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.	:	

MERIT BRIEF OF APPELLANT SOUTH CENTRAL POWER COMPANY

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STATEMENT OF FACTS

On September 10, 2003, decedent Robert Turner ("Turner") was a passenger in a vehicle driven by Bryan Hittle. Mr. Hittle was traveling southbound on State Route 188 in Pleasant Township, Fairfield County, Ohio. (Complaint ¶¶ 1-2; Supplement ("Supp.") at 2.) Mr. Hittle was traveling an estimated 55 to 59 miles per hour (in a 45 miles per hour zone) when he left the roadway and crashed his vehicle into a utility pole. (James Crawford Aff., Exh. 1, at 5 (Plaintiff's expert, estimating actual speed); Trooper Christopher Goss Dep. at 71 (speed limit); Supp. at 12, 25.) As between Defendants-Appellants South Central Power Company ("South Central") and Ohio Bell Telephone Company ("Ohio Bell"), the responsibility for the placement of the utility pole which the Hittle vehicle struck is in dispute, according to the appeals court. The responsibility for the placement of the pole as between the two Defendants is neither at issue in this appeal nor germane to the legal questions presented.

Mr. Hittle was subsequently convicted of vehicular manslaughter. (Bryan Hittle Dep. at 52; Supp. at 30.) This crash resulted in Turner's death. State Highway Patrol Troopers Christopher Goss and Tito Duran investigated the crash. (*See generally* Depositions of Troopers Goss and Duran.) Trooper Duran identified State Route 188 as a two-lane road, newly paved with white lines on both sides of the roadway and a double yellow line down the middle of the roadway. (Duran Dep. at 89; Supp. at 17.) He testified that on the west side of the roadway, where the accident occurred, there was a white edge line. (*Id.*) A berm of pavement extended beyond the white edge line. (*Id.* at 90; Supp. at 18.) He described a further area of loose gravel beyond the pavement. (*Id.*) The utility pole involved in the accident was situated three feet, nine inches west of the painted edge line of State Route 188, and two feet, five inches from the outermost edge of the loose gravel. (Goss Dep. at 26-27; Supp. at 22-23.) Troopers Goss and Duran agree that a vehicle traveling southbound on State Route 188 which stayed within the

painted white lines would not make contact with the utility pole. (Goss Dep. at 29; Duran Dep. at 91; Supp. at 24, 19.) Moreover, a southbound vehicle which traveled off the paved portion of the highway and onto the outer limits of the loose berm mixture would likewise not make contact with the utility pole. (Goss Dep. at 29; Supp. at 24.) Trooper Goss testified as follows:

> Q. (By Jennifer E. Short, Esq.) Would you agree with me that a vehicle traveling on State Route 188 that stayed within the white lines would not come into contact with this pole?
>
> A. (By Trooper Christopher Goss) That's correct.
>
> Q. And even a vehicle that was traveling on State Route 188 on the berm would not come into contact with this pole?
>
> A. Correct.
>
> Q. And when I say berm, I'm also including this loose gravel area.
>
> A. That's correct.
>
> Q. Okay. So you would agree that even a vehicle traveling on this loose berm mixture would not come in contact with the pole?
>
> A. That is correct.

(*Id.*) Troopers Goss and Duran also testified that the utility pole was in a grassy area off the roadway, and that it in no way obstructed or interfered with traffic on the roadway. (Goss Dep. at 72; Duran Dep. at 91; Supp. at 26, 19.)

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

I. South Central's Propositions Of Law

First Proposition Of Law: As a matter of law, a utility pole which is located within the public road right-of-way, beyond both the paved portion and berm of the roadway, in an area not intended or used for travel, does not constitute a danger or obstruction to those properly using the roadway, and therefore a utility company whose pole is struck by a vehicle cannot be held liable in negligence or nuisance for the placement of its pole within such space.

Second Proposition Of Law: A utility company which lawfully places its facilities within a public road right-of-way, beyond the pavement and berm, in an

> area not intended or used for travel, owes no duty, in tort, nuisance, or otherwise, to motorists who leave the roadway.

All of the arguments which follow below support both of these propositions of law.

II. The Issues As Framed By The Appeals Court In Its Order Certifying A Conflict

> 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.
>
> 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.

(*See* Entry, *Turner v. Ohio Bell Tel. Co.* (Mar. 28, 2007), Ohio Supreme Court No. 2007-0112.)

III. Introduction

If a tree falls in the forest and no one hears it, does it make a sound? That depends on how one defines sound. Must a sound be heard in order for it to be a sound?

This case presents a similar question. If a driver loses control of his automobile, leaves the roadway, and hits something in the ditch off the roadway, are the driver and his passengers properly using the roadway? Unlike the question of the lonely falling tree, this question has an easy answer: Of course not.

This case raises three major policy issues: driver responsibility, property rights, and the cost-efficient delivery of public utility services. This is undeniably an important case for the Plaintiff as well, whose son died. But it rests upon this Court to decide this case based on the extraordinary policy implications for Ohio property owners and utility consumers, and not based on the tragedy that haunts Robert Turner's mother.

The court of appeals ignored each of these policy issues, and decided the case instead based on geometry and road design—holding, in effect, that a jury should decide whether Robert Turner would have survived had this pole not been in this ditch when the vehicle in which he

was a passenger veered off this roadway. Undeniably, had the pole been in a different location, the Hittle vehicle would have missed it. Indeed, had the pole been in the center of the paved road, the Hittle vehicle would not have hit it, because the Hittle vehicle was out of control and off the road. But the liability of a utility company should not turn on where motorists stray or how highway engineers design and maintain public roads. It should instead turn on where the roadway ends, and where the off-road right-of-way dedicated to public use begins. The appeals court's holding, if adopted by this Court, would impose liability for accidents upon owners of mailboxes, those who park their cars in close proximity to the traveled portion of a highway, and those who situate fire hydrants, signs, and trees and other landscaping near the traveled portion of Ohio's roadways. Because the appeals court's decision in this case would undo the well-settled body of law holding that no liability attaches to a utility pole's owner when the pole does not constitute an obstruction to a motorist who is *properly* using the *roadway*, it should be reversed.

IV. Applicable Ohio Statutory Law

A utility company may construct or place utility lines and poles upon and along the public roads of this state so long as the lines and poles do not "incommode" the public in its use of those roads. This right is statutory, and derives from Revised Code Section 4931.03:

> (A) A telegraph or telephone company may do either of the following in the unincorporated area of the township:
>
> (1) Construct telegraph or telephone lines upon and along any of the public roads and highways and across any waters within that area by the erection of the necessary fixtures, including posts, piers, or abutments for sustaining the cords or wires of those lines. Those lines shall be constructed so as not to incommode the public in the use of the roads or highways . . . .
>
> . . .
>
> (B) (1) . . .

(2) Construction under this section is subject to section 5571.16 of the Revised Code, as applicable, and any other applicable law, including, but not limited to, any law requiring approval of the legislative authority, the county engineer, or the director of transportation.

R.C. 4931.03, Appx. at A-70; *see also* R.C. 4931.01 (repealed Sept. 29, 1999), Appx. at A-68.

Revised Code Section 4933.14 extends to electric utilities, such as South Central, this general right to place utility lines and poles upon and along the public roads:

(A) Except section 4931.08 of the Revised Code and except as otherwise provided in division (B) of this section, sections 4931.01 to 4931.23 and 4933.13 to 4933.16 of the Revised Code apply to a company organized for supplying public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares, and public places with electric light and power, and to an automatic package carrier. Except section 4931.08 of the Revised Code and except as otherwise provided in division (B) of this section, every such company has the powers and is subject to the restrictions prescribed for a telegraph company by sections 4931.01 to 4931.23 of the Revised Code.

(B) Sections 4931.04, 4931.06, 4931.07, 4931.12, and 4931.13 of the Revised Code apply to a company organized for supplying electricity only if the company transmits or distributes electricity, and every such company has the powers and is subject to the restrictions prescribed for a telegraph company by those sections except for the purpose of erecting, operating, or maintaining an electric generating station.

R.C. 4933.14, Appx. at A-71. This grant of authority allows public utilities, such as South Central and Ohio Bell, to construct utility poles and maintain their lines throughout the state without seeking easements from private landowners.

V. The Appeals Court Decision In This Case Is A Departure From Seventy Years Of Ohio Jurisprudence.

The propositions of law which South Central asks this Court to adopt are not new to Ohio jurisprudence. As the Eighth District Court of Appeals acknowledged in certifying a conflict to this Court, its holding in this case is in direct conflict with the holdings of at least seven other cases in four other appellate districts in Ohio (the First, Second, Fifth, and Ninth Appellate

Districts). Those cases in conflict with the decision in this case—and which support South Central's proposed propositions of law—include the following.[1]

A. *Cincinnati Gas & Electric Co. v. Bayer* (1st Dist., Nov. 3, 1975), Hamilton App. Nos. C-74627, C-74628, 1975 Ohio App. LEXIS 6305

In *Bayer*, the motorist struck a utility pole located just eleven inches from the roadway. *Id.* at *2. The First Appellate District held as a matter of law that the utility company "was not negligent in the placement of the light pole" because "[t]he pole would not have been a hazard to anyone operating a motor vehicle on the paved portion of Clifton Avenue normally used for vehicular traffic." *Id.* at *8. The court explained further that the driver's "right to use the public street did not give him a right to run his vehicle over the curb onto the sidewalk and adjacent lawn." *Id.* at *8-9; *see also id.* at *10-12 (reasoning that the dispositive question is whether the area where the pole was located was fit and used for travel).

B. *Ferguson v. Cincinnati Gas & Electric Co.* (1st Dist. 1990), 69 Ohio App.3d 460, 590 N.E.2d 1332

In *Ferguson*, the plaintiff was injured when her elbow, which was hanging just six inches out the window of a moving city bus, struck a utility pole. *Id.* at 462. The First Appellate District held as a matter of law that because the pole was located off the traveled portion of the street, the utility company could not be held liable. *Id.* at 463. Indeed, the *Ferguson* court went further, noting that even though the pole leaned toward the road, because there was no evidence that the pole pierced the vertical plane of the edge of the roadway, the utility company could not be held liable for its placement or its maintenance in a leaning position. *Id.*

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[1] Notably, although all seven of these cases were cited in the Defendants' appellate briefs, the appeals court discussed only one—the case in which the pole was most distant from the road—and instead relied upon authority—never cited by any party—from Louisiana, Pennsylvania, Kentucky, and Oklahoma in making new Ohio law. *See Turner v. Ohio Bell Tel. Co.* (Nov. 22, 2006), Cuyahoga App. No. CA-05-087541, 2006-Ohio-6168, at 6 (discussing *Niederbrach v.*

C. *Neiderbrach v. Dayton Power & Light Co.* (2d Dist. 1994), 94 Ohio App.3d 334, 640 N.E.2d 891

In *Neiderbrach*, a motorist struck a utility pole located approximately sixteen feet, three inches from the edge of the roadway. *Id.* at 336. Reasoning that the utility pole "was located properly in the utility right-of-way," and therefore "did not interfere with the proper use of the roadway," the Second Appellate District followed *Yant, infra,* as well as a 1990 Ninth District decision and a 1983 Ohio Supreme Court case concerning municipal liability for utility pole placement (*Strunk*, discussed *infra*), and held that the defendant electric utility had no duty to locate its pole in a different location than where it had been located. *See id.* at 338-339, 343.

D. *Ohio Postal Telegraph-Cable Co. v. Yant* (5th Dist. 1940), 64 Ohio App. 189, 18 O.O. 57, 28 N.E.2d 646

In *Yant*, the pole in question was located thirteen feet beyond the edge of the pavement, and eleven feet beyond "that part of the highway improved for vehicular travel and use at that point." *Id.* at 190. The court explained that "[n]either the top of the berm, nor the slope of the bank to the pole, was intended or improved for travel." *Id.* The Fifth Appellate District focused on the word "use," and observed that "the traveling public has no superior right to misuse the highways" by leaving them. *Id.* at 192. The court then held as a matter of law that the dispositive question in a pole-collision case is whether the portion of the right-of-way where the accident happened is dedicated to vehicular use, and that public utilities have a superior right to place their equipment within the road right-of-way where the ground is not dedicated to vehicular use. As the *Yant* court explained:

> 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

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Dayton Power & Light Co., infra), Appx. at A-11; *id.* at 7-8 (discussing and relying upon four other states' authority), Appx. at A-12 – A-13.

> the right to regulate public thoroughfares. We grant that emergencies may arise where such use is permissive. But we do not recognize any such unqualified superior right to a negligent traveler who abuses his privilege.

Id. at 193.

