

**IN THE SUPREME COURT OF OHIO
CASE NO. 2007-0035**

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

v.

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

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

**PLAINTIFF-APPELLEE'S RESPONSE TO DEFENDANTS'
MEMORANDA IN SUPPORT OF JURISDICTION**

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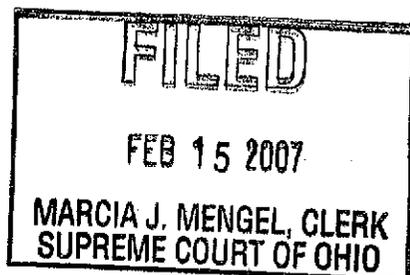
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I. **Response to Appellants' claim that this is a case of public or great general interest.**

Appellants argue that this Court should accept jurisdiction because utility companies are in need of a "bright line test" to assist them in determining where to locate utility poles within the public's right of way. Appellee would point out that the existing case law in this area has well served the interests of both the public and utility companies over the last seventy years. Further, Appellee would respectfully submit that the "bright line test" proffered by Appellants is unnecessary. Even if such a test were needed, it should come from the Legislature, not this Court.

II. **Appellants' Proposition of Law.**

Taken together, Appellants' respective propositions of law can be distilled down to the following concept:

As a matter of law, a utility company cannot be liable for damage to persons or property resulting from a motor vehicle striking one of its utility poles, located within the public's right of way, unless the pole is placed on an improved portion of the right of way, i.e. within the marked lane of travel or on a berm.

III. **Response to Appellants' Propositions of Law.**

In order to adequately respond to Appellants' propositions of law, it is necessary to reference additional facts not mentioned by Appellants. In the early morning hours of September 10, 2003, Plaintiff's decedent, Robert Turner, age twenty (20), was traveling southbound on State Route 188 in Pleasant Township, Ohio, as a passenger in a Ford Mustang being operated by his friend and co-worker, Bryan Hittle. As the Hittle vehicle negotiated a left bearing curve, the passenger side front tire encountered a loose gravel

berm that sloped away from the road. Because of the composition and slope of the berm, the Hittle vehicle was literally pulled into a utility pole that was located three feet, nine inches, from the edge line of the highway, and two feet, five inches, from berm. Although Mr. Hittle walked away from the crash with superficial injuries, Mr. Turner sustained a fatal blow to the head when the utility pole penetrated forty-seven inches (47") into the passenger compartment of the Mustang.

At the time of the fatal crash, the pole was owned by Defendant Ohio Bell Telephone Company ("Ohio Bell" hereinafter) and being utilized by Defendant South Central Power Company ("South Central" hereinafter).

At the trial court level, Plaintiff presented evidencing establishing that the location of the utility poles along the eastern side of this section of SR 183 presented a danger to the motoring public. In particular, there had been more than twenty-eight (28) prior crashes along this section of State Route 88 where a vehicle had run off the road and struck a utility pole or a fixed object. Moreover, during 2002-2003, there had been six other collisions involving **this particular pole**.

At the point of initial contact with the pole, a portion of Mr. Hittle's Mustang, which was approximately sixty inches in width, was still located on the paved portion of the roadway. This was due to the fact that the berm was very narrow (not nearly wide enough to accommodate an average sized vehicle), and the fact that the utility pole was located only three feet, nine inches, from the edge of the roadway.

Plaintiff presented expert testimony supporting the fact that motor vehicle-utility pole impacts are most common on left-bearing curves where a pole is offset less than ten feet from the edge of the roadway—exactly the facts of the case at hand.

Plaintiff also presented expert testimony substantiating the fact that, had this particular utility pole been located eight to ten feet from the edge of the roadway, the trajectory of the Hittle vehicle would have taken it into a the adjacent field where the mechanism that caused Mr. Turner's fatal head injury would not have been present.

After the fatal crash, and due to Mrs. Turner's relentless lobbying efforts, the utility companies capitulated and moved to a location fifteen feet (15") from the edge of the roadway, still with the public's right of way. There have been no other crashes since the utility pole was relocated.

Since the proverbial horse and buggy days, Ohio's codified law has authorized utility companies to locate their poles within the public right of way so long as the location does not interfere with public travel. Monahan v. Miami Telephone Co. (1899), 9 Ohio Dec. 532, 1899 WL 14171. From 1953 through 1999, Ohio Revised Code Section 4931.01 provided:

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 erection of the necessary fixtures, including posts, piers, or abutments for the sustaining of cords or wires of such lines. **Such lines shall be constructed so as not to incommode the public in the use of roads or highways** or endanger or injuriously interrupt the navigation of such waters. This section does not authorize the erection of a bridge across any waters of this state. (*Emphasis added*)

In 1999, The Ohio legislature repealed R.C. 4931.01 and subsequently enacted Revised Code Section 4931.03, which provides, in pertinent part:

1 In 1895, Section 3454, Rev. Stat. provided that. "A magnetic telegraph company ... may construct telegraph lines from point to point, along and upon any public road by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires, but the same shall not incommode the public in the use of such road."

