

CASE NOS. 2007-0035 and 2007-0112  
IN THE SUPREME COURT OF OHIO

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

v.

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

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

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MERIT BRIEF OF DEFENDANT-APPELLANT,  
THE OHIO BELL TELEPHONE COMPANY, d/b/a SBC OHIO

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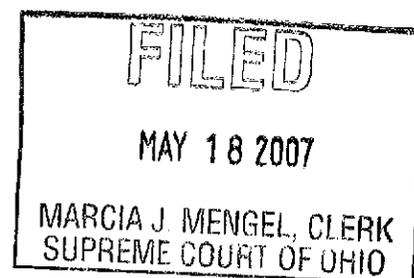
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## II. STATEMENT OF FACTS

At approximately 5:30 a.m. on September 10, 2003, Bryan Hittle picked up his friend and co-worker, Robert Turner, in his red Ford Mustang to drive to work. (Supp. at 2-3). Both Hittle and Turner worked as bulldozer operators for Layton Excavating. (Id. at 1). While Hittle drove, Turner slept in the front passenger's seat. (Id. at 4).

On the morning of the accident, it was dark and very foggy outside. (Id. at 3). As he drove southbound on State Route 188, Hittle could not see oncoming traffic and could not clearly see the center and edge lines of the road. (Id. at 9). Due to the poor visibility, he followed the tail lights of a pick up truck traveling immediately in front of him. (Id. at 4-5, 9). While trying to follow the truck, Hittle drove his car off the road striking a utility pole and killing Turner. (Id. at 6).

According to Plaintiff's accident reconstruction expert, Hittle was driving between 55 and 59 miles per hour at the time of the accident. (Id. at 21). The posted speed limit for this stretch of State Route 188 is 45 miles per hour. (Id. at 14). Neither Hittle nor Turner was wearing a seatbelt at the time of the accident. (Id. at 2). Hittle subsequently was charged with, among other things, vehicular homicide, vehicular manslaughter, and failure to control. (Id. at 7). He was found guilty of vehicular manslaughter. (Id. at 8).

At the time of the accident, State Route 188 was newly paved. (Id. at 16). It was (and remains today) a two lane roadway --- one lane for northbound traffic and one lane for southbound traffic --- marked with white edge lines and a double yellow center line. (Id.). On the west side of the roadway (where the accident occurred), there was pavement outside the white edge line. (Id. at 17). The utility pole at issue was located in a grassy area off the roadway

two feet five inches from the edge of the pavement and three feet nine inches from the white edge line. (Id. at 11-12, 14-15, 19-20).

The pole did not obstruct or interfere with traffic on State Route 188. (Id. at 15, 18-20). A vehicle traveling on State Route 188 that stayed on the traveled and improved portion of the roadway would not come into contact with the pole. (Id. at 13, 19-20). Hittle agreed that the pole did nothing to cause him to drive his car off the roadway. (Id. at 6). Had Hittle kept his car on the roadway, his car never would have struck the pole. (Id. at 18).

### III. ARGUMENT

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

**A. SBC Ohio's Proposition Of Law Is In Accord With The Litany Of Ohio Cases Governing The Placement Of Utility Poles.**

Under Ohio law, a utility company, such as SBC Ohio, enjoys the right to place and maintain utility poles within the right-of-way for public roads so long as its poles do not incommode the public in its proper use of the roads. See Curry v. The Ohio Power Co., 1980 Ohio App. LEXIS 11996, \*3 (Licking Cty., Feb. 14, 1980). This long-standing Ohio policy obviates the need for utility companies to obtain easements from private landowners which, in turn, benefits the state's consumers.

When a vehicle strikes a utility pole, the utility company will not be liable for any resulting damages to person or property unless the pole is placed on the traveled portion of the roadway or in such close proximity thereto as to constitute an obstruction dangerous to anyone **properly** using the roadway. See Mattucci v. The Ohio Edison Co., 79 Ohio App. 367, 369 (Summit Cty. 1946). In other words, the pole must obstruct or interfere with the **proper** use of

the roadway in order to hold the utility company liable. See Neiderbrach v. Dayton Power & Light Co., 94 Ohio App. 3d 334, 339 (Miami Cty. 1994).