E. *Mattucci v. Ohio Edison Co.* (9th Dist. 1946), 79 Ohio App. 367, 35 O.O. 131, 73 N.E.2d 809

In *Mattucci*, the pole which was hit was located off and slightly above the traveled portion of the brick street, close to the curb. *Id.* at 368. Construing the then-applicable code provisions (today, R.C. 4931.03), the Ninth Appellate District focused on the question of whether a vehicle which has left the highway is "properly using the highway," and held that the pole "was not maintained so as to incommode the public in the reasonable and proper use of the street." *Id.* at 369-370.

F. *Crank v. Ohio Edison Co.* (9th Dist., Feb. 2, 1977), Wayne App. No. 1446, 1977 Ohio App. LEXIS 9020

In *Crank*, the handlebar of an out-of-control motorcycle caught a guy wire supporting a utility pole, which guy wire was situated less than two feet from the curb, in a "tree lawn" (the area between the curb and the sidewalk) alongside the road. *Id.* at *2-3. The Ninth Appellate District held that because the guy wire was not located on an improved, traveled portion of the roadway, the trial court properly granted a directed verdict in favor of the defendant utility company. *Id.* at *3-4.

G. *Jocek v. GTE North, Inc.* (9th Dist., Sept. 27, 1995), Summit App. No. 17097, 1995 Ohio App. LEXIS 4343

In *Jocek*, the decedent's vehicle went off the road and into the median, where it struck a utility pole. *Id.* at *2. The Ninth Appellate District held that because the median was not improved for travel, the utility company could not be held liable:

> GTE's pole was located on the median strip, which was not improved for travel. It was situated no less than eleven feet from the improved roadway. The location

> of the pole did not affect the public's travel on the road. We conclude that GTE's duty to not incommode the public in its use of State Route 21 was not implicated by its placement of the pole. Because no duty existed, [plaintiff's] negligence claim fails as a matter of law.

Id. at *9 (following *Mattucci*, *Neiderbrach*, *Crank*, and *Yant*).

H. South Central's Propositions Of Law Are Consistent With This Court's 1930s Decisions On Utility Pole Placement.

The Eighth District Court of Appeals relied in its opinion on two decisions by this Court, each more than seventy years old: *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, 2 O.O. 513, 196 N.E. 371. *See Turner*, 2006-Ohio-6168, at 5-7, Appx. at A-10 – A-12. As several of the cases cited above point out, *Harrington* and *Lung* are clearly distinguishable from those cases. And they are distinguishable from this case as well. Specifically, *Harrington* and *Lung* did not involve poles located outside the traveled and improved portion of the road. In *Harrington*, the utility pole was located within the improved portion of the road on a water-bound macadam berm fit for travel and in use, according to plaintiff's own witnesses. *Harrington*, 127 Ohio St. at 1. In *Lung*, the utility pole was located within an improved portion of the highway that was used by the driving public and was 5.1 feet from the paved road. *Lung*, 129 Ohio St. at 509.

By contrast, every one of the intermediate appellate decisions discussed above stands for the proposition that utilities have the right to place poles off the traveled portion of the roadway, in areas that are not so close to the roadway that they impede the motorist in the proper use *of the roadway*. For example, the *Yant* court pointed out that the syllabi of *Harrington* and *Lung* have to be considered in the context of the facts presented before this Court (*i.e.*, that the poles in those cases were located on improved parts of the roadway). The court in *Yant* explained:

> If the rule of the *Harrington* case, *supra,* is extendable to objects clearly without the roadway and not in close proximity to the improved portion, then guard and bridge rails, trees, road and railway signs of all descriptions, mail boxes, road-lighting poles, plantings for esthetic [sic] purposes, parked cars, hydrants, and numerous other appliances are obstructions which 'incommode the public in the use thereof.' . . .
>
> It is significant that the statute uses the word 'use.' To our notion, the traveling public has no superior right to *misuse the highways*. It is inconceivable that a traveler may destroy warning signs placed thereon for his protection and safety, or that, under a claim of superior right, one may negligently or wantonly drive through and ruin costly shrubbery placed along roads for their beautification.

Yant, 64 Ohio App. at 192 (emphasis added); *see also Bayer*, 1975 Ohio App. LEXIS 6305, at *10 ("[*Harrington* and *Lung*] are both distinguishable from the instant case. In both the *Harrington* and the *Lung* case, the utility pole was placed on the highway, which is usable and was being used for vehicular traffic."); *Ohio Bell Tel. Co. v. Short* (1941), 35 Ohio L. Abs. 375, 376, 37 N.E.2d 439 (noting that its decision was not in conflict with *Harrington* and *Lung* because the pole at issue was located off the traveled portion of the road, whereas the poles in *Harrington* and *Lung* were located on the improved and traveled portion of the road); *Jocek*, 1995 Ohio App. LEXIS 4343, at *9-10 (same).

In this case, it has never been disputed that the collision pole was outside the traveled and improved portion of the roadway. Troopers Goss and Duran, the Ohio Highway Patrol officers who investigated the accident, testified, without contradiction, that the pole was not an obstruction to anyone properly using the roadway. The propositions of law which South Central asks this Court to adopt are entirely consistent with the holdings of *Harrington* and *Lung*, as each of the four Ohio appellate districts which have established the majority rule have held. South Central's propositions of law should therefore be adopted by this Court.

VI. Utilities Owe A Duty Only To Those Lawfully Using The Roadway, Not To Those Who Lose Control Of Their Vehicles And Leave The Roadway.

A. As A Matter Of Law, One Who Leaves The Road Is Not Using The Road.

While South Central does not agree entirely with the manner in which the Eighth District framed the conflict questions in its certification decision, the court got it right in speaking in terms of "anyone *properly using* the highway" and "harm to users of the *roadway.*" *See* Entry, *Turner v. Ohio Bell Telephone Co.* (Mar. 28, 2007), Ohio Supreme Court No. 2007-0112 (emphasis added). The applicable code provisions likewise speak in terms of "use" and "roads and highways." The fundamental questions for this Court can therefore be reduced to this: what is "proper use," and what it is the "roadway"?

As for the former question, can it seriously be contended that criminal conduct is a proper use? Mr. Hittle was convicted of vehicular manslaughter. (Hittle Dep. at 52; Supp. at 30.) Or that a vehicle, three wheels of which are off the roadway, is using the roadway? Even Mr. Hittle admits he "ran off the road." (*Id.* at 40; Supp. at 29.) A motorist, such as Mr. Hittle, has a duty to drive his vehicle as nearly as is practicable entirely within the single lane that is clearly marked for traffic, and to not move from such lane until the driver "has first ascertained that such movement can be made with safety." *See* R.C. 4511.33(A)(1), Appx. at A-89 – A-90. A motorist also has a duty to drive his vehicle only upon the right half of the roadway. R.C. 4511.25(A)(1), Appx. at A-86 – A-88. Because Mr. Hittle broke the law—both traffic and criminal—he was not "properly using" the roadway when he flew off the road and struck the utility pole. South Central therefore cannot be liable.

As for the latter question, while "roadway" is not defined in Title 49 (the title applicable to utility companies), the term "roadway" is defined in R.C. 4511.01(EE), as the "portion of a highway improved, designed, or ordinarily used for vehicular traffic, *except the berm or*

shoulder." R.C. 4511.01(EE), Appx. at A-73 – A-85 (emphasis added). Because it is undisputed in this case that the pole which Mr. Hittle hit was in a grassy area beyond the road, the berm, and even the loose gravel beyond the berm, it cannot be said that his vehicle was in the "roadway," or that Mr. Hittle was using the "roadway" in any manner when he hit the pole.

Tort law is about duty, and duty in turn is, at its most elemental level, a two-part question: What is the duty, and to whom is it owed? The fundamental principle of the well-settled law on point is that vehicles have a right to use the roads—nothing less, and, importantly as it relates to this case, nothing more. Ohio law recognizes a duty owed only to those properly using the traveled and improved portion of the road, and not to those who leave the traveled and improved portion of the road and hit a utility pole in the grass. As articulated by the court in *Yant*:

> 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 [the motorist] preeminence is to deny the statutory right of occupancy given to public utilities, and to withhold from public authority the right to regulate public thoroughfares. We grant that emergencies may arise where such use is permissive, but we do not recognize any such unqualified superior right to a negligent traveler who abuses his privilege.

Yant, 64 Ohio App. at 193. The *Yant* court went on to reason that since the motorist has no superior right to occupy the areas off the roadway, it was the motorist's negligence and failure to control his vehicle, and not the pole, which was the proximate cause of the accident. *Id.* at 194 ("The defendants' car got out of control. Had it gone through the fence and run into a dwelling house, it would be then just as illogical to say that the house caused the injury.").

In *Mattucci*, the court echoed the decision in *Yant* to the effect that when the driver is not properly using the highway and improperly leaves it, that conduct of the driver is the proximate cause of the accident, and "that the existence of a pole at the point where it was maintained" could not be considered a proximate cause of the accident. *Mattucci*, 79 Ohio App. at 370.

B. The Appeals Court's Holding Is Neither Workable Nor A Reasonable Interpretation Of The Applicable Code Provisions.

The unworkability and unreasonableness of the appeals court's holding can perhaps be illustrated by reference to one of the facts relied upon by the appeals court: that a "portion of Bryan Hittle's vehicle was still located on an improved portion of the road at impact." *Turner*, 2006-Ohio-6168, at 9, Appx. at A-14.

First, by any reasonable construction of the statute, it cannot be said that a vehicle with one wheel on and three wheels off the road is "using" the road.

Second, even if part of the vehicle was touching the roadway at the moment of impact, that would not make Mr. Hittle's operation lawful. In order to sustain the appeals court's decision, this Court must impose upon South Central a duty to anticipate and engineer against criminal conduct.

Third, the appeals court's conclusion is not supported by any existing Ohio authority, and in fact several cases have found no liability where the vehicle remained partly on the road. For example, in *Bayer, supra*, a case involving a car that struck a pole located eleven inches from the improved portion of the road, a judgment in favor of a utility company was affirmed. And in *Turowski v. Johnson* (1990), 68 Ohio App.3d 704, 589 N.E.2d 462, a case involving a car that struck a pole located thirty-one inches from the improved portion of the road, a utility company won summary judgment. *Id.* at 705. Without a doubt, these vehicles were not completely off the road when they made contact with the poles.

Fourth, under this putative proposition of law—that a utility must leave enough room between the edge of the road and the pole for a vehicle to pass—what vehicle width would the law find sufficient? Must there be enough space for a Mini Cooper to pass? A Honda Accord?

A Hummer? If a Hummer, would that be a Hummer 1, 2, or 3? The fact is that regardless of the size or model, any such vehicle would be traveling unlawfully.

It is undisputed that the car in which Mr. Turner was riding left the road and hit a pole which was lawfully placed in the right-of-way. The pole was located off the traveled and improved portion of the road. As a matter of law, the location of the utility pole did not breach any duty of care owed to Robert Turner.

VII. This Court Has Already Established A Rule, Applicable To Municipal Utilities, Which Is Contrary To The Rule Adopted By The Eighth District In This Case.

The questions presented by this case have already been answered by this Court in the context of municipal utility poles. There is no logical justification for departing from that precedent in this case.

In *Strunk v. Dayton Power & Light Co.* (1983), 6 Ohio St.3d 429, 453 N.E.2d 604, the plaintiff's automobile left the highway and collided with a light pole located off the traveled portion of the highway. 6 Ohio St.3d at 429 (Court's statement of facts). The plaintiff's complaint alleged that the municipality had purchased, installed, and approved the light pole, and that the pole constituted an unreasonably dangerous hazard. *Id.* The court of appeals affirmed the trial court's decision, holding that an automobile collision with a light pole located outside the traveled portion of a municipal roadway cannot serve as a basis for municipal liability. *Id.* at 431. Affirming the two lower courts' decisions sustaining the municipality's Civil Rule 12(B)(6) motion, this Court held:

> 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 that 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.

Id. (emphasis added). This Court further held that a municipal corporation's duty to keep the roads free from nuisance "includes only those aspects which affect the physical conditions of such roadways and does not extend to adjacent property." *Id.*

This Court's decision in *Strunk*, like the seven intermediate appellate decisions discussed above, recognizes the balance of duties and responsibilities between drivers, on the one hand, and those whose public or quasi-public function depends on the use of the right-of-way, on the other hand. Fixtures of all kinds abound within road right-of-way in Ohio (*e.g.*, concrete barriers, mailboxes, signs, streetlights, traffic lights, etc.) and indeed even within the roadway itself (*e.g.*, bridge abutments). It is the motorist's duty to stay on the road and thereby avoid those fixtures, not the utility company's duty to imagine the path that every possible wayward motorist who flies off the pavement may take.