A telegraph or telephone company may do either of the following in an unincorporated area of the township *** (2) construct telegraph or telephone lines and fixtures necessary for containing and protecting those lines beneath the surface of any of the public roads and highways and beneath waters within that area. **Those lines shall be constructed so as not to incommode the public in the use of roads or highways**, or endanger or injuriously interrupt the navigation of waters. (*Emphasis added*)²

The common thread running through the statutes referenced above, as well as their predecessors in the General Code, has been that public utility companies may place utility poles within the public right-of-way for roads, subject to the admonition that lines and poles shall not incommode the public in the use of the roads or highways. The legislature granted public utility companies this license so as to obviate the need for the utility to appropriate easements across private lands, presumably to the ultimate benefit of the consumer. However, the statutory license came with an incumbent duty, i.e., the responsibility for protecting the superior rights of the traveling public. Curry v. Ohio Power Co. (5th Dist., 2/14/80), Licking App. No. CA-2671, 1980 Ohio App. LEXIS 11996

As noted by the Ohio Supreme Court in Cambridge Home Telephone Co. v. Harrington (1933), 127 Ohio St. 1, the traveling public has a right to use a public highway, to the entire width of the right of way, not just the improved portion of the roadway. Id at syllabus. As the Harrington court explained:

“The highway is primarily constructed for the purposes of travel, and not for the site of monuments, billboards, telephone or telegraph poles, or other devices that may cause an obstruction within the limits of the right-of-way.” The legislature must have had this rule in mind when it enacted section 8170 of the General Code (the predecessor to Revised Code Section 4931.01). The last

² Although R.C. 4931.01 and R.C. 4931.03 are limited to “telephone companies”, 4913.14 provide that these sections also apply to public power companies.

clause in this section, "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 [public utilities] are placed on notice to the effect that if they erect posts, piers, and/or abutments within the right-of-way of the highway, they may not prejudice the superior rights of the traveling public in doing so. Id. at page 5 (Emphasis added).

Two years after Harrington, the Ohio Supreme Court decided Ohio Bell Telephone Co. v. Lung (1935), 129 Ohio St. 505. In Lung, plaintiff's decedent was killed when a vehicle in which he was riding as a passenger came in contact with a utility pole that was owned by Ohio Bell, also one of the Defendants herein. The telephone pole in Lung was located 5.1 feet from the roadway, in the area of a left-bearing curve. In affirming a jury verdict in favor of the plaintiff, the Supreme Court held:

When a guest (passenger) is killed while riding in an automobile which collides with a telephone pole located in an improved portion of the highway 5.1 feet from the pavement, the question whether the telephone company is guilty of negligence by placing the pole on the highway so as to incommode the traveling public, and whether such negligence is a proximate cause of such fatality, are properly submitted to the jury for determination. *Id.* at syllabus.

In pursuit of a "bright line" test, the utility companies importune this Court to not only abandon Harrington, supra and Lung, supra, but to further ignore the clear mandate of over one hundred years of codified law. South Central and Ohio Bell advocate the creation of a new rule of law, not through the legislative process but by judicial fiat, whereby utility companies would not be responsible when motorists are injured in collisions involving utility poles located within the public's right-of-way unless the utility pole is located on the improved portion of the roadway.

If the legislature had intended such a result, it would have included the appropriate language in either 4931.01 or its successor. The fact that the recent

promulgation of R.C. 4931.03 does not contained the rules of law espoused by the utility companies is certainly evidence that the legislature intended the rule of law to remain the same.

South Central and Ohio Bell fail to acknowledge the fact that their respective right to place utility poles within the public's right of way is inferior to that of the traveling public. This is the rationale underlying the requirement that the utility companies account for conditions of the roadway, the contour, the slope, the grade, and the presence of prior accidents, in determining whether to place and/or maintain the locations of their utility poles with respect to the road. Contrary to the assertions of the utility companies: this concept is not something new; indeed, is has been the law of Ohio more than one hundred years. See Monahan v. Miami Telephone Co., *supra*.

The Eighth District Court of Appeals simply followed the mandates of Harrington, *supra*, and Lung, *supra*, in deciding that, under the facts of this particular case, a jury issue was presented as to whether the pole that caused Mr. Turner's death was placed in a location that, given the attendant circumstances, "incommoded" the public's use of the roadway.