Over the years, Ohio courts consistently have granted judgment in favor of utilities where the subject pole did not obstruct or interfere with the **proper** use of the roadway. See, e.g., Ferguson v. Cincinnati Gas & Electric Co., 69 Ohio App. 3d 460, 463 (Hamilton Cty. 1990); Cincinnati Gas & Electric Co. v. Bayer, 1975 Ohio App. LEXIS 6305, \*8 (Hamilton Cty., Nov. 3, 1975); Turowski v. Johnson, 68 Ohio App. 3d 704, 706 (Summit Cty. 1990); Crank v. Ohio Edison Co., 1977 Ohio App. LEXIS 9020 at \*3 (Wayne Cty., Feb. 2, 1977); Mattucci, 79 Ohio App. at 370.

These First and Ninth Appellate District cases are in accord with SBC Ohio's Proposition of Law. In Cincinnati Gas & Electric Co. v. Bayer, the plaintiff's vehicle ran off the roadway and struck a utility pole located eleven inches from the road's surface. The Appellate Court affirmed judgment in favor of the utility, finding that the pole was not a hazard to anyone operating a vehicle on the paved portion of the roadway normally used for vehicular traffic. The court distinguished Harrington<sup>1</sup> and Lung<sup>2</sup> on the basis that the poles in those cases were located in areas fit for travel and used by the traveling public. The court also noted that the plaintiff's right to use the roadway "did not give him the right to run his vehicle over the curb onto the sidewalk and adjacent lawn." The court found that the proximate cause of the collision was the plaintiff's driving and not the location of the pole.

In Turowski v. Johnson, the plaintiff's decedent was a passenger in a vehicle that ran off the roadway and struck a utility pole located thirty-one inches from the roadway. The Appellate Court affirmed summary judgment in favor of the utility. In Crank v. Ohio Edison

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<sup>1</sup> 127 Ohio St. 1 (1933).

<sup>2</sup> 129 Ohio St. 505 (1935).

Company, the plaintiff was a passenger on a motorcycle that ran off the roadway and struck a utility pole and guy wire located in the tree lawn (the area between the curb and sidewalk) approximately two feet from the road. The Appellate Court affirmed a directed verdict in favor of the utility on the grounds that the pole and wire did not incommode the public in the reasonable and proper use of the roadway, and that the proximate cause of the collision was the driver's failure to properly control the motorcycle, not the location of the pole and wire.

In Mattucci v. The Ohio Edison Co., the plaintiff's decedent was a passenger in a vehicle that ran off the roadway and struck a utility pole located in a grass strip, six feet wide, between the sidewalk and curb. The appellate court affirmed a directed verdict in favor of the utility, finding that the pole did not constitute an obstruction dangerous to anyone properly using the roadway. As with Bayer and Crank, the court also concluded that the proximate cause of the collision was driver error and not the location of the pole.

Finally, in Ferguson v. Cincinnati Gas & Electric Co., the plaintiff was seated in a bus with her arm resting on a window frame and her elbow extending no more than six inches outside the bus. As the bus passed a leaning utility pole located adjacent to the street at the curb line, the plaintiff's elbow contacted the pole causing her injury. The record demonstrated that the pole did not obstruct the traveled portion of the roadway even though it leaned into the road. For this reason, the appellate court affirmed the lower court's grant of summary judgment in favor of the utility. See also The Ohio Postal Telegraph-Cable Co. v. Yant, 64 Ohio App. 189, 195 (Licking Cty. 1940) (entering judgment in favor of the utility where the pole was located eleven feet from the improved portion of the roadway); Curry, 1980 Ohio App. LEXIS 11996 at \*15 (affirming summary judgment in favor of the utility where the pole was located in a grassy area twelve feet six inches from the berm of the highway); Neiderbrach, 94 Ohio App. 3d at 339

(Miami Cty. 1994) (affirming summary judgment in favor of the utility where the pole was located sixteen feet, three inches from the edge of the improved portion of the roadway); Jocek v. GTE North, Inc., 1995 Ohio App. LEXIS 4343, \*9 (Summit Cty., Sep. 27, 1995) (affirming summary judgment in favor of the utility where the pole was located on the median strip eleven feet from the improved portion of the roadway).