Strunk provides further support 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. If the pole which Messrs. Hittle and Turner struck in this case had been owned by a municipal utility, *Strunk* would indisputably bar the claim. South Central respectfully submits that there is no legal, logical, or policy basis for denying recovery if the pole belongs to a municipality, yet allowing recovery if the same pole is owned by a non-municipal utility company. Unless the judgment in this case is reversed, the law will reach a different result based not on the actions of the tortfeasor or the circumstances of the tort, but instead on the happenstance of an immutable and irrelevant fact, such as whether the pole has been placed by a

public or private entity. Because the appeals court decision cannot logically be reconciled with *Strunk*, it must be reversed.[2]

VIII. Public Uses Are Permitted Both Within And Without Ohio's Roadways, And Such Uses Do Not Give Rise To Liability.

This case is about facilities beyond the roadway but still within the right-of-way. One Ohio court has previously excused from liability, as a matter of law, those who leave their vehicles within not just the right-of-way, but within the roadway itself. In *Campbell v. Daniels Motor Freight, Inc.* (1966), 8 Ohio App.2d 244, 37 O.O. 2d 240, 221 N.E.2d 470, the Putnam County Court of Appeals considered the liability of the owner of a truck tractor who had left his disabled vehicle on the side of the road for several days. *Id.* at 246-247. The tractor was parked so that no part of it was on the paved roadway, but was instead parked between the edge line of the roadway and the edge of the right-of-way, with one wheel upon the asphalt apron of the paved roadway. *Id.* at 247. The Court held as a matter of law that so long as the truck was parked off the traveled part of the highway, it could remain there indefinitely without liability being imposed:

> It is apparent from these various sections that, except as specifically prohibited by Section 4511.68, or other statute, upon any highway outside a business or residence district one may park his vehicle off of the paved *or* main traveled part of the highway and leave it so parked indefinitely without, for such reason alone, becoming civilly liable for a violation of either a statutory or common-law standard of care.

Id. at 251 (emphasis in original). The court found dispositive the fact that the truck tractor was parked legally beyond the "main traveled part of the highway":

> [W]e must conclude that a vehicle may be legally parked, though not disabled, *either* when it is parked off the paved part of the highway *or* when it is parked off the main traveled part of the highway. Under any view of the facts, defendants'

[2] Just as the appeals court ignored all but one of the seven Ohio appellate cases relied upon by South Central, the court also ignored *Strunk*, even though it was briefed at some length by the parties, and was discussed extensively at oral argument.

> truck tractor was legally parked at the time of the collision, there was no issue of common-law negligence for the jury, and plaintiffs' third assignment of error is without merit.

Id. (emphasis in original).

As in *Strunk* and *Campbell*, South Central's use of the non-traveled portion the right-of-way, for what is unquestionably a public or quasi-public use, is entirely appropriate. Indeed, such use is specifically contemplated and authorized by the Ohio Revised Code. Because liability does not attach to those municipalities who place their utility poles off the roadway, or to drivers who park on or off the roadway, liability should likewise not attach here. The court of appeals should be reversed.

IX. The Law Developed By Ohio's Intermediate Appellate Courts Is Good Public Policy.

A. This New Judge-Made Test Ignores Driver Responsibility And Imposes An Unreasonable Engineering Burden Upon Utilities.

The court of appeals in this case fashioned an eight-factor test to determine whether a utility can be held liable in a pole-collision case. *See Turner*, 2006-Ohio-6168, at 3-6, Appx. at A-8 – A-11. The eight factors to be considered under this new test are (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 4, Appx. at A-9. This new test presents several fundamental problems.

First, it has no statutory basis and is entirely judge-made.

Second, it ignores altogether any consideration of the responsibility of those using the road to remain on the road.

Third, it imposes upon utilities a duty to engineer their facilities to take account of out-of-control motorists—an inherently impossible task, given that the path of the errant vehicle will, by definition, be completely unpredictable. This Court need look no farther than the eight-factor

test adopted by the court below to appreciate how ill-equipped *utility* managers would be at engineering the location of roadside poles so as not to be hit by wayward vehicles. Of the eight factors, seven of them ask about the road: its condition, direction, curvature, width, grade, slope, and the position of side drains or ditches. *See Turner*, 2006-Ohio-6168, at 4, Appx. at A-9. Only the eighth factor, proximity of the pole to the road, asks about the location of the pole—the only one of the eight factors within the utility company's control.

B. The Ohio General Assembly Has Properly Balanced The Competing Duties And Burdens, And Any Change In That Balance Should Be Left To The General Assembly.

The Ohio General Assembly long ago made the public policy judgment that because public utilities serve an important and unique public function, they should be afforded the opportunity to use public space to locate their facilities. Utility companies make use of such public road right-of-way for their pole placements for several reasons.

First, because a utility company does not need to pay for a private easement where it makes use of such right-of-way, utility delivery costs—and therefore ultimately, consumer costs—are minimized.

Second, where public road right-of-way is used, permission to use such space often exists on a blanket basis, without the need for specific grants. By contrast, where private easements are necessary, the utility company must identify the interest holder, and negotiate and obtain an easement, on a pole-by-pole basis.

Third, it can be presumed that even in those circumstances where a consumer-landowner is willing to accept compensation for and transfer a utility easement voluntarily, those consumer-landowners would prefer that utility facilities not be placed on their property.

Fourth, where the consumer-landowner is unwilling to convey an easement voluntarily, the utility must initiate eminent domain proceedings. While public utilities enjoy the right of

eminent domain under Ohio law, they are reluctant to exercise that right any more frequently than is necessary. Among other things, eminent domain proceedings place the utility company in an adversarial relationship with those whom it serves—who, in South Central's case, are its owners. Moreover, as this Court is well aware, popular opposition to eminent domain is both strong and growing. Finally, eminent domain proceedings consume valuable time and resources, and can delay the commencement of necessary utility service to business and residential users.

This Court ought not second-guess the Ohio General Assembly's sound and well-settled policy judgment, which has been relied upon by Ohio utilities for generations, that utility facilities belong in the right-of-way of this state's public roads.

C. The Practical Consequences Of The Decision Below Would Be Significant.

Absent reversal, the practical effect of the decision in this case upon utility companies will be significant. As the several amicus parties have explained, and as is self-evident, under the new rule of law announced by the court of appeals in this case, just about every pole placement can now be second-guessed, in the event of an automobile pole collision.

As the amicus parties have explained, if the decision of the court of appeals were to become Ohio law, Ohio utilities would be confronted with two unattractive options. The first option would be to inspect their entire systems, at a cost of many millions of dollars, and where necessary under the new eight-factor test, reengineer their systems to relocate poles to different locations within the right-of-way, or onto private property. This option would be extraordinarily expensive. Moreover, given the breathtaking scope of the appeals court's rule, the most prudent course would be to abandon altogether right-of-way for pole placements in Ohio, and retrench to private property, where liability does not attach. But even beyond the political and economic costs of such an approach, a move to private easements would present significant practical challenges on an ongoing basis. For example, utilities would be forced to manage and maintain

their pole inventory amidst a patchwork of hundreds of thousands of individually negotiated easements, each potentially with its own terms.

The only other option for Ohio utilities, in a post-*Turner* world, would be to maintain the status quo—meaning that every pole placement could be challenged after the fact in the event that an automobile loses control, leaves the traveled and improved roadway, and strikes a utility pole.

This is not a mere abstract question. In 2005, the most recent year for which statistics are available, there were 3,710 injury accidents involving utility poles, 90 of which were fatal; and another 5,255 pole collisions causing property damage but not injury. Ohio Dept. of Public Safety, Ohio Traffic Crash Facts 2005, Table 5.25 (April 1, 2006). That's nearly 9,000 pole accidents annually, and now in each and every one of those, the pole placement could be questioned, if *Turner* becomes the law of this state. Given the number of utility poles in this state—almost every one of them installed in the seven decades since the Court last considered this issue, and while the law has developed in the direction opposite *Turner*—and given the number of pole collisions each year, any change in the law of that magnitude should fall upon the legislature, and not this Court.

X. A Number Of Other States Have Adopted The Law Which South Central Urges This Court To Adopt.

In departing from seventy years of Ohio jurisprudence, the Eighth District Court of Appeals ignored all of the Ohio authority upon which South Central relied (with the exception of the case in which the pole was most distant from the road) and instead looked to the law of four other states. *See Turner*, 2006-Ohio-6168, at 8, Appx. at A-13. While those four states have reached a different conclusion than South Central urges this Court to reach, there are as many states which have recognized the same principles which South Central advocates.

A. Georgia: *Southern Bell Telephone & Telegraph Co. v. Martin* (Ga. 1972), 194 S.E.2d 910

In *Martin*, the Supreme Court of Georgia reversed the appeals court and reimposed summary judgment in favor of the utility company in a pole-collision personal injury action. The court held that a utility which has placed its facilities pursuant to local authorization cannot be held liable as a matter of law:

> The owner of a telephone pole is not liable for its alleged negligent placement in a public road right of way where such pole is located with the approval of the county or municipal authorities and does not obstruct or interfere with the ordinary use of the public highway.

Id. at 912. The pertinent Georgia code section provided:

> "that the posts, arms, insulators, and other fixtures of such lines be so erected, placed, and maintained as not to obstruct or interfere with the ordinary use of such . . . public highways . . ."

Id. Construing that language, the court concluded that "if the vehicle in which the plaintiff was riding had remained on the paved portion of the road and within the curb, it would not have struck the pole." *Id.* This Court should likewise draw the line where those who design roads place it: at the edge of the traveled way.

B. Kansas: *Payne v. Kansas Gas And Electric Co.* (Kan. 1933), 26 P.2d 255

In *Payne*, the pole at issue was "about sixteen inches east from the curb" at a jog in the road, in the space between the edge of the pavement and the adjacent sidewalk. *Id.* at 256. As in Georgia, key to the Kansas Supreme Court's decision was the fact that the pole was in an area not intended or used for travel:

> The cases cited by plaintiff concerning the placing of poles *in that part of the street designed and used for vehicular traffic* are not applicable to the case we have. As already remarked, it is not claimed that the city was liable in authorizing or permitting the defendant to place its poles in the parkway, and likewise the defendant cannot be held liable for availing itself of the permission to set the pole outside of the *traveled way*.

Id. at 257 (emphasis added).

C. Kentucky: *Southern Bell Telephone & Telegraph Co. v. Edwards* (Ky. App. 1934), 70 S.W.2d 1

The Court of Appeals of Kentucky, in *Edwards*, took the same approach as did the Ohio First Appellate District in *Ferguson, supra*. In *Edwards*, the plaintiff was standing on the running board of a milk truck. *Id.* at 1. The pole in question was somewhere between three inches and nine inches from the outer edge of the curb of the road. *Id.* at 2. As in *Ferguson*, the pole leaned toward the road; indeed, "a plumb line dropped from the edge of the pole nearest the curb 6 feet from the ground would fall on the curb about one inch from the outer edge thereof." *Id.* The plaintiff was injured as the milk truck passed the pole; at the time, the truck's tires were entirely on the pavement. *Id.* The court distilled the controlling proposition of law in Kentucky to be whether "the pole alleged to have caused the injuries was erected and maintained upon or so near the highway as to interfere with or obstruct the ordinary use thereof by the traveling public." *Id.* at 3. Noting that "appellee's head and body projected several inches beyond the traveled portion of the street," the court held that "[t]his was not an ordinary use of the highway," and explained further that "none of the cases relied upon by appellee would indicate a right of recovery where the vehicle in or upon which the injured person was riding or his body projects beyond the edge of the highway and thereby comes in contact with a telephone pole." *Id.*

D. Missouri: *Clinkenbeard v. City of St. Joseph* (Mo. 1928), 10 S.W.2d 54

In *Clinkenbeard*, the Supreme Court of Missouri, like the long line of Ohio appellate courts which have considered the question, found dispositive the fact that the pole was off the traveled and improved portion of the roadway:

> We are of opinion that neither of the defendants herein is chargeable with actionable negligence in the maintenance of the parkway, or its incidents,

> including the pole in question, which were entirely and wholly outside of the traveled and improved roadway of Ashland Boulevard set aside and designated by the defendant city for ordinary vehicular travel and use of the public.

Id. at 62. As the court explained, the pole "was not erected and maintained so close to the traveled and improved vehicular roadway as to endanger any one using such traveled and improved portion of the street in the ordinary manner and for the purpose for which such roadway was intended and improved." *Id.* In explaining its conclusion, the court also noted that the pole had been placed there with the local municipality's permission and acquiescence, and that the placement of the pole was "for a necessary public use and service." *Id.* at 63; *see also Baker v. Empire District Elec. Co.* (Mo.App. 2000), 24 S.W.3d 255, 259-264 (summarizing applicable Missouri law since *Clinkenbeard*).