The utility companies argue that this is an unworkable standard. South Central points out that there are approximately 2.5 million utility poles located along Ohio's highways, within the public right-of-way, that will need to be moved at a cost of in excess of two billion dollars, unless this Court intervenes to rewrite the law in a manner more suitable to the interests of Ohio's utility companies.

However, the last seventy years of Ohio jurisprudence belie the fallacy of the utility companies' position. Since Lung, *supra*, and Harrington, *supra*, were decided in

the 1930s, Appellants reference a total of seven published decisions in the State of Ohio involving collisions between motor vehicles and utility poles. Each one of these cases was decided in favor of the utility company. Seven decisions over more than seventy-years, without a loss, hardly support the utility companies' argument that the absence of a "bright line" rule has created an operational dilemma.

The utility companies lament that the Eight District's decision in the case *sub judice* has created disarray among the intermediate appellate courts of this state. In support, the utility companies cite several court of appeals decisions which, in their eyes, directly conflict with the Eighth District's decision in the case at hand.

These appellate cases are factually distinguishable for the matter at bar and may be separated into two groups. The first group of cases involved factual scenarios in which a motor vehicle struck a utility pole that was located no less ten feet from the edge of the roadway. See Neiderbrach v. Dayton Light & Power Co. (1994), 94 Ohio App.3d 334 [pole location 16 feet from the edge of the roadway]; Ohio Postal Telegraph-Cable Co. v. Yant (5th Dist., 1940), 64 Ohio App. 189 [pole location 13 feet from the road, 11 feet from the berm]; Jocek v. GTE North, Inc. (9th Dist., 9/27/95), Summit App. No. 17097, 1995 Ohio App. LEXIS 4343 [pole location 11 feet from road]; Curry v. Ohio Power Co. (5th Dist., 2/14/80), Licking App. No. CA-2671, 1980 Ohio App. LEXIS 11996.

The second group of cases involve factual scenarios where the pole, or, in one case, a guy wire anchoring a pole, was separated from the roadway by a curb. See

Mattucci v. Ohio Edison Co. (1946), 79 Ohio App. 367; Crank v. Ohio Edison (1997) WL 198768; Cincinnati Gas & Electric v. Bayer (1975), 1975 Ohio App. Lexis 6305.

The case at bar stands asunder when compared to the appellate decisions relied upon by the utility companies. Here, the utility pole was located less than a vehicle's width from the edge of the road and there was no barrier, such as a curb, protecting motorists who might errantly stray from the roadway.

The case at hand is also unique because of the fact that there had been six other collisions involving this particular pole that occurred during 2002 and 2003 before the utility company moved the pole back to a more appropriate distance from the roadway. The utility company can point to no "conflicting" case involving facts even remotely as egregious as those of the case at hand.

Under the proposition of law advocated by the utility companies, the proliferation of prior collisions involving this pole does not even enter the equation in determining whether this particular pole is situated in a location that does not inconvenience the public's use of the roadway. As long as the pole is not in the roadway or on an improved berm, the utility company is insulated from liability as a matter of law.

Appellee would submit that the legislature purposely created a fluid standard that forces a utility to account for the road conditions present as a proposed pole location in exchange for the privilege of enjoying a license to use public land, gratis.

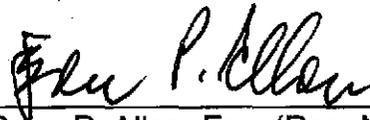
It took the death of Bobby Turner to justify the utility companies' bearing the expense (which according to South Central was all of \$966.10) of moving this particular

pole a more discrete distance from the roadway. 3 Since the pole was moved, there have not been any other collisions at this location.

The decisions in Harrington, *supra*, and Lung, *supra*, have worked well for the past nearly seventy-five years and there is no reason to revisit these cases.

Based upon the foregoing, Plaintiff Lorri Turner, Administratrix of the Estate of Robert Turner, deceased, requests this Court to deny Defendants-Appellants' request that this Court accept jurisdiction of the within matter.

Respectfully submitted,



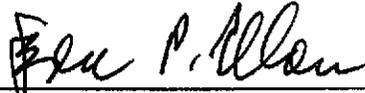
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CERTIFICATE OF SERVICE

A copy of the foregoing Response to Memoranda in Support of Jurisdiction has been served upon William R. Case, Scott A. Campbell, and Jennifer E. Short, Counsel for Defendant South Central Power Company, Thompson Hine LLP, 10 West Broad Street, Suite 700, Columbus, Ohio 43215-3435; and upon Thomas I. Michals and Anthony F. Stringer, Counsel for Defendant Ohio Bell, Calfee, Halter & Griswold LLP, 1400 McDonald Investment Center, 800 Superior Avenue, Cleveland, Ohio 44114-2688, by ordinary U.S. Mail, postage prepaid, this 13th day of February, 2007.



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