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

In Harrington and Lung, this Court reviewed the law applicable to the placement of utility poles and found in favor of the plaintiffs. In both cases, the utility pole was a danger to individuals **properly** using the roadway. Each pole was located in the improved portion of the roadway, which was usable and was being used for vehicular traffic. In Harrington, the pole was located in the macadam berm, which was fit for travel and in use. In Lung, the pole was located in a "Y" intersection. There was a filling station located within this intersection. From the station to both highways, cinders were packed filling the "Y" up to the pavement. This Court noted: "The cindered part of the highway around the pole was used for a long time prior to the accident by autoists going into and coming out of the gas station." The drivers who struck the poles in both cases were **properly** using the roadway.

**C. The Eighth District Has Created A New Rule Of Law For The Placement Of Utility Poles That Is Gray, Unclear, And In Conflict With Well-Established Ohio Case Law On The Subject.**

In reversing the trial court's grant of summary judgment, the Eighth District departed from the bright line rule of law applied in the cases discussed above and applied a fact-specific test based on foreseeability and unreasonableness. The Eighth District did not consider whether the placement of the pole constituted an obstruction dangerous to anyone properly using the roadway. Rather, the Eighth District asked whether the placement of the pole constituted a

foreseeable and unreasonable risk of harm to users of the roadway. See Journal Entry and Opinion at 8. In making its determination, the Eighth District set forth a non-exclusive list of factors for courts to consider: (1) the narrowness and general contours of the road; (2) the presence of sharp curves in the road; (3) the illumination of the pole; (4) any warning signs of the placement of the pole; (5) the presence or absence of reflective markers; (6) the proximity of the pole to the highway; (7) whether the utility company had notice of previous accidents at the location of the pole; and (8) the availability of less dangerous conditions. Id. at 9.

This new rule of law virtually eliminates any potential for summary judgment because foreseeability and proximate cause are typically jury questions. Plaintiff lawyers and their experts could always use these eight factors, and others, to argue that the placement of the pole constituted a foreseeable and unreasonable risk of harm. Because this rule of law is gray and unclear, it provides no certainty for public utilities and the traveling public. There is no bright line standard to which utilities and the traveling public can conform their actions.

In addition, the rule of law imposes an enormous burden on public utilities, which will have little choice but to re-evaluate the location of hundreds of thousands of utility poles lawfully located throughout the state. As part of this evaluation, public utilities will need to engage outside experts and consultants to ensure that the various factors outlined by the Eighth District, many of which relate to road design and engineering, are addressed. Undoubtedly, many poles will need to be relocated as they are now potential sources of liability. Any relocation most likely will require the utilities to procure costly easements from private landowners. All in all, the Eighth District's rule of law has far-reaching consequences.

**D. SBC Ohio's Proposition Of Law Strikes An Effective Balance Between The Competing Interests Of The Traveling Public and Public Utilities.**

With respect to the placement of utility poles, there are two competing public policy interests: (1) the traveling public's right to use the state's roadways and (2) the public utilities' right to place their poles within the public right-of-ways. With respect to the former, Chapter 4511 of the Ohio Revised Code contains Ohio's traffic laws. Section 4511.01(EE) defines "roadway" as the "portion of a highway improved, designed, or ordinarily used for vehicular traffic, except the berm or shoulder." Section 4511.33 sets forth the rules for driving in marked lanes. That Section provides, in pertinent part:

(A) Whenever any "roadway" has been divided into two or more clearly marked lanes for traffic . . . the following rules apply:

(1) A vehicle or trackless trolley shall be driven, **as nearly as practicable**, entirely within a single lane or line of traffic and shall not be moved from such lane or line **until the driver has first ascertained that such movement can be made with safety.**

See O.R.C. 4511.33(A)(1) (emphasis added).

The statute permits motorists to move outside a lane of traffic **so long as the motorist first ascertains that such movement can be made safely.** This provision obviously accounts for emergency situations that require motorists to drive outside the white edge line. Under the statute, there may be circumstances where a motorist is deemed "properly" using the roadway even though the vehicle is driven outside the white edge line. The key to this analysis is safety -- - whether the movement can be made safely. In making his or her decision, the motorist obviously will need to take into account the location of utility poles, signs, fire hydrants, and pedestrians, such as children waiting for a school bus.

