IN THE SUPREME COURT OF OHIO

LORRI TURNER, ADMINISTRATRIX, etc.,	:	Case Nos.: 2007-0035; 2007-0112
	:	
Appellee,	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
-vs-	:	
	:	
OHIO BELL TELEPHONE COMPANY, et al.,	:	Court of Appeals Case No. CA-05-087541
Appellants.	:	

BRIEF OF *AMICI CURIAE* THE OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, THE TOLEDO EDISON COMPANY AND FIRSTENERGY CORP. IN SUPPORT OF APPELLANTS, URGING REVERSAL

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INTEREST OF *AMICI CURIAE*

This Court certified two issues for review:

1. Whether a utility pole that is located off the road and within the right-of-way, may constitute an obstruction dangerous to anyone properly using the highway.

2. Whether a utility company may be found negligent when a motorist strikes a utility pole located off the road and within the right-of-way when such pole presents a foreseeable and unreasonable risk to users of the roadway.

The Ohio Edison Company ("Ohio Edison"), The Cleveland Electric Illuminating Company ("CEI"), The Toledo Edison Company ("Toledo Edison"), and their parent FirstEnergy Corp. (hereinafter referred to as "FirstEnergy Companies") serve approximately 2,100,000 residential, commercial and industrial customers in more than half of Ohio's 88 counties. The vast majority of the FirstEnergy Companies' service is distributed through a network of approximately 57,000 miles of overhead electric lines supported, as of 2005, by approximately 1,100,000 million wood poles. Nearly all of these poles are located within public road right-of-ways, as opposed to private property.

Considering these facts, there is no question that this Court's consideration and analysis of how tort liability may be assigned to utility pole owners is of utmost importance to the FirstEnergy Companies, both as individual entities and industry leaders. Therefore, pursuant to S. Ct. R. VI, Sec. 6, the FirstEnergy Companies hereby offer this *amicus* brief, and urge this Court to find for the appellants and reverse the decision of the Eighth District Court of Appeals.

SUMMARY OF ARGUMENT

Ohio law has established a comprehensive statutory scheme governing the proper placement of poles in public right-of-ways. Based upon these laws, for over 70 years Ohio courts have found that pole owners are not liable to motorists who strike poles that are properly placed in right-of-ways that are not intended or used for travel. The Eighth District Court of

Appeals' decision in *Turner v. Ohio Bell Telephone Co.*, 2006-Ohio-6168 (Cuyahoga County App. No. CA-05-087541), ignores Ohio's statutes and directly contradicts established precedent. Worse still, the *Turner* decision will convert simple liability suits into complex multiparty litigation, clogging the dockets of Ohio courts and creating confusion state-wide. Accordingly, the FirstEnergy Companies ask this Court to strike down *Turner* and, consistent with several other Ohio courts of appeals – in decisions spanning decades – formally recognize that pole owners owe no duty to motorists who – for whatever reason – strike poles which are properly placed under Ohio law off the road, but in public right-of-ways.

ARGUMENT

I. The *Turner* Test Ignores Ohio's Existing Public Policies and Statutes Supporting the Public Utilities' Use of Right-of-Ways and Is Preempted by the Statutory Scheme Regulating the Placement of Utility Poles.

As detailed in their Statement of Interest, the FirstEnergy Companies have over 1,100,000 utility poles in Ohio and make use of public road right-of-ways for the vast majority of their pole placements. Because public utilities serve an important and unique public function, the Ohio General Assembly has codified its belief that public utilities should be afforded the opportunity to use public space to locate their facilities. This public policy is consistent with the public utilities' practice to make efficient use of public right-of-ways to minimize the environmental and land use impact on public and private property.

The Ohio Revised Code dictates that it is the "**public policy of the state to ensure that access to and occupancy or use of public ways**" advances the state's policies designed to guarantee: (1) "the availability of adequate basic local [telecommunications] exchange service to citizens throughout the state" and, (2) "the availability of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced electric service." R.C. 4939.02(A)(3)(emphasis added)(incorporating all of the provisions of R.C. 4927.02 (setting forth

Ohio's state policy to promote and protect the interests of the telecommunications industry) and R.C. 4928.02 (setting forth Ohio's state policy to promote and protect the interests of electric retail service industry)).

