accidents in the other cases occurred off the side of the road. We believe this to be a distinction without a difference and note that if we believed otherwise, this fact would also distinguish *Harrington* and *Lung*, the two Ohio Supreme Court cases cited by Jocek.

Jocek cites to GTE's internal work order of 1971; this work, if performed, would have eliminated the pole. [\*11] The work order was prepared shortly after another accident with a GTE pole at the same site. We do not find that the preparation of the work order created any duties or indicated that any duties existed. Similarly, while it may have been feasible for GTE to not use a pole in the State Route 21 median strip, as indicated by photographs of other utility lines that crossed State Route 21 without the aid of a pole, this fact does not give rise to a duty on GTE's behalf.

Dr. Eck's affidavits also did not create any questions of fact as to whether GTE was negligent. Jocek notes that

Dr. Eck, in his second affidavit, concluded that GTE's pole "incommodes the public in the use of the highway." An affidavit, however, must not state legal conclusions. Brannon v. Rinzler (1991), 77 Ohio App.3d 749, 756, 603 N.E.2d 1049, citing State v. Licsak (1974), 41 Ohio App.2d 165, 169, 324 N.E.2d 589; Hackathorn v. Preisse (June 21, 1995), Summit App. No. 17058, unreported at 3. If we would give binding effect to legal conclusions stated in an affidavit, we would be permitting affiants to usurp the judicial function. Because of this rule, and because the remainder of the affidavits did not [\*12] create any questions of material fact, we find that the trial court did not err by granting summary judgment for GTE.

Finally, Jocek argues that GTE's placement of the pole violated guidelines, promulgated by the American Association of State Highway and Transportation Officials (AASHTO), that are purportedly incorporated in ODOT's Utilities Manual. Pursuant to App.R. 9 and Loc.R. 3, the appellant has the burden of providing the materials necessary for review. See Volodkevich v. Volodkevich (1989), 48 Ohio App.3d 313, 314, 549 N.E.2d 1237. The record received by this court does not contain full copies of either the AASHTO or ODOT documents. n2 Jocek attached unauthenticated excerpts from the ODOT and AASHTO publications to her memorandum in opposition to summary judgment. A court need not consider such unauthenticated items in ruling on a summary judgment motion. Green v. B.F. Goodrich Co. (1993), 85 Ohio App.3d 223, 228, 619 N.E.2d 497; Clark v. Orrville (Apr. 19, 1995), Wayne App. No. 2874, unreported at 9. Reliance on unauthenticated documents, however, may be permitted if the opposing party does not object. Green, 85 Ohio App.3d at 228. Because GTE has not objected, [\*13] we will consider whether the excerpts from the AASHTO and ODOT manuals create any genuine issues of material fact.

n2 In her reply brief, Jocek states that full copies of the AASHTO and ODOT guidelines were placed into the lower court record as exhibits. The transcript of the docket and journal entries, however, does not reflect any such filing. Further, Jocek failed to file a praecipe with the court reporter, pursuant to Loc.R. 3(D), which may explain why this court did not receive the documents.

In Neiderbrach, 94 Ohio App.3d at 342, the court recognized that the AASHTO guidelines are not manda-

tory. We believe this conclusion to be correct. The guidelines are phrased in aspirational rather than mandatory language. We, therefore, reject Jocek's argument as it relates to the AASHTO guidelines.

Jocek asserts that ODOT's Utilities Manual incorporates the AASHTO guidelines and makes them mandatory. She cites section 8.10(F)(1)(a) of the manual, which states that "design of the utility facilities shall conform [\*14] to the guidelines contained herein, but where local or industry standards are higher than specified herein, local or industry standards shall prevail." The AASHTO guidelines do not constitute "local or industry standards" under that provision. As stated in the preceding paragraph, the guidelines are not mandatory. None of the ODOT materials submitted to this court indicate that ODOT considers these guidelines to be mandatory. This conclusion also leads us to reject Jocek's argument pursuant to section 8.10(F)(2) of ODOT's Utilities Manual.

Jocek's assignment of error is overruled. The judgment of the trial court is affirmed.

*Judgment affirmed.*

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). [\*15]

Costs taxed to Appellant.

Exceptions.

LYNN C. SLABY

FOR THE COURT

BAIRD, P.J.

MAHONEY, J.

CONCUR

(Mahoney, J., retired Judge of the Ninth District Court of Appeals, sitting by assignment pursuant to Article IV, § 6(C), Constitution.)