SBC Ohio's Proposition of Law recognizes that public utilities need to account for the right of the traveling public to use the roadways properly. Thus, if the pole's placement poses a

danger to anyone properly using the roadway, then the utility can be held liable. Conversely, if the pole's placement does not endanger anyone properly using the roadway, then the utility cannot be held liable. Chapter 4511 of the Ohio Revised Code, particularly Sections 4511.01(EE) and 4511.33(A)(1), provides a framework for determining whether a motorist is properly using the roadway.

SBC Ohio's Proposition of Law provides the traveling public, who regularly utilize Ohio's roadways, with a clear and uniformly-applied rule of law to which they are entitled. Similarly, it provides a bright line standard that allows utilities to conduct their business within a clearly defined framework.

**E. The Eighth District's Rule of Law Makes For Bad Public Policy.**

The Eighth District's rule of law fails to address the two competing public policy interests at play (i.e., the traveling public's right to use the state's roadways and the public utilities' right to place their poles within the public right-of-ways). It elevates one policy interest over the other; specifically, it confers to the traveling public an unqualified, superior right to the roadways and public right-of-ways without any recognition of the utilities' right to use the public right-of-ways. As one Ohio court noted, this makes for bad public policy:

It seems crystal clear that the traveling public has no right to drive upon that portion of a public highway which is not dedicated, improved and made passable for vehicular use. To accord him preeminence is to deny the statutory right of occupancy given to public utilities, and to withhold from public authority the right to regulate public thoroughfares. We grant that emergencies may arise where such use is permissive.<sup>3</sup> But we do not recognize any such unqualified superior right to a negligent traveler who abuses his privilege.

See Yant, 64 Ohio App. at 193.

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<sup>3</sup> In this action, it is undisputed that there was ample room before and after the subject utility pole for vehicles to pull off the road in the case of an emergency.

The traveling public has no right to misuse the roadways. In fact, Chapter 4511 of the Ohio Revised Code, discussed above, requires the public to use the roadways properly. Under the Eighth District's rule of law, public utilities could be held liable in connection with pole striking accidents caused solely by driver error. The instant action is a good example. Under the Eighth District's decision, SBC Ohio and South Central Power could be held liable even though Hittle recklessly drove his vehicle off the roadway, striking the pole. He was charged with, among other things, vehicular homicide, vehicular manslaughter, and failure to control. See Hittle Tr. at 50. He was found guilty of vehicular manslaughter. Id. at 52 This result is at odds with sound public policy.

**F. The Eighth District's Decision Should Be Reversed And The Trial Court's Grant Of Summary Judgment Should Be Reinstated.**

**1. The Subject Pole Did Not Present An Obstruction Dangerous To Anyone Properly Using State Route 188.**

The utility pole at issue was located in a grassy area off the roadway, two feet five inches from the edge of the paved improved portion of the roadway and three feet nine inches from the white edge line. See Goss Tr. at 26-27, 71-72. It is undisputed that the pole did not obstruct or interfere with traffic on State Route 188. See Goss Tr. at 72; Duran Tr. at 91. A vehicle traveling on State Route 188 that stayed on the traveled and improved portion of the roadway would not come into contact with the pole. See Goss Tr. at 29. Hittle agreed that the pole did nothing to cause him to drive his car off the roadway. See Hittle Tr. at 40. Had Hittle kept his car on the roadway, his car never would have struck the pole. See Duran Tr. at 91. Applying SBC Ohio's Proposition of Law to the undisputed facts, SBC is entitled to summary judgment.

**2. Hittle's Driving Was The Sole, Proximate Cause Of The Accident.**

In cases like this one, where a person drives his vehicle off the roadway and strikes a utility pole, Ohio courts have concluded that the proximate cause of any resulting injury is driver error and not the location of the pole. See, e.g., The Ohio Postal Telegraph-Cable Co., 64 Ohio App. at 194 (finding that the driver's failure to control his vehicle was the proximate cause of the accident and not the location of the utility pole); Mattucci, 79 Ohio App. at 370 (finding that the sole proximate cause of the death of plaintiff's decedent was the improper manner by which the driver operated the vehicle and that the location of the pole was not a proximate cause of the death); Cincinnati Gas & Electric Co. v. Bayer, 1975 Ohio App. LEXIS 6305, \*12 (finding that the plaintiff's failure to control his vehicle was the proximate cause of his injuries and not the location of the pole); Crank, 1977 Ohio App. LEXIS at \*3 (finding that the driver's failure to control his vehicle was the proximate cause of the accident and not the location of the pole).