Specific to electric companies, R.C. 4933.13 provides that

> A company organized for supplying electricity for power purposes, and for lighting the streets and public and private buildings of a municipal corporation ... [w]ith the consent of the municipal corporation, under such reasonable regulations as such municipal corporation prescribes, ... **may construct lines for conducting electricity for power and light purposes through the streets, alleys, lanes, lands, squares, and public places of such municipal corporation, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for the wires.**

R.C. 4933.13 (emphasis added).[1]

Finally, consistent with all of these policies, Ohio's "**initial consent for occupancy or use of a public way shall be conclusively presumed for all lines, poles** ... or other appurtenances, structures, or facilities of a public utility." R.C. 4939.03 (emphasis added).

A. Ohio Law Regulates the Placement, Maintenance, and Removal of Utility Poles In Public Road and Highway Right-of-Ways.

Under the current regulatory framework, various government entities review pole placements made within the public road right-of-ways to ensure the poles do not inconvenience the traveling public or otherwise interfere with road design or traffic flow and safety. In fact, pursuant to statute, a public utility's poles may only be placed in road or highway right-of-ways after the public utility has received a permit from the Ohio Department of Transportation ("ODOT"). See, R.C. 5515.01. These permits "when granted, shall be upon" certain conditions which include that:

[1] This grant of authority is also consistent with Ohio case law and other portions of the Ohio Revised Code permitting utility companies to place their facilities within the right-of-way. See e.g., R.C. 4931.03.

(A) The placing of poles in roads or highway right of ways "**shall be in the location as prescribed" by ODOT.**

(B) "**Such location shall be changed as prescribed" by ODOT** when ODOT decides change is necessary for the convenience of the traveling public, or is required to construct, maintain, or improve a road or highway.

(C) The placing of poles **"shall be at a grade and in accordance" with ODOT approved plans or specifications.**

(D) The road or highway in all respects "**shall be fully restored to its former condition of usefulness"** at the expense of the company placing the poles.

(E) The public utility **"shall maintain" all poles** and "promptly repair all damages resulting to such road or highway on account of any maintenance, or pay any costs and expenses expended by ODOT in repairing any damage.

(F) **Such other conditions as may seem reasonable** to ODOT.

(G) **Permits may be revoked by the director at any time for a noncompliance with the conditions imposed.**

See, R.C. 5515.01(A)-(G).

Thus, by statute, public utilities are not the primary or ultimate authorities in the placement of poles in right of ways; ODOT is. Moreover, once installed pursuant to a permit, a public utility's access to the right-of-way still is not unlimited. For example, a public utility must remove or relocate its poles when a board of county commissioners finds that they constitute obstructions or otherwise interfere with proposed improvements. See, R.C. 5547.03.

In short, Ohio utilities can only erect their poles in a road or highway right-of-way **after getting permission** from the various governmental entities, **and then can place them only at the government's direction.** Thereafter they are under the government's supervision and their poles may be removed or relocated by a government directive at any time.

B. The *Turner* Test Is Clearly Preempted by R.C. 5515.01.

The test created by the Eighth District Court of Appeals in *Turner v. Ohio Bell Telephone Co.*, Cuyahoga App. No. CA-05-087541, 2006-Ohio-6168, completely ignores Ohio's

current comprehensive statutory framework. Under the test created by the Eighth District, which ignores the legislature's directives (potentially violating the separation of powers), eight factors must be considered to determine whether a utility can be held liable in a pole-collision case: (1) proximity to the road, (2) the condition of the road, (3) the direction of the road, (4) the curvature of the road, (5) the width of the road, (6) the grade of the road, (7) the slope of the road, and (8) the position of side drains or ditches. *Id.* at ¶¶ 10, 12. **This new minority position does not reference R.C. 5515.01 and fails to acknowledge that before any utility can place a pole in a public right-of-way it must obtain a permit and satisfy conditions prescribed by ODOT.** Thereafter, if a public utility does not adhere to the requirements of the permit, the permit will be revoked and the utility pole must be relocated or removed.

Even a cursory analysis of R.C. 5515.01 reveals that ODOT's permit process explicitly or implicitly incorporates each of the elements created by the new *Turner* test. As Ohio law completely and comprehensively regulates this area, the *Turner* test has been preempted by statute. Once ODOT has approved design plans for pole location, or expressly dictated where a pole must be, a public utility should have no further duty to review its pole placement, and certainly should not be second guessed by a court that operates with little, if any, knowledge of the issues associated with proper utility pole placement.