E. North Carolina: *Shapiro v. Toyota Motor Co., Ltd.* (N.C. App. 1978), 248 S.E.2d 868

The North Carolina case of *Shapiro v. Toyota Motor Co., Ltd.* is perhaps most factually analogous to this case, and in its conclusion most closely aligned with the propositions of law which South Central asks this Court to adopt. In *Shapiro*, the plaintiff sued the local telephone company, among others, alleging negligence in the location of the pole along a curve in the road. The court of appeals sustained the summary judgment entered in favor of the utility company and the municipality. The court explained that the motorist "failed to negotiate the curve and crashed into the telephone pole located twelve and one-half inches (12 1/2") beyond the elevated curbing forming the southern edge of the eastbound lane of travel." *Id.* at 871. The court concluded that "the pole would not have been struck had the Toyota been operated in a proper manner," and therefore "maintenance of the pole did not constitute an act of negligence." *Id.* Explaining and applying an earlier North Carolina Supreme Court decision, the *Shapiro* court explained that prior holding as follows:

> In effect, the Court held that the maintenance of a utility pole along a public highway does not constitute an act of negligence unless the pole constitutes a hazard to motorists using the portion of the highway designated and intended for vehicular travel in a *proper manner*.

Id. (emphasis in original) (applying *Wood v. Carolina Tel. & Tel. Co.* (N.C. 1948), 46 S.E.2d 717). The *Shapiro* court got the analysis just right: An out-of-control vehicle which has left the roadway is not using the roadway in a proper manner. This Court should likewise place the duty upon the driver to follow the law and remain on the road, and not upon the utility to anticipate and engineer for all those who are drunk, asleep, speeding, disoriented, or otherwise out of control and unlawfully leave the roadway, as Mr. Hittle did in this case.

XI. The Court Of Appeals Improperly Relied Upon Evidence Outside The Record.

Among the purported facts relied upon by the court of appeals in reaching the result in this case were that "there had been previous crashes along this section of the roadway involving a utility pole or fixed object; [and that] a nearby property owner was aware of at least six collisions involving this particular pole occuring during 2002-2003." *Turner*, 2006-Ohio-6168, at 9, Appx. at A-14. As for the suggestion that there had been other crashes along this section of roadway, that claim seems to derive from page 7 of Plaintiff's opening brief in the court below, and in turn from this one sentence in an expert report submitted by Plaintiff: "In fact, since 1990 there have been more than 28 accidents where vehicles ran off of SR-188 in Fairfield County just north of Lancaster, Ohio." (Crawford Aff., Exh. 1, at 6, ¶ 7; Supp. at 13.) However, Plaintiff never introduced any non-hearsay evidence of those alleged accidents, or what "just north" meant, or how many miles from the utility pole in question those accidents occurred, or whether any of those accidents involved utility poles, or any other details about those accidents. Simply put, the record is vacant on this particular "fact" upon which the appeals court relied. As for the purported testimony concerning other alleged accidents at that pole in particular, such testimony

was first submitted *after* the trial court granted summary judgment, and the trial court properly rejected that evidence for reasons both procedural and substantive:

> In this instance, Plaintiff Turner seeks relief under subsection (B)(2), the "newly discovered evidence" prong of Civ. R. 60. In particular, Plaintiff asserts that the deposition testimony of Mr. Daniel Ochs — concerning previous motor vehicle accidents on that portion of State Route 188 — could not have been obtained until November 28, 2005. However, given that the accident in question occurred in September of 2003, and that Mr. Ochs testified in his deposition that, shortly after the death of Robert Turner, Plaintiff Lorri Turner spoke with him directly on three separate occasions, along with the fact that Mr. Ochs has owned the property across from the accident scene for nearly fifty years, the Court finds that, by due diligence, Plaintiff could have certainly discovered this evidence well before this Court's consideration of Defendants' motions for summary judgment. As Plaintiff cannot satisfy the second of the *GTE* requirements, the Court hereby denies her motion for relief from judgment.
>
> Moreover, even if this Court were to consider Mr. Ochs's testimony as newly-discovered evidence, it is clear that it is irrelevant to the issue *sub judice*. According to the transcript of Mr. Ochs's deposition, there were three accidents along that portion of State Route 188 for which he has a "specific recollection." One of these incidents involved an intoxicated driver striking the pole while traveling State Route 188 at night. The second concerned a motorist who fell asleep at the wheel before hitting the utility pole. Lastly, the third accident appears to have gone unreported, and Mr. Ochs could not recall any damage to the utility pole.

Turner v. Ohio Bell Tel. Co. (Dec. 22, 2005), Cuyahoga C.P. No. 555394, Memorandum of Opinion and Order, at 1-2 (footnote omitted), Appx. at A-66 – A-67. Because the court of appeals relied upon evidence outside the record, its judgment should be reversed.

XII. The Pole Placement Does Not Constitute A Qualified Nuisance.

In addition to reversing the defense summary judgment on negligence, the court below also reversed on the qualified nuisance claim. A qualified nuisance is premised upon negligence. Absent a predicate finding of negligence, there can be no finding that a defendant maintained a qualified nuisance. *Metzger v. Pennsylvania, Ohio & Detroit RR. Co.* (1946), 146 Ohio St. 406, 32 O.O. 450, 66 N.E.2d 203, paragraph one of the syllabus; *see also Curtis v. State of Ohio, Ohio State Univ.* (1986), 29 Ohio App.3d 297, 301, 29 Ohio B. Rep. 363, 504 N.E.2d 1222; *accord*

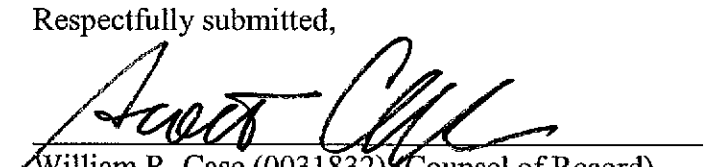
City of Cincinnati v. Beretta U.S.A. Corp. (2001), 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, ¶¶ 15-16.

Appellee was not entitled to relief against South Central for negligence because the utility pole in question was not located in the traveled portion of the road; the driver of the vehicle was not properly using the road when he ran off the road and hit the utility pole; and the location of the utility pole was not the proximate cause of the accident. Because without negligence there can be no showing of a qualified nuisance, the appeals court's judgment as to Appellee's qualified nuisance claim should also be reversed.

CONCLUSION

For all of the foregoing reasons, the judgment of the Cuyahoga County Court of Appeals should be reversed.

Respectfully submitted,



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The undersigned certifies that a copy of the foregoing, *Merit Brief Of Appellant South Central Power Company*, was served upon the following by regular U.S. mail, postage pre-paid, on May 21, 2007:

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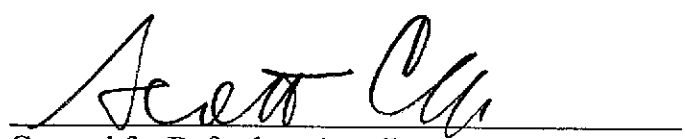

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IN THE SUPREME COURT OF OHIO

LORRI TURNER, ADMINISTRATRIX, ETC.,	:	**07-0035**
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.	:	

NOTICE OF APPEAL OF APPELLANT SOUTH CENTRAL POWER COMPANY

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FILED
JAN 08 2007
MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT SOUTH CENTRAL POWER COMPANY

Appellant South Central Power Company 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 is one of public or great general interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing, *Notice of Appeal of Appellant South Central Power Company*, was served upon the following by regular U.S. mail, postage pre-paid, on January 8, 2007:

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DEC - 4 2006

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87541

LORRI TURNER, ADMINISTRATRIX, ETC.

PLAINTIFF-APPELLANT

vs.

OHIO BELL TELEPHONE COMPANY, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-555394

BEFORE: Gallagher, J., Sweeney, P.J., and McMonagle, J.

RELEASED: November 22, 2006

CA05087541 42716160

JOURNALIZED: DEC - 4 2006

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FILED A... ...LIZED
PER APP. R. 22(E)

DEC -4 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY_____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_____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.

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

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

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

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

"I. The trial court erred in granting defendant-appellees' motions for summary judgment."

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

Turner argues that the issue of whether the utility pole in question "incommodes" 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

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imposed where the placement of a pole in close proximity to the edge of a roadway constitutes a foreseeable and unreasonable risk of harm to users of the roadway. *Boteler v. Rivera* (LA App. 1997), 700 So.2d 913 (finding location of utility pole three feet, and less than a car's width, from the road's edge poses an unreasonable risk of harm to users of the road); *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;

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

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

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

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

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

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

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

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

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

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

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

However, we find summary judgment was properly granted on the claims for absolute nuisance and negligence per se. The facts of this case do not support an absolute nuisance claim. The Ohio Supreme Court has stated, "[a]n absolute nuisance is based on either intentional conduct or an abnormally dangerous condition that cannot be maintained without injury to property, no matter what care is taken." *State ex rel. R.T.G., Inc.*, 90 Ohio St.3d at 13. Here, there is no evidence that the placement or maintenance of a utility pole within a right of way is so abnormally dangerous that it cannot ever be performed safely.[1]

---

[1] The Ohio Supreme Court has also stated that an absolute nuisance "consists of either a culpable and intentional act resulting in harm, or an act involving culpable and unlawful conduct causing unintentional harm, or a nonculpable act resulting in accidental harm, for which, because of the hazards involved, absolute liability attaches notwithstanding the absence of fault." *Metzger*, 146 Ohio St. 406, at paragraph one of the syllabus. Here again, we do not find the facts of this case support a claim for absolute nuisance.

Turner's negligence per se claim is based on R.C. 4931.01, a statute that was repealed in 1999.[2] That statute included a duty that a utility company constructing posts along public roads do so in a manner "not to incommode the public in the use of the roads or highways." Because the duty "not to incommode the public" is a general, abstract description of a duty, negligence per se has no application, and the elements of negligence must be proved in order to prevail. See *Sikora v. Wenzel*, 88 Ohio St.3d 493, 395, 2000-Ohio-406; *Mussivand v. David* (1989), 45 Ohio St.3d 314, 319.

Turner's sole assignment of error is sustained in part and overruled in part. We affirm on the claims of negligence per se and absolute nuisance. We reverse on the claims of negligence and qualified nuisance.

This cause is affirmed in part, reversed in part and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellees share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

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

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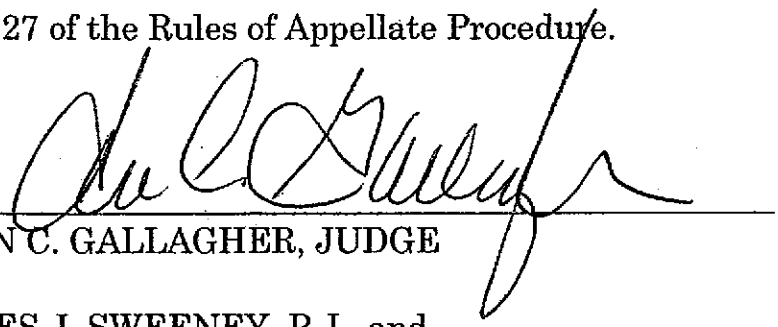
A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



SEAN C. GALLAGHER, JUDGE

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

IN THE SUPREME COURT OF OHIO

LORRI TURNER, ADMINISTRATRIX, ETC.,	:	07-0112
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.	:	

NOTICE OF APPELLANT SOUTH CENTRAL POWER COMPANY OF CERTIFIED CONFLICT

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FILED
JAN 22 2007
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

NOTICE OF APPELLANT SOUTH CENTRAL POWER COMPANY OF CERTIFIED CONFLICT

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

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

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

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

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

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

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

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

- Whether a utility pole which is located beyond both the paved portion and the berm of a public roadway, *in an area not intended or used for travel,* constitutes a danger or obstruction to those properly using the roadway.

- Whether a utility company lawfully placing its facilities within a public road right-of-way, beyond the pavement and berm, *in an area not intended or used for travel,* owes any duty to motorists who leave the roadway.

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

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

> First Proposition of Law: As a matter of law, a utility pole which is located within the public road right-of-way, beyond both the paved portion and berm of the roadway, *in an area not intended or used for travel,* does not constitute a danger or obstruction to those properly using the roadway, and therefore a utility company whose pole is struck by a vehicle cannot be held liable in negligence or nuisance for the placement of its pole within such space.
>
> Second Proposition of Law: A utility company which lawfully places its facilities within a public road right-of-way, beyond the pavement and berm, *in an area not*

> *intended or used for travel*, owes no duty, in tort, nuisance, or otherwise, to motorists who leave the roadway.