It is undisputed that Hittle lost control of his vehicle and ran it off the roadway, striking the subject utility pole. See Hittle Tr. at 40. As a result of the accident, Hittle was ultimately convicted of vehicular manslaughter. See Hittle Tr. at 50, 52. There is no real dispute that the sole, proximate cause of this accident was Hittle's reckless driving, as Hittle testified:

Q: Do you feel responsible at all for the accident?

A: Yes, very much.

MR. ALLAN: Objection to that question.

Q: And why is that?

A: Because I took his life. I had a car accident. He was a passenger in my car and I had an accident.

See Hittle Tr. at 47. Trooper Goss testified on the issue of causation as follows:

Q: Trooper Goss, the cause of the accident in this case was Mr. Hittle driving his car off the right side of the road; is that correct?

A: He failed to negotiate the curve, drove off the right side of the road, yes.

Q: And that caused the accident?

A: Yes.

See Goss Tr. at 81. Trooper Duran also agreed that, had Hittle not run his car off the roadway, the accident would not have occurred. See Duran Tr. at 91.

Indeed, the utility pole was a fixed object located in a grassy area off the improved portion of the roadway. The pole had been in that location for 25 years prior to the accident. The accident was caused by a series of events that had nothing to do with the location of the pole:

- At the time of the accident, it was dark and very foggy outside. See Hittle Tr. at 34.
- Hittle could not see oncoming traffic and could not clearly see the center and edge lines of the road. Id. at 94.
- Due to the poor visibility, Hittle followed the tail lights of a pick up truck traveling immediately in front of him. Id. at 38-39, 95.
- Hittle was traveling between 55 and 59 m.p.h. (the posted speed limit was 45 m.p.h.). See Crawford Report at 5.
- Hittle failed to negotiate a bend in the roadway and drove his car off the right side of the roadway striking the pole. See Goss Tr. at 81.

Whether Hittle hit a pole, a deer, or children waiting for a school bus, the cause of the accident would be the same --- Hittle's reckless driving. Consequently, because the sole, proximate cause of Robert Turner's death was Hittle's reckless driving, SBC Ohio is entitled to summary judgment.

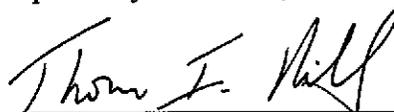
### 3. Plaintiff's Qualified Nuisance Claim Fails As A Matter Of Law.

A qualified nuisance is essentially a tort of negligent maintenance of a condition that creates an unreasonable risk of harm, ultimately resulting in injury. See State ex rel. R.T.G., Inc. v. State of Ohio, 98 Ohio St. 3d 1, 13 (2002). To prove a qualified nuisance, the plaintiff must establish an act lawfully but so negligently or carelessly done as to create a potential and unreasonable risk of harm, which results in injury to another. See Metzger v. The Pennsylvania, Ohio & Detroit Rd. Co., 146 Ohio St. 406, Syllabus ¶ 2 (1946). A qualified nuisance is dependent on a showing of negligence. There is no evidence that SBC Ohio was negligent --- it did not breach a duty of care and the placement of the pole was not the proximate cause of the accident. Consequently, the Eighth District erred by failing to uphold summary judgment for SBC Ohio on Plaintiff's qualified nuisance claim.

#### IV. CONCLUSION

For the foregoing reasons, this Court should adopt SBC Ohio's Proposition of Law and reinstate the trial court's grant of summary judgment.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing Merit Brief of Defendant-Appellant The Ohio Bell Telephone Company, d/b/a SBC Ohio was served this 18 day of May, 2007, by First Class U.S. Mail, postage pre-paid upon:

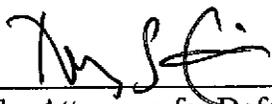
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## V. APPENDIX

1. Date-stamped Notice of Appeal to the Ohio Supreme Court.
2. Judgment from which the Appeal is taken.

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

v.