This is the conclusion reached by Supreme Court of New Jersey. In analyzing similar governmental regulations and analyzing whether pole owners can be liable when their properly placed poles are struck, that Supreme Court ruled in *Contey v. New Jersey Bell Telephone Co.*, 136 N.J. 582 (1994):

> We believe that responsibility for the safety of motorists should rest with those who own, control, and maintain the thoroughfare. **Although utility companies have a duty to foresee that motorists will leave the traveled portion of the highway, the**

> **governmental bodies and highway planners are best suited to determine how the utilities should fulfill that duty.** Those public bodies are in the best position to provide and to enforce standards and regulations governing utilities. **Utilities do not have the right to locate poles wherever they deem expedient.** Public bodies may by their ordinances and regulations require the relocation, removal, shielding, or redesign of poles that do not meet safety standards.

Contey, 136 N.J. at 590 (emphasis added). The Supreme Court of New Jersey ultimately concluded that

> When a public utility has located its poles or structures within public rights-of-way in accordance with the location and design authorized by the public body, **the utility, in the absence of countermanding directions from the public body, should have no further duty to protect the motoring public.**

Id. at 591.

Considering Ohio public policy, Ohio's statutory scheme, and Ohio's established case law, this Court would certainly be justified in adopting New Jersey's analysis. Accordingly, this Court should strike down *Turner* and, like New Jersey, shield from liability public utilities, and other pole owners, who have located their poles within public right-of-ways pursuant to the authorization and supervision of appropriate government bodies.

II. <u>The *Turner* Decision Directly Contradicts Over 70 Years of Ohio Jurisprudence.</u>

Since this Court decided *Cambridge Home Telephone Co. v. Harrington* (1933), 127 Ohio St. 1, 186 N.E. 611, and *Ohio Bell Telephone Co. v. Lung* (1935), 129 Ohio St. 505, 196 N.E. 371, those decisions have been interpreted to mean that only when a utility pole is located in an area intended or used for travel, could the utility could be held liable for the placement of the pole in that location. That is a logical proposition. However, **under the *Turner* test, a utility can be liable for placing a utility pole in a right-of-way that is not intended for public travel. That is an illogical proposition.**

For almost seventy years, until *Turner*, **no Ohio court of appeals found a pole owner liable for placing its pole in a right-of-way that was not intended or used for travel. This is because poles placed in such right-of-ways do not constitute a danger or obstruction to those properly using the road or highway.** *See Cincinnati Gas & Electric Co. v. Bayer* (1st Dist., Nov. 3, 1975), Hamilton App. Nos. C-74627, C-74628, 1975 Ohio App. LEXIS 6305; *Ferguson v. Cincinnati Gas & Electric Co.* (1st Dist. 1990), 69 Ohio App.3d 460; *Neiderbrach v. Dayton Power & Light Co.* (2d Dist. 1994), 94 Ohio App.3d 334; *Ohio Postal Telegraph-Cable Co. v. Yant* (5th Dist. 1940), 64 Ohio App. 189; *Mattucci v. Ohio Edison Co.* (9th Dist. 1946), 79 Ohio App. 367; *Crank v. Ohio Edison Co.* (9th Dist., Feb. 2, 1977), Wayne App. No. 1446, 1977 Ohio App. LEXIS 9020; *Jocek v. GTE North, Inc.* (9th Dist., Sept. 27, 1995), Summit App. No. 17097, 1995 Ohio App. LEXIS 4343.

When compared to these numerous contrary decisions, the weakness and temerity of the Eighth District's reasoning is made clear. Whereas these Ohio decisions struck the proper balance between the right of the public to travel safely on Ohio's public roads and the right of utilities to use the untraveled portion of the roadway – where no person properly using the roadway should be – the *Turner* test makes no such effort.[2]

Finally, the decision in *Turner* contradicts this Court's findings in *Strunk v. Dayton Power & Light Co.* (1983), 6 Ohio St.3d 429, 453 N.E.2d 604. There, the plaintiff's automobile left the highway and collided with a light pole located off the traveled portion of a highway. *Id.* at 605. The pole was owned by a municipal utility and the plaintiff alleged that,