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

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

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

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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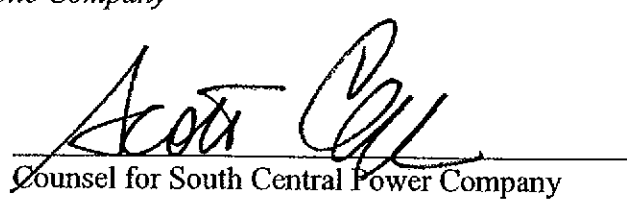

Counsel for South Central Power Company

533168.1

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.

RECEIVED FOR FILING

JAN 12 2007

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

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

Presiding Judge JAMES J. SWEENEY, Concurs

Judge CHRISTINE T. MCMONAGLE, Concurs

Judge SEAN C. GALLAGHER

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

LORRI TURNER, ADMINISTRATRIX, ETC.

Appellant

COA NO. 87541 | LOWER COURT NO. CP CV-555394

COMMON PLEAS COURT

-vs-

OHIO BELL TELEPHONE COMPANY, ET AL.

Appellee

MOTION NO. 391245

Date 01/12/2007

Journal Entry

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

RECEIVED FOR FILING

JAN 12 2007

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

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

Presiding Judge JAMES J. SWEENEY, Concurs

Judge CHRISTINE T. MCMONAGLE, Concurs

Judge SEAN C. GALLAGHER

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

Journal Entry

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.* (9th Dist. Sep. 27, 1995), Summit App. No. 17097; *Neiderbrach v. Dayton Power and Light Co.* (2nd Dist. 1994), 94 Ohio App.3d 334; *Ferguson v. Cincinnati Gas & Electric*

Co. (1st Dist. 1990), 69 Ohio App.3d 460; *Crank v. The Ohio Postal Telegraph-Cable Co. v. Yant* (5th Dist. Apr. 8, 1940), 64 Ohio App. 189.[1] 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 OF APPEALS
BY _____ DEP.

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

[1] Although appellees cite additional cases, we cite to the most recent case appellees rely upon from each district.

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87541

LORRI TURNER, ADMINISTRATRIX, ETC.

PLAINTIFF-APPELLANT

vs.

OHIO BELL TELEPHONE COMPANY, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-555394

BEFORE: Gallagher, J., Sweeney, P.J., and McMonagle, J.

RELEASED: November 22, 2006

CA05087541 42716160

JOURNALIZED: DEC - 4 2006

625 0396

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FILED A... ...LIZED
PER APP. R. 22(E)

DEC -4 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY_____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_____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

0625 0397

SEAN C. GALLAGHER, J.:

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

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

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

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

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

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

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

"I. The trial court erred in granting defendant-appellees' motions for summary judgment."

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

Turner argues that the issue of whether the utility pole in question "incommodes" 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. *Vigreaux*, 535 So.2d at 519-520; *Scheel*, 312 A.2d at 47.

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

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

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

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

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

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

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

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

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

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

However, we find summary judgment was properly granted on the claims for absolute nuisance and negligence per se. The facts of this case do not support an absolute nuisance claim. The Ohio Supreme Court has stated, "[a]n absolute nuisance is based on either intentional conduct or an abnormally dangerous condition that cannot be maintained without injury to property, no matter what care is taken." *State ex rel. R.T.G., Inc.*, 90 Ohio St.3d at 13. Here, there is no evidence that the placement or maintenance of a utility pole within a right of way is so abnormally dangerous that it cannot ever be performed safely.[1]

---

[1] The Ohio Supreme Court has also stated that an absolute nuisance "consists of either a culpable and intentional act resulting in harm, or an act involving culpable and unlawful conduct causing unintentional harm, or a nonculpable act resulting in accidental harm, for which, because of the hazards involved, absolute liability attaches notwithstanding the absence of fault." *Metzger*, 146 Ohio St. 406, at paragraph one of the syllabus. Here again, we do not find the facts of this case support a claim for absolute nuisance.

Turner's negligence per se claim is based on R.C. 4931.01, a statute that was repealed in 1999.[2] That statute included a duty that a utility company constructing posts along public roads do so in a manner "not to incommode the public in the use of the roads or highways." Because the duty "not to incommode the public" is a general, abstract description of a duty, negligence per se has no application, and the elements of negligence must be proved in order to prevail. See *Sikora v. Wenzel*, 88 Ohio St.3d 493, 395, 2000-Ohio-406; *Mussivand v. David* (1989), 45 Ohio St.3d 314, 319.

Turner's sole assignment of error is sustained in part and overruled in part. We affirm on the claims of negligence per se and absolute nuisance. We reverse on the claims of negligence and qualified nuisance.

This cause is affirmed in part, reversed in part and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellees share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

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

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

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

LEXSEE

Positive
As of: Jan 16, 2007

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

No. C-890617

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

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

September 19, 1990, Decided
September 19, 1990, Filed

PRIOR HISTORY: [***1]

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

DISPOSITION:

Judgment affirmed.

COUNSEL:

Gerald Nuckols, for appellants.

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

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

JUDGES:

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

OPINION BY:

PER CURIAM

OPINION:

[*462] [**1333] Plaintiff-appellant, Carmaletha Ferguson, appeals from the trial court's order granting summary judgment against her on her claim alleging that defendants-appellees, Southwest Ohio Regional Transit Authority ("SORTA") and Cincinnati Gas & Electric Company ("CG & E"), negligently caused her to sustain personal injuries. The substance of her single assignment of error is that, despite the trial court's finding that she assumed the risk, plaintiff was entitled to have her negligence compared to the defendants' negligence as provided by R.C. 2315.19. The assignment of error is not well taken.

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

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

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

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

[**1334] By contrast, implied assumption of the risk involves a plaintiff who consents to or acquiesces in an appreciated, known, or obvious risk to his safety. *Wever v. Hicks* (1967), 11 Ohio St.2d 230, 40 O.O.2d 203, 228 N.E.2d 315. An example is an injury suffered by a plaintiff diving into a swimming pool. See *Stanton v. Miller, supra.* Under these circumstances, the pool owner or the manufacturer owes a duty of reasonable care because its negligence created the risks by implication. *Collier v. Northland Swim* [*463] *Club, supra.* See Woods, Comparative Fault (2 Ed.1987) 134-135, Section [***4] 6.1; Prosser, Law of Torts (4 Ed.1971) 440, fn. 10. Unlike the absolute bar to liability under primary assumption of the risk, the Supreme Court has merged the defense of implied assumption of the risk with the defense of contributory negligence, thereby requiring it to be compared by the trier of the facts with the defendant's negligence. See R.C. 2315.19; *Anderson v. Ceccardi* (1983), 6 Ohio St.3d 110, 6 OBR 170, 451 N.E.2d 780.

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

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

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

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

The judgment of the trial court is affirmed.

Judgment affirmed.

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

LEXSEE

Positive
As of: Jan 16, 2007

NEIDERBRACH, Admr., Appellant, v. DAYTON POWER AND LIGHT COMPANY et al., Appellees

No. 93-CA-12

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

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

April 13, 1994, Decided

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

DISPOSITION:

Judgment affirmed.

COUNSEL:

Craig Denmead and *Deborah A. Bonarrigo*, for appellant.

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

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

JUDGES:

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

OPINION BY:

BROGAN

OPINION:

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

Appellant alleges that on or about December 9, 1989 at approximately 10:00 p.m., decedent was driving his 1987 Chevrolet Blazer west on Brown Road in Miami County. Siler's automobile skidded off the road and violently struck a utility pole, which is owned, maintained and controlled by DP & L. The utility pole is approximately sixteen feet, three inches from the edge of Brown Road. It was installed at its present location in 1947. The complaint further alleged that as a sole result of the collision with the utility pole, [***2] Siler suffered severe head injuries and multiple trauma, which eventually resulted in his death on June 24, 1990. A blood-alcohol test performed on the decedent following the accident revealed 0.224 percent alcohol by weight.

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

In its motion for summary judgment, DP & L argued that the distance of the utility pole from the edge of Brown Road warranted judgment in its favor based upon R.C. 4931.01, as expanded by R.C. 4933.14. The trial court granted summary judgment to the defendants without elaboration.

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

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

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

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

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

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

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

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

Appellees assert that *Manufacturer's* does not mandate a reversal of the trial court's judgment in this case. Appellees argue that R.C. 4931.01 and 4933.14 essentially grant licenses to utility companies to erect structures along public highways so long as they do not "incommode" the public in the use of those highways.

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

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

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

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

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

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

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

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

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

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

"It is significant that the statute uses the word 'use.' To our notion, the traveling public has no superior right to misuse the highways. * * *

"It seems crystal clear that the traveling public has no right to drive upon that portion of a public highway which is not dedicated, improved and made passable for vehicular use. To accord him preeminence is to deny the statutory right of occupancy given to public utilities, and to withhold from public authority the right to regular public thoroughfares. We grant that emergencies may arise where such use is permissive. But we do not recognize any such unqualified superior right to a negligent traveler who abuses his privilege." Id. at 192-193, 18 O.O. at 58-59, [***9] 28 N.E.2d at 647.

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

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

Appellant argues that summary judgment should not have been granted to DP & L because it failed to meet certain standards of the United States Department of Transportation in its placement of the utility pole in question alongside Brown Road. Specifically, appellant refers to Highway Safety Program Guideline No. 12 and the Highway Safety Program Manual issued by the United States Department of Transportation.

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

"Highway Design, Construction and Maintenance

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

"* * *

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

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

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

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

"*VI. CRASH SURVIVABILITY*

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

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

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

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

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

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

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

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

"GENERAL CONSIDERATIONS

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

"*Location*

"* * *

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

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

"*OVERHEAD POWER AND COMMUNICATION LINES*

"*Location*

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

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

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

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

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

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

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

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

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

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

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

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

[*343] Last, appellant argues that DP & L had an obligation to relocate its utility pole erected in 1947 to meet the requirements of the [***17] Ohio Department of Transportation Location and Design Manual ("ODOT Manual"). The ODOT Manual provides that "in all cases, the preferred alternative is to keep the entire Design Clear Zone free of fixed objects wherever economically feasible." Appellant argues the "design clear zone" must mean the same as "clear zone" in the AASHTO Guide.

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

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

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

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

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

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

Judgment affirmed.

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

LEXSEE

Cited
As of: Jan 16, 2007

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

[NO NUMBER IN ORIGINAL]

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

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

April 8, 1940, Decided

DISPOSITION: [***1]

Judgment reversed.

SYLLABUS:

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

COUNSEL:

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

Mr. T. B. Mateer, for appellees.

JUDGES:

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

OPINION BY:

SHERICK

OPINION:

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

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

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

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

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

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

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

We are cognizant of the admonition that the syllabus of a case is only the law in so far as it pertains to the facts of the case. We, therefore, feel at liberty to consider [*192] our facts, and the law applicable, as one of first impression. The same view is taken with respect to the construction to be placed upon [***6] that portion of Section 9170, General Code, which recites, "but shall not incommode the public in the use thereof." If the traveling public has a right of user of the entire highway, then, as pointed out by Judge Matthias, some public body has the duty cast upon it of making and keeping it fit for public travel. Surely, such was never intended. If the rule of the *Harrington case, supra*, is extendable to objects clearly without the roadway and not in close proximity to the improved portion, then guard and bridge rails, trees, roads and railway signs of all descriptions, mail boxes, road-lighting poles, plantings for esthetic purposes, parked cars, hydrants and numerous other appliances are obstructions which "incommode the public in the use thereof." If this be the law, then the responsible public body or individual acts, or fails to act, at its, or his, peril.

It is significant that the statute uses the word "use." To our notion, the traveling public has no superior right to misuse the highways. It is inconceivable that a traveler may destroy warning signs placed thereon for his protection and safety, or that, under a claim of superior right, one may negligently or wantonly [***7] drive through and ruin costly shrubbery placed along roads for their beautification.

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

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

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

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

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

It seems crystal clear that the traveling public has no right to drive upon that portion of a public highway which is not dedicated, improved and made passable for vehicular use. To accord him preeminence is to deny the statutory right of occupancy given to public utilities, and to withhold from public authority the right to regulate public thoroughfares. We grant that emergencies may arise where such use is permissive. But we do not recognize any such unqualified superior right to a negligent [***9] traveler who abuses his privilege.

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

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

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

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

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

Judgment reversed.

LEXSEE

Positive
As of: Jan 16, 2007

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

C.A. NO. 17097

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

1995 Ohio App. LEXIS 4343

September 27, 1995, Decided
September 27, 1995, Filed

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

PRIOR HISTORY:

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

DISPOSITION:

Judgment affirmed.

COUNSEL:

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

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

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

OPINION BY: LYNN C. SLABY

OPINION:

DECISION AND JOURNAL ENTRY

Dated: September 27, 1995

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

SLABY, Judge.