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

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

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**NOTICE OF APPEAL OF DEFENDANT-APPELLANT,  
THE OHIO BELL TELEPHONE COMPANY, d/b/a SBC OHIO**

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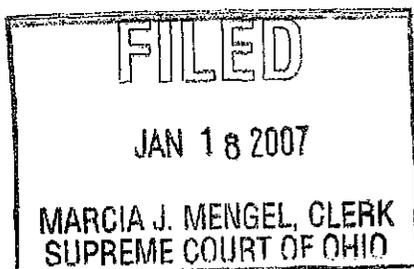
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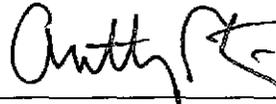
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**NOTICE OF APPEAL**

Defendant-Appellant, The Ohio Bell Telephone Company, d/b/a SBC Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals Case No. CA-05-087541 on December 4, 2006.

This case involves an issue of public and great general interest.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Notice of Appeal was served this 17<sup>th</sup> day of January, 2007, by First Class U.S. Mail, postage pre-paid upon:

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South Central Power Company



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One of the Attorneys for Defendant-Appellant  
The Ohio Bell Telephone Company,  
d/b/a SBC Ohio

# 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**

---

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

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

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

NOV 22 2006

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

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

NOTICE MAILED TO COUNSEL  
FOR ALL PARTIES-COSTS TAXED

SEAN C. GALLAGHER, J.:

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

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

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

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

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

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

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

“I. The trial court erred in granting defendant-appellees’ motions for summary judgment.”

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

Turner argues that the issue of whether the utility pole in question “incommodates” the public’s use of the roadway and/or constitutes a nuisance

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

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

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

**“The traveling public has the right to the use of the highway to the entire width of the right of way as against all other persons using such highway for purposes other than travel, except those upon whom devolves the legal duty to maintain and repair such highway.**

**“The highway is primarily constructed for purposes of travel, and not as a site for monuments, billboards, telephone or telegraph poles, or any other device that may create an obstruction within the limits of the right of way. \* \* \* The last clause [of the applicable law], ‘but shall not incommode the public in the use thereof,’ is a danger signal to public utilities using the highways for their own private purposes. They are placed upon notice, to the effect that if they erect ‘posts, piers, and/or abutments’ within the right of way of the highway, they must not prejudice the superior rights of the traveling public in so doing.”**

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

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

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

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

Id.

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

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

Indeed, numerous other jurisdictions have found that liability may be

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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.

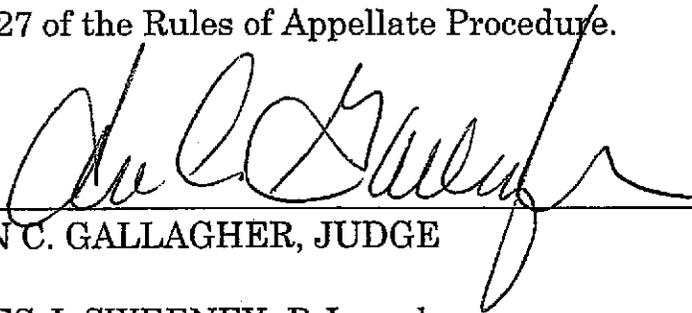
The court finds there were reasonable grounds for this appeal.

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

~~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

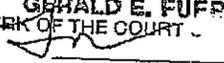
Date 01/12/2007

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.

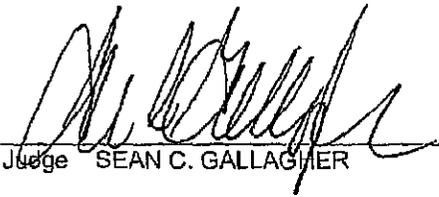
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JAN 12 2007

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

Presiding Judge JAMES J. SWEENEY, Concur

Judge CHRISTINE T. MCMONAGLE, Concur

  
Judge SEAN C. GALLAGHER

NOTICE MAILED 10:00AM  
FOR ALL PARTIES-COSTS TAXED

DOCKETED

JAN 17 2007

JAR

**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*

**DOCKETED**

JAN 17 2007

**J A R**

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. FURST  
CLERK OF THE COURT APPEALS  
BY \_\_\_\_\_ DEP.