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[2] *Turner* improperly relies on 19th Century decisions which were rendered before Ohio law regulated the placement of utility poles and when the unpaved roads, which did not have curbs or shoulders, were inferior to today's streets and highways. **More importantly, these cases involved <u>horse drawn buggies</u>.** However even then courts recognized that utility companies could not anticipate every possibility when placing their poles, something that the *Turner* test now requires. While quoting *Martin Monahan v. The Miami Telephone Co.* (1899), 7 Ohio N.P. 95, 96 (C.P. Warren County), in support of its ruling, the appellate court conveniently omitted the directive that a pole owner "is not bound to anticipate every possible accident that may occur to passing persons or vehicles." *Id.*

despite being off the traveled portion of the road and in a right-of-way, the pole constituted an unreasonably dangerous hazard. *Id.* This Court affirmed both the court of appeals and trial court decisions granting the defendant's motion to dismiss and stated that:

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

Strunk, 6 Ohio St.3d at 431.

This Court's decision in *Strunk*, like the other appellate decisions discussed above, recognized the balance of duties and responsibilities between drivers and entities whose public or quasi-public functions depend on the use of the right-of-way. ***Strunk* stands for the proposition that a utility pole owner should not be held liable when a motorist strikes a utility pole located off the traveled and improved portion of the road, and clearly requires that this Court overrule the misguided *Turner* decision.**

III. <u>If the *Turner* Decision is Allowed to Stand, this Court Runs the Risk of Creating a Tumultuous Situation for Cases Involving Utility Poles and Other Objects and Individuals Located in Right-of-Ways.</u>

In 1999, this Court rendered a decision in *Scott-Pontzer v. Liberty Mut. Fire Ins.* Co. (1999), 85 Ohio St. 3d 660, which "converted simple liability suits into complex multiparty litigation, and created massive and widespread confusion – the antithesis of what a decision of this court should do." *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216, 2003-Ohio-5849 ¶ 50. In *Westfield Ins. Co. v. Galatis*, four years and tens of thousands of lawsuits later, this Court recognized that because it had abandoned established precedent, its decision in "*Scott-Pontzer* [Had] Caused Chaos in the Courts." Thankfully, this Court had the wisdom and mettle to correct its mistake.

Here, this Court can avoid creating chaos in the courts by striking down the incorrect, shortsighted, inequitable, and potentially harmful *Turner* ruling. If this Court fails to reverse the Eighth District's decision, it risks generating needless litigation and creating uncertainty for pole owners who placed their poles in locations "prescribed" by the government. See, e.g., R.C. 5515.01.

For example, in the circumstance of **an unlicensed, intoxicated, distracted, speeding or otherwise careless driver who loses control of his vehicle and strikes a pole properly placed in the right-of-way, the *Turner* decision would needlessly require a trial on the merits** since, "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." See *Turner* at 10. Similar results would occur in the case of **a driver who drives left of center and strikes a utility pole properly located in the right-of-way on the opposite side of the road**. Had the negligent driver struck a vehicle traveling in the opposite direction, there would be no question as to liability. Under *Turner* however, should the left of center vehicle strike a properly placed pole on the opposite side of the road, the pole owner is exposed to a trial despite the driver's negligent actions. In the above limited examples, a reasonable person would say that there was no question about the cause of each accident: an intoxicated driver in the first instance and a driver who negligently loses control of his vehicle in the second.

In each of these examples, if the driver had struck a car there would be no question of liability. However, because the driver struck a pole, under *Turner*, an eight factor test must be applied to determine if the pole – which was placed with ODOT approval and subject to ODOT and other governmental regulation – had been properly placed. The *Turner* analysis leads to this absurd result and only serves to create litigation where there should be none

and to increase the potential liability for pole owners who have complied with Ohio's regulations.

The effect of the *Turner* decision will not be limited to utility pole owners. It is a logical step to envision that the *Turner* reasoning will be applied beyond utility poles and will extend to any and all roadside objects that could be struck by errant vehicles even though they are outside the traveled portion of the road be used by motorists. Streetlight poles, fire hydrants, mailboxes, trees, fences, signposts, and buildings are all located in the proximity of roads and could be struck by vehicles. Applying the logic of *Turner*, if a car was parked, or was disabled, along the untraveled portion of a roadway and struck by another vehicle, its owner would be subject to liability because of a failure to take into account such factors as the curvature, slope, and width of the road. Similarly, patrol officers could potentially be liable for stationing their vehicles in the right-of-way. These are just a few examples; clearly there is no end to how far attorneys could take the *Turner* analysis if it is allowed to stand.[3]