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

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

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

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

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

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

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

Assignment of Error

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

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

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

"(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party."

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

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

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

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

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

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

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

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

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

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

We find that the trial court did not err by granting GTE's motion for summary judgment. The cases discussed above indicate that a utility company's duty under R.C. 4931.01 is not triggered if the company places a pole alongside a roadway, but not on or immediately adjacent to the portion that is improved for travel. GTE's pole was located on the median strip, which was not improved for travel. It was situated no less than eleven feet from the improved roadway. The location of the pole did not affect the public's travel on the road. We conclude that GTE's duty to not incommode the public in its use of State Route 21 was not implicated by its placement of the pole. Because no duty existed, Jocek's negligence claim fails as a matter of law.

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

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

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

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

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

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

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

In Neiderbrach, 94 Ohio App.3d at 342, the court recognized that the AASHTO guidelines are not mandatory. We believe this conclusion to be correct. The guidelines are phrased in aspirational rather than mandatory language. We, therefore, reject Jocek's argument as it relates to the AASHTO guidelines.

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

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

Judgment affirmed.

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

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

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

Costs taxed to Appellant.

Exceptions.

LYNN C. SLABY

FOR THE COURT

BAIRD, P.J.
MAHONEY, J.
CONCUR

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

THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

LORRI TURNER, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF ROBERT W. TURNER, DECEASED Plaintiff	CASE NUMBER 555394 JUDGE STUART A. FRIEDMAN MEMORANDUM OF OPINION AND ORDER
vs.	
THE OHIO BELL TELEPHONE COMPANY, ET AL. Defendants	

FRIEDMAN, J:

{¶1} The Court has before it for consideration the motion of Defendant The Ohio Bell Telephone Company, d/b/a SBC Ohio for summary judgment (filed September 30, 2005), the motion of Defendant South Central Power Company for summary judgment (filed September 30, 2005), and Plaintiff's brief in opposition (filed November 9, 2005)[1]. Upon a careful review of the motions and brief submitted in this matter, the Court hereby grants summary judgment in favor of Defendants The Ohio Bell Company, d/b/a SBC Ohio and South Central Power Company.

{¶2} The following facts are undisputed. 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, due to 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

[1] The Court granted Plaintiff until November 9, 2005 to file briefs in opposition to the motions for summary judgment.

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.

{¶3} 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 is 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.

{¶4} Pursuant to *Dresher v. Burt* (1996), 75 Ohio St.3d 280, a party moving for summary judgment cannot simply allege that the nonmoving party has no set of facts to prove its case; rather, it must point to specific portions of the record for support. *Id.* at 293. Once this burden is satisfied, the nonmoving party must set forth specific facts showing that there is an issue for trial, and "if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." *Id. See also Whiteleather v. Yosowitz* (Cuyahoga Cty. App. 1983), 10 Ohio App.3d 272 (The nonmoving party bears no burden of proof unless the moving party submits evidence that refutes the nonmoving party's claim; once such evidence is before the Court, the nonmoving party has the burden to present rebuttal evidence.) This is not a simple or mechanical task. The United States Supreme Court has established that in order to create a genuine issue of material fact the non-moving party must go beyond simply presenting some evidence, stating:

> There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the [non-moving party's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted.
>
> *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 249-250.

{¶5} This Court will first address Plaintiff's negligence and negligence *per se* claims. In order to prevail on her negligence cause of action, Plaintiff Turner must demonstrate the following: (1) that Defendants owed a duty of care to Robert Turner; (2) that Defendants breached their duty of care; (3) that the breach proximately caused Robert Turner's death; and (4) that Plaintiff suffered damages. *Chambers v. St. Mary's School* (1988), 82 Ohio St.3d 563, 565, *citing Wellman v. E. Ohio Gas Co.* (1953), 160 Ohio St. 103, 108-109, *Sedar v. Knowlton Constr. Co.* (1990), 49 Ohio St.3d 193, 198, *Brennaman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460. "Typically, a duty may be established by common law, legislative enactment, or by the particular facts and circumstances of the case. Where a legislative enactment imposes a specific duty for the safety of others, failure to perform that duty is negligence *per se*." *Id., citing Eisenbuth v. Moneyhon* (1954), 161 Ohio St. 367. "Application of negligence *per se* in a tort action means that the plaintiff has conclusively established that the defendant breached the duty that he or she owed to the plaintiff. It is not a finding of liability *per se* because the plaintiff will also have to prove proximate cause and damages." *Id., citing Pond v. Leslein* (1995), 72 Ohio St.3d 50, 53.

{¶6} Under Ohio law, a utility company may erect or place utility lines and poles upon and along the public roads and highways so long as the lines and poles do not incommode the public in its use of the roads and highways. *See* Ohio Revised Code §§ 4931.01 (repealed September 29, 1999), 4931.03, and 4933.14. In addition, when a vehicle strikes a utility pole, the utility company will not be liable for resulting damages unless the pole is located on the traveled portion of the roadway or in such close proximity to the roadway as to constitute an obstruction dangerous to anyone properly using the road. *Mattucci v. The Ohio Edison Co.* (Summit Cty. App. 1946), 79 Ohio

App. 367, 369; *Neiderbach v. Dayton Power & Light Co.* (Miami Cty. App. 1994), 94 Ohio App.3d 334, 339.

{¶7} Accordingly, in this case, Defendants had a duty to place or construct the utility pole in question so as not to incommode[2] Mr. Hittle and Mr. Turner in their proper use of State Route 188. The relevant statutes, however, do not specify where the poles should be positioned. For example, the Revised Code does not outline an exact distance from the roadway's edge line or berm for the placement of a utility pole. Moreover, the Revised Code does not identify a range of distances for the location of a utility pole. In fact, the many cases cited by Plaintiff and Defendants in their briefs and motions demonstrate that utility poles are placed at varying distances from the roadway.

{¶8} Although Ohio law imposes a duty upon Defendants not to incommode the public in its use of the roads when constructing and placing utility poles, the Court is reluctant, without further specifics from the related statutes and from Plaintiff, to apply the doctrine of negligence *per se* in this instance. With respect to the remaining negligence claim, it is clear from the overwhelming case law on the matter that the placement of a utility pole by the Defendants three feet, nine inches from the roadway's edge line and two feet, five inches from the highway's berm does not incommode the public in its proper use of the traveled portion of State Route 188. In this instance, 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. *See The Ohio Postal Telegraph-Cable Co. v. Yant* (Licking Cty. App. 1940), 64 Ohio App. 189, 195; *Mattucci* (Summit Cty. App. 1946), 79 Ohio App. at 370; *Curry v. The Ohio Power Co.* (Licking Cty. App. 1980), 1980 Ohio App. LEXIS 11996, *3; *Cincinnati Gas & Electric Co. v. Bayer* (Hamilton Cty. App. 1975), 1975 Ohio App. LEXIS 6305, *8; *Crank v. Ohio Edison Co.* (Wayne Cty.

[2] Incommode is defined as to inconvenience or give distress to.

App. 1977), 1977 Ohio App. LEXIS 9020, *3; *Turowski v. Johnson* (Summit Cty. App. 1990), 68 Ohio App.3d 704, 706; *Ferguson v. Cincinnati Gas & Electric Co.* (Hamilton Cty. App. 1990), 69 Ohio App.3d 460, 463; *Neiderbrach* (Miami Cty. App. 1994), 94 Ohio App.3d at 339; *Jocek v. CTE North, Inc.* (Summit Cty. App. 1995), 1995 Ohio App. LEXIS 4343, *9. Consequently, Plaintiff cannot demonstrate a breach of Defendants' duty of care.[3] Accordingly, the Court grants summary judgment in favor of both Defendants on Plaintiff's claims of negligence and negligence *per se*.

{¶9} Regarding Plaintiff's remaining claims, in order to establish an absolute nuisance, Plaintiff must demonstrate the following: (1) a culpable and intentional act, the consequence of which necessarily results in harm, (2) an act involving culpable and unlawful conduct causing unintentional harm, or (3) a nonculpable act resulting in accidental harm, for which, because of the hazards involved, absolute liability attaches notwithstanding the absence of fault. *Metzger v. Pennsylvania, Ohio & Detroit RR Co.* (1946), 146 Ohio St. 406, syllabus; *Curtis v. State of Ohio, Ohio State University* (1986), 29 Ohio App.3d 297, 301. Moreover, to establish a claim of qualified nuisance, Plaintiff must show 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. *Metzger*, 146 Ohio St. 406, syllabus.

{¶10} Given that Plaintiff is unable to satisfy the elements of negligence in this case, as discussed above, the Court grants summary judgment in favor of Defendants on Plaintiff's qualified nuisance claim. With respect to the absolute nuisance cause of action, it is clear from the record that, by placing a utility pole three feet, nine inches from the roadway's edge line and two feet, five inches from the highway's berm, Defendants did not engage in any culpable or intentional act resulting in harm or any unlawful or culpable conduct resulting in unintentional harm. Furthermore, Plaintiff fails to establish how the location of a utility pole constitutes the type of hazard that

[3] Although this Court need not address the remaining prongs of Plaintiff's negligence claim, the Court finds that, given the actions of Mr. Hittle, the driver of the vehicle, and the facts as established in this case, Plaintiff cannot demonstrate that the utility pole was in fact the proximate cause of Mr. Turner's death.

warrants absolute liability. As noted by the *Curtis* Court, the third prong of the absolute nuisance claim focuses upon items inherently dangerous and likely to do mischief such as combustibles, blasting operations and wild animals. *Curtis*, 29 Ohio App.3d at 301. Accordingly, the Court grants summary judgment in favor of Defendants on the absolute nuisance claim.

{¶11} The Court further cancels the pre-trial scheduled in this matter for December 6, 2005 at 2:15 pm. FINAL.

IT IS SO ORDERED.

Judge Stuart A. Friedman

Dated: December 2, 2005

SERVICE

Copies of the foregoing Memorandum of Opinion and Order were sent via facsimile to all counsel of record this date: December 5, 2005

Judge Stuart A. Friedman

THE COURT OF COMMON PLEAS

CUYAHOGA COUNTY, OHIO

LORRI TURNER
Plaintiff
vs.

OHIO BELL TELEPHONE CO., ET AL.
Defendant

CASE NUMBER 555394
JUDGE STUART A. FRIEDMAN

MEMORANDUM OF OPINION AND ORDER

FRIEDMAN, J:

{¶1} The Court has before it for consideration the motion of Plaintiff Lorri Turner for relief from judgment (filed December 7, 2005) and the briefs in opposition of Defendant The Ohio Bell Telephone Company, d/b/a SBC Ohio (filed December 19, 2005) and Defendant South Central Power Company (filed December 15, 2005). Upon a careful review of the motion and briefs, along with the supplemental brief of Plaintiff (filed December 2, 2005), the Court hereby denies the motion of Plaintiff for relief from judgment.

{¶2} To prevail on a motion for relief from judgment filed pursuant to Civ. R. 60(B), the movant must demonstrate the following: (1) he has a meritorious defense or claim to present if relief is granted; (2) he is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time. *See GTE Automatic Electric, Inc. v. Arc Industries, Inc.* (1976), 47 Ohio St.2d 146, 150-151. Should the movant fail to satisfy any one of the three foregoing requirements, the trial court should deny the motion for relief from judgment. *Id.* at 151.

{¶3} In this instance, Plaintiff Turner seeks relief under subsection (B)(2), the "newly discovered evidence" prong of Civ. R. 60[1]. In particular, Plaintiff asserts that the deposition testimony of Mr. Daniel Ochs – concerning previous motor vehicle accidents on that portion of State Route 188 – could not have been obtained until November 28, 2005. However, given that the accident in question occurred in September of 2003, and that Mr. Ochs testified in his deposition that, shortly after the death of Robert Turner, Plaintiff Lorri Turner spoke with him directly on three separate occasions, along with the fact that Mr. Ochs has owned the property across from the accident scene for nearly fifty years, the Court finds that, by due diligence, Plaintiff could have certainly discovered this evidence well before this

[1] Although Plaintiff includes the text of Civ. R. 60(B)(5) – "any other reason justifying relief from judgment" – in her motion for relief from judgment, it is clear from the substance and body of the motion that Plaintiff is seeking relief solely under Civ. R. 60(B)(2), the newly discovered evidence prong.

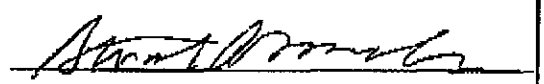
Court's consideration of Defendants' motions for summary judgment. As Plaintiff cannot satisfy the second of the *GTE* requirements, the Court hereby denies her motion for relief from judgment.