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

CASE NO. 07-0112  
IN THE SUPREME COURT OF OHIO

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

v.

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

---

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

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DEFENDANT-APPELLANT, THE OHIO BELL TELEPHONE COMPANY,  
d/b/a SBC OHIO'S NOTICE OF CERTIFIED CONFLICT

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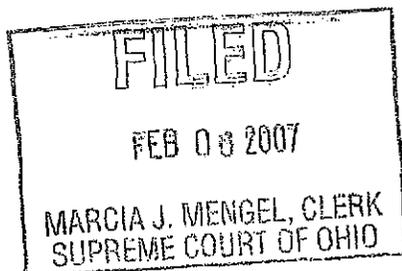
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Attorneys for Defendant-Appellant,  
South Central Power Company

**DOCKETED**

FEB 08 2007

(DM1926.DOC;1)

JAR

## NOTICE OF CERTIFIED CONFLICT

Pursuant to Ohio Supreme Court Rule IV, Defendant-Appellant, The Ohio Bell Telephone Company, d/b/a SBC Ohio ("SBC Ohio"), hereby gives notice to this Court that, on January 12, 2007, the Cuyahoga County Court of Appeals, Eighth Appellate District, in Case No. CA-05-087541, certified a conflict among the Ohio courts of appeals on two questions of law relating to the placement of utility poles. The Eighth District's Order certifying a conflict is attached hereto at Appendix pages A-1 through A-4. In its Order, the Eighth District found that its decision (attached hereto at Appendix pages A-5 through A-20) is in conflict with the following decisions from the First, Second, Fifth, and Ninth Appellate Districts:

- Ferguson v. Cincinnati Gas & Electric Co., 69 Ohio App. 3d 460 (1st. Dist. 1990)
- Neiderbrach v. Dayton Power & Light Co., 94 Ohio App. 3d 334 (2nd Dist. 1994)
- Ohio Postal Telegraph-Cable Co. v. Yant, 64 Ohio App. 189 (5th Dist. 1940)
- Jocek v. GTE North, Inc., 1995 Ohio App. LEXIS 4343; Summit Cty. Case No. 17097 (9th Dist., Sep. 27, 1995)

A copy of the aforementioned decisions are attached hereto at Appendix pages A-21 through A-42.

The two questions of law that the Eighth District has certified to this Court 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.

These questions differ from the question that SBC Ohio asked the Eighth District to certify. That question was as follows:

- Whether a public utility can be held liable when a vehicle runs off the road and strikes its pole, which is located within the right of way in a grassy area three feet nine inches from the edge line of the road and two feet five inches from the berm that does not obstruct or interfere with anyone properly using the road.

See Motion of Defendant-Appellee The Ohio Bell Telephone Company, d/b/a SBC Ohio to Certify a Conflict at 2.

On January 18, 2007, SBC Ohio timely filed a Notice of Appeal and Memorandum in Support of Jurisdiction with this Court (the "Discretionary Appeal"). In its Discretionary Appeal, SBC Ohio proposed the following proposition of law:

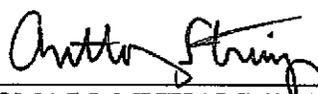
- A utility company is not liable for damage to persons or property resulting from a vehicle striking a utility pole so long as the pole is not placed on the traveled portion of the road or placed such that it is an obstruction dangerous to anyone properly using the road.

See Memorandum in Support of Jurisdiction of Defendant-Appellant The Ohio Bell Telephone Company, d/b/a SBC Ohio at 7.

Because the way in which the Eighth District has framed the questions of law is different than SBC Ohio's proposition of law, this Court should accept SBC Ohio's Discretionary Appeal. As the First, Second, Fifth, and Ninth Appellate Districts have concluded, the issue is not proximity or foreseeability, but rather the impact of the pole's location on those properly using Ohio's roadways. For example, in Ferguson v. Cincinnati Gas & Electric Co., the plaintiff was seated in a bus with her arm rested on a window frame and elbow extending no more than six inches outside the bus. As the bus passed a pole located adjacent to the street at the curb line, the plaintiff's elbow contacted the pole causing her injury. Because the pole did not obstruct the traveled portion of the road, the appellate court affirmed the lower court's grant of summary judgment in favor of the utility.