Moreover, because of the ambiguity of *Turner's* eight factor test, and the little, if any, guidance it gives future jurists, summary judgment cannot practically be used to resolve cases involving the placement of utility poles. Summary judgment is an integral part of our legal system and is designed to secure a just, speedy and inexpensive determination of claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Burns v. Lawson Co.*, 122 Ohio App.3d 105, 106 Summit Cty. 1997). **Unfortunately, the *Turner* Court has declared that pole placement is always a gray area to be second-guessed and made into a question of fact, making summary judgment all but impossible.** This will most certainly increase litigation costs, clog court

[3] Carrying *Turner* to its most tragic extreme, an adult or child who is struck while standing off the road but in a right-of-way would have his degree of negligence assessed by a jury under the *Turner* factors. That is wrong.

dockets, and create inconsistent outcomes. The increased litigation costs that would surely result would logically be felt by utility consumers across Ohio in the form of increased rates.

This Court has already been faced with undoing the chaos and confusion caused by a legal decision that abandoned established precedent and ventured into unwarranted areas. Considering Ohio's established statutory scheme, its 70 years of case law, and the potential that unnecessary litigation will be generated if *Turner* is allowed to stand, this Court must overrule the Eighth District's decision and find for the appellants in this case.

IV. The *Turner* Decision Places an Impossible Burden On Utility Pole Owners.

Review and potential relocation of utility poles across the FirstEnergy Companies' territory would be a significant cost that would necessarily be borne, in large part, by electric consumers. Simply inspecting the location of each of the FirstEnergy Companies' over 1,100,000 wood poles would require large outlays of capital and subvert those resources from other reliability and improvement projects. Approximately $4,000 and numerous labor hours are expended on an average pole replacement project, which requires the inspection of a pole, removal of the old pole, and the setting of a new pole. Assuming that only 1% of the FirstEnergy Companies' poles would have to be moved out of an abundance of caution – despite being placed in accordance with proper permits issued by the ODOT – the inspection and replacement costs would amount to approximately $44,000,000.

This assumes that a pole can be moved, which for spatial reasons, may not be the case. For example, if the only available location for a pole borders a sharp curve, should the utility remove it entirely, terminating electric service to its customers in that area (something not permitted by the Public Utilities Commission of Ohio), or just hope that a speeding, careless, reckless, impaired or otherwise out of control driver does not strike it? These are the practical

problems created by the *Turner* decision. These problems did not exist prior to *Turner's* deviation from established case law and Ohio's statutory scheme.

V. Consistent with Established Case Law and the Provisions of the Ohio Revised Code, this Court Should Establish that Pole Owners Owe No Duty To Motorists Who Strike Poles Properly Placed in Public Right-of-Ways.

In accordance with Ohio's established law and public policies, this Court should formally recognize that pole owners owe no duty to motorists who strike poles which are properly placed within right-of-ways pursuant to ODOT permits and stand without protest from other responsible governmental authorities. This rule is consistent with Ohio policy, statutes, and pre-*Turner* precedent. Such a finding also promotes certainty and recognizes the involvement of the government in the process of pole placement. Finally, this step would be consistent with this Court's opinion in *Strunk v. Dayton Power & Light Co.,* and decisions in others states, specifically, the Supreme Court of New Jersey's opinion in *Contey v. New Jersey Bell Telephone Co.*, 136 N.J. 582 (1994), discussed in Section I.

CONCLUSION

Should the appellate court's decision in *Turner* be upheld, it would create and expand liability for utility companies for acts beyond its control – the actions of the driver and the conditions of the roadway. Furthermore, if the reasoning of *Turner* is adopted, a Pandora's Box of liability will be opened. For all of these reasons, the FirstEnergy Companies ask that this Court: (1) hold that pole owners have no further duty to protect the motoring public after it has obeyed Ohio law and properly placed its pole off of the road and in a public right-of-way place; (2) find for the appellants; and, (3) reverse the decision of the Eighth District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing, *Brief Of Amici Curiae The Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company, and FirstEnergy Corp. In Support Of Appellants, Urging Reversal*, was served upon the following by regular U.S. mail, postage pre-paid, on May 21, 2007:

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