{¶4} Moreover, even if this Court were to consider Mr. Ochs's testimony as newly-discovered evidence, it is clear that it is irrelevant to the issue *sub judice*. According to the transcript of Mr. Ochs's deposition, there were three accidents along that portion of State Route 188 for which he has a "specific recollection." One of these incidents involved an intoxicated driver striking the pole while traveling State Route 188 at night. The second concerned a motorist who fell asleep at the wheel before hitting the utility pole. Lastly, the third accident appears to have gone unreported, and Mr. Ochs could not recall any damage to the utility pole. None of these incidents would have put Defendants on notice of any negligence or nuisance on their parts related to the placement or maintenance of the utility pole.

{¶5} As a final remark, the Court reiterates its findings as noted in its December 2, 2005, Memorandum of Opinion and Order that, given the actions of Mr. Hittle, the driver of the vehicle, Plaintiff cannot demonstrate that the utility pole was in fact the proximate cause of Mr. Turner's death. Accordingly, Plaintiff cannot satisfy the first of the *GTE* requirements, as she lacks a meritorious claim or defense.

{¶6} For the foregoing reasons, the Court denies the motion of Plaintiff for relief from judgment.

IT IS SO ORDERED.



Judge Stuart A. Friedman

Dated: 12/22/05

SERVICE

Copies of the foregoing Memorandum of Opinion and Order were sent via facsimile to all counsel of record this date: 12/22/05

Judge Stuart A. Friedman

ORC Ann. 4931.01

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Practitioner's Toolbox

Section Notes

*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH MAY 14, 2007 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2007 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH APRIL 18, 2007 ***

TITLE 49. PUBLIC UTILITIES
CHAPTER 4931. COMPANIES -- TELEGRAPH; TELEPHONE

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

ORC Ann. 4931.01 (2007)

§ 4931.01. Repealed

Repealed, 148 v H 283, § 2 [RS § 3461-1; 45 v 34; GC § 9180; Bureau of Code Revision, 10-1-53]. Eff 9-29-99.

Section Notes:

This section stated that telegraph lines should not incommode the public.

The effective date is set by section 163 of HB 283.

[Repealed]

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*** THIS DOCUMENT REFLECTS CHANGES RECEIVED THROUGH NOVEMBER 1, 1998 ***

TITLE XLIX [49] PUBLIC UTILITIES
CHAPTER 4931: COMPANIES -- TELEGRAPH; TELEPHONE

ORC Ann. **4931.01** (1998)

§ **4931.01** Lines shall not incommode the public.

A telegraph company or any person may construct telegraph lines upon and along any of the public roads and highways, and across any waters, within this state, by the erection of the necessary fixtures, including posts, piers, or abutments for sustaining the cords or wires of such lines. Such lines shall be constructed so as not to incommode the public in the use of the roads or highways, or endanger or injuriously interrupt the navigation of such waters. This section does not authorize the erection of a bridge across any waters of this state.

HISTORY: RS § 3461-1; 45 v 34; GC § 9180; Bureau of Code Revision. Eff 10-1-53.

ORC Ann. 4931.03

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TITLE 49. PUBLIC UTILITIES
CHAPTER 4931. COMPANIES -- TELEGRAPH; TELEPHONE

◆ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

ORC Ann. 4931.03 (2007)

§ 4931.03. Construction of telegraph or telephone lines upon, along, and beneath public roads, highways, and waters in unincorporated area of township

(A) A telegraph or telephone company may do either of the following in the unincorporated area of the township:

(1) Construct telegraph or telephone lines upon and along any of the public roads and highways and across any waters within that area by the erection of the necessary fixtures, including posts, piers, or abutments for sustaining the cords or wires of those lines. Those lines shall be constructed so as not to incommode the public in the use of the roads or highways, or endanger or injuriously interrupt the navigation of the waters.

(2) Construct telegraph or telephone lines and the fixtures necessary for containing and protecting those lines beneath the surface of any of the public roads and highways and beneath any waters within that area. Those lines shall be constructed so as not to incommode the public in the use of the roads or highways, or endanger or injuriously interrupt the navigation of the waters.

(B) (1) This section does not authorize the construction of a bridge across any waters within the state.

(2) Construction under this section is subject to section 5571.16 of the Revised Code, as applicable, and any other applicable law, including, but not limited to, any law requiring approval of the legislative authority, the county engineer, or the director of transportation.

History:

◆ 150 v H 97, § 1, eff. 10-21-2003.

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TITLE 49. PUBLIC UTILITIES
CHAPTER 4933. COMPANIES -- GAS; ELECTRIC; WATER; OTHERS

◆ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

ORC Ann. 4933.14 (2007)

THIS SECTION HAS MORE THAN ONE DOCUMENT WITH VARYING EFFECTIVE DATES.

§ 4933.14. Electric light, power, and automatic package carrier companies

(A) Except section 4931.08 of the Revised Code and except as otherwise provided in division (B) of this section, sections 4931.01 to 4931.23 and 4933.13 to 4933.16 of the Revised Code apply to a company organized for supplying public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares, and public places with electric light and power, and to an automatic package carrier. Except section 4931.08 of the Revised Code and except as otherwise provided in division (B) of this section, every such company has the powers and is subject to the restrictions prescribed for a telegraph company by sections 4931.01 to 4931.23 of the Revised Code.

(B) Sections 4931.04, 4931.06, 4931.07, 4931.12, and 4931.13 of the Revised Code apply to a company organized for supplying electricity only if the company transmits or distributes electricity, and every such company has the powers and is subject to the restrictions prescribed for a telegraph company by those sections except for the purpose of erecting, operating, or maintaining an electric generating station.

History:

RS § 3471a; 92 v 204; 84 v 7; GC § 9192; Bureau of Code Revision, 10-1-53; ◆ 148 v S 3. Eff 10-5-99.

ORC Ann. 4933.14

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TITLE 49. PUBLIC UTILITIES
CHAPTER 4933. COMPANIES -- GAS; ELECTRIC; WATER; OTHERS

◆ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

ORC Ann. 4933.14 (2007)

THIS SECTION HAS MORE THAN ONE DOCUMENT WITH VARYING EFFECTIVE DATES.

§ 4933.14. Electric light, power, and automatic package carrier companies

Sections 4931.02 to 4931.22 and 4933.13 to 4933.16 of the Revised Code apply to companies organized for supplying public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares, and public places with electric light and power, and to an automatic package carrier. Every such company shall have the powers and be subject to the restrictions prescribed for telegraph companies by sections 4931.02 to 4931.22 of the Revised Code.

History:

RS § 3471a; 92 v 204; 84 v 7; GC § 9192; Bureau of Code Revision, 10-1-53; ◆ 148 v H 283. Eff 9-29-99.

Section Notes:

The effective date is set by section 162 of HB 283.

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*** ARCHIVE MATERIAL ***

*** THIS DOCUMENT REFLECTS CHANGES RECEIVED THROUGH NOVEMBER 1, 2002 ***

TITLE XLV [45] MOTOR VEHICLES -- AERONAUTICS -- WATERCRAFT
CHAPTER 4511: TRAFFIC LAWS -- OPERATION OF MOTOR VEHICLES

ORC Ann. **4511.01** (Anderson 2003)

§ **4511.01** Definitions.

-- RC § **4511.01** is affected by Am. Sub. S.B. 123 (149 v --), effective 1-1-2004. See the 2002 Legislative Bulletin No. 4 for the version effective 1-1-2004.

As used in this chapter and in Chapter 4513. of the Revised Code:

(A) "Vehicle" means every device, including a motorized bicycle, in, upon, or by which any person or property may be transported or drawn upon a highway, except motorized wheelchairs, electric personal assistive mobility devices, devices moved by power collected from overhead electric trolley wires, or used exclusively upon stationary rails or tracks, and devices other than bicycles moved by human power.

(B) "Motor vehicle" means every vehicle propelled or drawn by power other than muscular power or power collected from overhead electric trolley wires, except motorized bicycles, road rollers, traction engines, power shovels, power cranes, and other equipment used in construction work and not designed for or employed in general highway transportation, hole-digging machinery, well-drilling machinery, ditch-digging machinery, farm machinery, trailers used to transport agricultural produce or agricultural production materials between a local place of storage or supply and the farm when drawn or towed on a street or highway at a speed of twenty-five miles per hour or less, threshing machinery, hay-baling machinery, agricultural tractors and machinery used in the production of horticultural, floricultural, agricultural, and vegetable products, and trailers designed and used exclusively to transport a boat between a place of storage and a marina, or in and around a marina, when drawn or towed on a street or highway for a distance of no more than ten miles and at a speed of twenty-five miles per hour or less.

(C) "Motorcycle" means every motor vehicle, other than a tractor, having a saddle for the use of the operator and designed to travel on not more than three wheels in contact with the ground, including, but not limited to, motor vehicles known as "motor-driven cycle," "motor scooter," or "motorcycle" without regard to weight or brake horsepower.

(D) "Emergency vehicle" means emergency vehicles of municipal, township, or county departments or public utility corporations when identified as such as required by law, the director of public safety, or local authorities, and motor vehicles when commandeered by a police officer.

(E) "Public safety vehicle" means any of the following:

(1) Ambulances, including private ambulance companies under contract to a municipal corporation, township, or county, and private ambulances and nontransport vehicles bearing license plates issued under section 4503.49 of the Revised Code;

(2) Motor vehicles used by public law enforcement officers or other persons sworn to enforce the criminal and traffic laws of the state;

(3) Any motor vehicle when properly identified as required by the director of public safety, when used in response to fire emergency calls or to provide emergency medical service to ill or injured persons, and when

operated by a duly qualified person who is a member of a volunteer rescue service or a volunteer fire department, and who is on duty pursuant to the rules or directives of that service. The state fire marshal shall be designated by the director of public safety as the certifying agency for all public safety vehicles described in division (E)(3) of this section.

(4) Vehicles used by fire departments, including motor vehicles when used by volunteer fire fighters responding to emergency calls in the fire department service when identified as required by the director of public safety.

Any vehicle used to transport or provide emergency medical service to an ill or injured person, when certified as a public safety vehicle, shall be considered a public safety vehicle when transporting an ill or injured person to a hospital regardless of whether such vehicle has already passed a hospital.

(5) Vehicles used by the commercial motor vehicle safety enforcement unit for the enforcement of orders and rules of the public utilities commission as specified in section 5503.34 of the Revised Code.

(F) "School bus" means every bus designed for carrying more than nine passengers that is owned by a public, private, or governmental agency or institution of learning and operated for the transportation of children to or from a school session or a school function, or owned by a private person and operated for compensation for the transportation of children to or from a school session or a school function, provided "school bus" does not include a bus operated by a municipally owned transportation system, a mass transit company operating exclusively within the territorial limits of a municipal corporation, or within such limits and the territorial limits of municipal corporations immediately contiguous to such municipal corporation, nor a common passenger carrier certified by the public utilities commission unless such bus is devoted exclusively to the transportation of children to and from a school session or a school function, and "school bus" does not include a van or bus used by a licensed child day-care center or type A family day-care home to transport children from the child day-care center or type A family day-care home to a school if the van or bus does not have more than fifteen children in the van or bus at any time.

(G) "Bicycle" means every device, other than a tricycle designed solely for use as a play vehicle by a child, propelled solely by human power upon which any person may ride having either two tandem wheels, or one wheel in the front and two wheels in the rear, any of which is more than fourteen inches in diameter.

(H) "Motorized bicycle" means any vehicle having either two tandem wheels or one wheel in the front and two wheels in the rear, that is capable of being pedaled and is equipped with a helper motor of not more than fifty cubic centimeters piston displacement that produces no more than one brake horsepower and is capable of propelling the vehicle at a speed of no greater than twenty miles per hour on a level surface.

(I) "Commercial tractor" means every motor vehicle having motive power designed or used for drawing other vehicles and not so constructed as to carry any load thereon, or designed or used for drawing other vehicles while carrying a portion of such other vehicles, or load thereon, or both.

(J) "Agricultural tractor" means every self-propelling vehicle designed or used for drawing other vehicles or wheeled machinery but having no provision for carrying loads independently of such other vehicles, and used principally for agricultural purposes.

(K) "Truck" means every motor vehicle, except trailers and semitrailers, designed and used to carry property.

(L) "Bus" means every motor vehicle designed for carrying more than nine passengers and used for the transportation of persons other than in a ridesharing arrangement, and every motor vehicle, automobile for hire, or funeral car, other than a taxicab or motor vehicle used in a ridesharing arrangement, designed and used for the transportation of persons for compensation.