SBC Ohio and the Eighth District agree that the Eighth District's decision and the First District's decision in Ferguson, as well as the court of appeals decisions in Neiderbrach, Yant, and Jocek, are in conflict on the issue of when a public utility can be held liable for damages caused by motorists who strike utility poles. SBC Ohio and the Eighth District disagree as to how that issue should be framed for this Court. Consequently, this Court should accept both the certified conflict case and SBC Ohio's Discretionary Appeal.

Respectfully submitted,



---

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The Ohio Bell Telephone Company,  
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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing Notice of Certified Conflict was served this  
5th day of February, 2007, by First Class U.S. Mail, postage pre-paid upon:

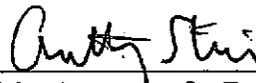
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Attorneys for Defendant-Appellant  
South Central Power Company



---

One of the Attorneys for Defendant-Appellant  
The Ohio Bell Telephone Company,  
d/b/a SBC Ohio

~~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

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Journal Entry

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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.

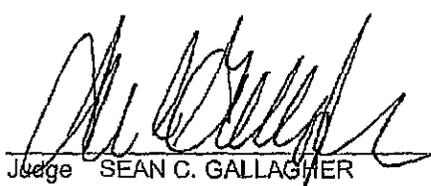
RECEIVED FOR FILING

JAN 12 2007

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

Presiding Judge JAMES J. SWEENEY, Concur

Judge CHRISTINE T. MCMONAGLE, Concur

  
Judge SEAN C. GALLAGHER

NOTICE FILED IN COURSE  
FOR ALL PARTIES-COSTS TAXED

DOCKETED

JAN 17 2007

JAR

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

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

LORRI TURNER, ADMINISTRATRIX, ETC.

Appellant

COA NO.  
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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*

**DOCKETED**

JAN 17 2007

**JAR**

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

RECEIVED FOR FILING

JAN 12 2007

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

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

NOTICE MAILED TO COUNSEL.  
FOR ALL PARTIES - COSTS TAXED

CASE NO. **07-0112**  
IN THE SUPREME COURT OF OHIO

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

v.

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

---

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

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DEFENDANT-APPELLANT, THE OHIO BELL TELEPHONE COMPANY,  
d/b/a SBC OHIO'S NOTICE OF CERTIFIED CONFLICT

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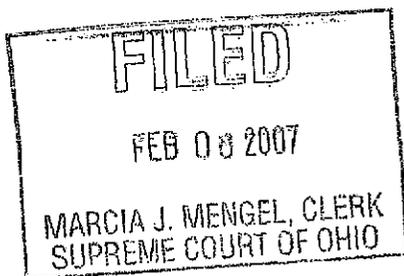
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Attorneys for Defendant-Appellant,  
South Central Power Company

DOCKETED

FEB 08 2007

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JAR

## NOTICE OF CERTIFIED CONFLICT

Pursuant to Ohio Supreme Court Rule IV, Defendant-Appellant, The Ohio Bell Telephone Company, d/b/a SBC Ohio ("SBC Ohio"), hereby gives notice to this Court that, on January 12, 2007, the Cuyahoga County Court of Appeals, Eighth Appellate District, in Case No. CA-05-087541, certified a conflict among the Ohio courts of appeals on two questions of law relating to the placement of utility poles. The Eighth District's Order certifying a conflict is attached hereto at Appendix pages A-1 through A-4. In its Order, the Eighth District found that its decision (attached hereto at Appendix pages A-5 through A-20) is in conflict with the following decisions from the First, Second, Fifth, and Ninth Appellate Districts:

- Ferguson v. Cincinnati Gas & Electric Co., 69 Ohio App. 3d 460 (1st. Dist. 1990)
- Neiderbrach v. Dayton Power & Light Co., 94 Ohio App. 3d 334 (2nd Dist. 1994)
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- Jocek v. GTE North, Inc., 1995 Ohio App. LEXIS 4343, Summit Cty. Case No. 17097 (9th Dist., Sep. 27, 1995)

A copy of the aforementioned decisions are attached hereto at Appendix pages A-21 through A-42.

The two questions of law that the Eighth District has certified to this Court 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.
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Respectfully submitted,



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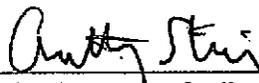
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