(M) "Trailer" means every vehicle designed or used for carrying persons or property wholly on its own structure and for being drawn by a motor vehicle, including any such vehicle when formed by or operated as a combination of a "semitrailer" and a vehicle of the dolly type, such as that commonly known as a "trailer

dolly," a vehicle used to transport agricultural produce or agricultural production materials between a local place of storage or supply and the farm when drawn or towed on a street or highway at a speed greater than twenty-five miles per hour, and a vehicle designed and used exclusively to transport a boat between a place of storage and a marina, or in and around a marina, when drawn or towed on a street or highway for a distance of more than ten miles or at a speed of more than twenty-five miles per hour.

(N) "Semitrailer" means every vehicle designed or used for carrying persons or property with another and separate motor vehicle so that in operation a part of its own weight or that of its load, or both, rests upon and is carried by another vehicle.

(O) "Pole trailer" means every trailer or semitrailer attached to the towing vehicle by means of a reach, pole, or by being boomed or otherwise secured to the towing vehicle, and ordinarily used for transporting long or irregular shaped loads such as poles, pipes, or structural members capable, generally, of sustaining themselves as beams between the supporting connections.

(P) "Railroad" means a carrier of persons or property operating upon rails placed principally on a private right-of-way.

(Q) "Railroad train" means a steam engine or an electric or other motor, with or without cars coupled thereto, operated by a railroad.

(R) "Streetcar" means a car, other than a railroad train, for transporting persons or property, operated upon rails principally within a street or highway.

(S) "Trackless trolley" means every car that collects its power from overhead electric trolley wires and that is not operated upon rails or tracks.

(T) "Explosives" means any chemical compound or mechanical mixture that is intended for the purpose of producing an explosion that contains any oxidizing and combustible units or other ingredients in such proportions, quantities, or packing that an ignition by fire, by friction, by concussion, by percussion, or by a detonator of any part of the compound or mixture may cause such a sudden generation of highly heated gases that the resultant gaseous pressures are capable of producing destructive effects on contiguous objects, or of destroying life or limb. Manufactured articles shall not be held to be explosives when the individual units contain explosives in such limited quantities, of such nature, or in such packing, that it is impossible to procure a simultaneous or a destructive explosion of such units, to the injury of life, limb, or property by fire, by friction, by concussion, by percussion, or by a detonator, such as fixed ammunition for small arms, firecrackers, or safety fuse matches.

(U) "Flammable liquid" means any liquid that has a flash point of seventy degrees Fahrenheit, or less, as determined by a tagliabue or equivalent closed cup test device.

(V) "Gross weight" means the weight of a vehicle plus the weight of any load thereon.

(W) "Person" means every natural person, firm, co-partnership, association, or corporation.

(X) "Pedestrian" means any natural person afoot.

(Y) "Driver or operator" means every person who drives or is in actual physical control of a vehicle, trackless trolley, or streetcar.

(Z) "Police officer" means every officer authorized to direct or regulate traffic, or to make arrests for violations of traffic regulations.

(AA) "Local authorities" means every county, municipal, and other local board or body having authority to adopt police regulations under the constitution and laws of this state.

(BB) "Street" or "highway" means the entire width between the boundary lines of every way open to the use of the public as a thoroughfare for purposes of vehicular travel.

(CC) "Controlled-access highway" means every street or highway in respect to which owners or occupants of abutting lands and other persons have no legal right of access to or from the same except at such points only and in such manner as may be determined by the public authority having jurisdiction over such street or highway.

(DD) "Private road or driveway" means every way or place in private ownership used for vehicular travel by the owner and those having express or implied permission from the owner but not by other persons.

(EE) "Roadway" means that portion of a highway improved, designed, or ordinarily used for vehicular travel, except the berm or shoulder. If a highway includes two or more separate roadways the term "roadway" means any such roadway separately but not all such roadways collectively.

(FF) "Sidewalk" means that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, intended for the use of pedestrians.

(GG) "Laned highway" means a highway the roadway of which is divided into two or more clearly marked lanes for vehicular traffic.

(HH) "Through highway" means every street or highway as provided in section 4511.65 of the Revised Code.

(II) "State highway" means a highway under the jurisdiction of the department of transportation, outside the limits of municipal corporations, provided that the authority conferred upon the director of transportation in section 5511.01 of the Revised Code to erect state highway route markers and signs directing traffic shall not be modified by sections **4511.01** to 4511.79 and 4511.99 of the Revised Code.

(JJ) "State route" means every highway that is designated with an official state route number and so marked.

(KK) "Intersection" means:

(1) The area embraced within the prolongation or connection of the lateral curb lines, or, if none, then the lateral boundary lines of the roadways of two highways which join one another at, or approximately at, right angles, or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict.

(2) Where a highway includes two roadways thirty feet or more apart, then every crossing of each roadway of such divided highway by an intersecting highway shall be regarded as a separate intersection. If an intersecting highway also includes two roadways thirty feet or more apart, then every crossing of two roadways of such highways shall be regarded as a separate intersection.

(3) The junction of an alley with a street or highway, or with another alley, shall not constitute an intersection.

(LL) "Crosswalk" means:

(1) That part of a roadway at intersections ordinarily included within the real or projected prolongation of property lines and curb lines or, in the absence of curbs, the edges of the traversable roadway;

(2) Any portion of a roadway at an intersection or elsewhere, distinctly indicated for pedestrian crossing by lines or other markings on the surface;

(3) Notwithstanding divisions (LL)(1) and (2) of this section, there shall not be a crosswalk where local authorities have placed signs indicating no crossing.

(MM) "Safety zone" means the area or space officially set apart within a roadway for the exclusive use of pedestrians and protected or marked or indicated by adequate signs as to be plainly visible at all times.

(NN) "Business district" means the territory fronting upon a street or highway, including the street or highway, between successive intersections within municipal corporations where fifty per cent or more of the frontage between such successive intersections is occupied by buildings in use for business, or within or outside municipal corporations where fifty per cent or more of the frontage for a distance of three hundred feet or more is occupied by buildings in use for business, and the character of such territory is indicated by official traffic control devices.

(OO) "Residence district" means the territory, not comprising a business district, fronting on a street or highway, including the street or highway, where, for a distance of three hundred feet or more, the frontage is improved with residences or residences and buildings in use for business.

(PP) "Urban district" means the territory contiguous to and including any street or highway which is built up with structures devoted to business, industry, or dwelling houses situated at intervals of less than one hundred feet for a distance of a quarter of a mile or more, and the character of such territory is indicated by official traffic control devices.

(QQ) "Traffic control devices" means all flaggers, signs, signals, markings, and devices placed or erected by authority of a public body or official having jurisdiction, for the purpose of regulating, warning, or guiding traffic, including signs denoting names of streets and highways.

(RR) "Traffic control signal" means any device, whether manually, electrically, or mechanically operated, by which traffic is alternately directed to stop, to proceed, to change direction, or not to change direction.

(SS) "Railroad sign or signal" means any sign, signal, or device erected by authority of a public body or official or by a railroad and intended to give notice of the presence of railroad tracks or the approach of a railroad train.

(TT) "Traffic" means pedestrians, ridden or herded animals, vehicles, streetcars, trackless trolleys, and other devices, either singly or together, while using any highway for purposes of travel.

(UU) "Right-of-way" means either of the following, as the context requires:

(1) The right of a vehicle, streetcar, trackless trolley, or pedestrian to proceed uninterruptedly in a lawful manner in the direction in which it or the individual is moving in preference to another vehicle, streetcar, trackless trolley, or pedestrian approaching from a different direction into its or the individual's path;

(2) A general term denoting land, property, or the interest therein, usually in the configuration of a strip, acquired for or devoted to transportation purposes. When used in this context, right-of-way includes the roadway, shoulders or berm, ditch, and slopes extending to the right-of-way limits under the control of the state or local authority.

(VV) "Rural mail delivery vehicle" means every vehicle used to deliver United States mail on a rural mail delivery route.

(WW) "Funeral escort vehicle" means any motor vehicle, including a funeral hearse, while used to facilitate the movement of a funeral procession.

(XX) "Alley" means a street or highway intended to provide access to the rear or side of lots or buildings in urban districts and not intended for the purpose of through vehicular traffic, and includes any street or highway that has been declared an "alley" by the legislative authority of the municipal corporation in which such street or highway is located.

(YY) "Freeway" means a divided multi-lane highway for through traffic with all crossroads separated in grade

and with full control of access.

(ZZ) "Expressway" means a divided arterial highway for through traffic with full or partial control of access with an excess of fifty per cent of all crossroads separated in grade.

(AAA) "Thruway" means a through highway whose entire roadway is reserved for through traffic and on which roadway parking is prohibited.

(BBB) "Stop intersection" means any intersection at one or more entrances of which stop signs are erected.

(CCC) "Arterial street" means any United States or state numbered route, controlled access highway, or other major radial or circumferential street or highway designated by local authorities within their respective jurisdictions as part of a major arterial system of streets or highways.

(DDD) "Ridesharing arrangement" means the transportation of persons in a motor vehicle where such transportation is incidental to another purpose of a volunteer driver and includes ridesharing arrangements known as carpools, vanpools, and buspools.

(EEE) "Motorized wheelchair" means any self-propelled vehicle designed for, and used by, a handicapped person and that is incapable of a speed in excess of eight miles per hour.

(FFF) "Child day-care center" and "type A family day-care home" have the same meanings as in section 5104.01 of the Revised Code.

(GGG) "Multi-wheel agricultural tractor" means a type of agricultural tractor that has two or more wheels or tires on each side of one axle at the rear of the tractor, is designed or used for drawing other vehicles or wheeled machinery, has no provision for carrying loads independently of the drawn vehicles or machinery, and is used principally for agricultural purposes.

HISTORY: HISTORY

: GC § 6307-2; 119 v 766, § 2; 120 v 221; 124 v 514; Bureau of Code Revision, 10-1-53; 126 v 392(408) (Eff 3-17-55); 126 v 790 (Eff 9-14-55); 126 v 115 (Eff 10-1-56); 127 v 54 (Eff 8-27-57); 128 v 1270 (Eff 11-4-59); 129 v 1273 (Eff 10-26-61); 130 v 1068 (Eff 8-5-63); 130 v 1074 (Eff 10-10-63); 131 v 1094 (Eff 10-15-65); 132 v H 634 (Eff 11-24-67); 132 v H 380 (Eff 1-1-68); 132 v H 878 (Eff 12-14-67); 132 v S 451 (Eff 2-29-68); 135 v H 200 (Eff 9-23-73); 135 v S 108 (Eff 11-21-73); 135 v H 995 (Eff 1-1-75); 136 v H 338 (Eff 1-9-76); 136 v S 56 (Eff 5-25-76); 136 v H 235 (Eff 10-1-76); 137 v S 100 (Eff 4-1-78); 138 v S 9 (Eff 6-20-79); 139 v H 53 (Eff 7-1-82); 143 v H 258 (Eff 11-2-89); 143 v H 319 (Eff 7-2-90); 143 v S 272 (Eff 11-28-90); 143 v S 382 (Eff 12-31-90); 144 v H 485 (Eff 10-7-92); 144 v S 98 (Eff 11-12-92); 144 v H 356 (Eff 12-31-92); 146 v S 293 (Eff 9-26-96); 148 v H 484 (Eff 10-5-2000); 149 v S 231. Eff 10-24-2002.

CURRENT
EFFECTIVE 9-16-04

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH MAY 14, 2007 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2007 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH APRIL 18, 2007 ***

TITLE 45. MOTOR VEHICLES -- AERONAUTICS -- WATERCRAFT
CHAPTER 4511. TRAFFIC LAWS -- OPERATION OF MOTOR VEHICLES

◆ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

ORC Ann. 4511.01 (2007)

§ 4511.01. Definitions

As used in this chapter and in Chapter 4513. of the Revised Code:

(A) "Vehicle" means every device, including a motorized bicycle, in, upon, or by which any person or property may be transported or drawn upon a highway, except that "vehicle" does not include any motorized wheelchair, any electric personal assistive mobility device, any device that is moved by power collected from overhead electric trolley wires or that is used exclusively upon stationary rails or tracks, or any device, other than a bicycle, that is moved by human power.

(B) "Motor vehicle" means every vehicle propelled or drawn by power other than muscular power or power collected from overhead electric trolley wires, except motorized bicycles, road rollers, traction engines, power shovels, power cranes, and other equipment used in construction work and not designed for or employed in general highway transportation, hole-digging machinery, well-drilling machinery, ditch-digging machinery, farm machinery, trailers used to transport agricultural produce or agricultural production materials between a local place of storage or supply and the farm when drawn or towed on a street or highway at a speed of twenty-five miles per hour or less, threshing machinery, hay-baling machinery, agricultural tractors and machinery used in the production of horticultural, floricultural, agricultural, and vegetable products, and trailers designed and used exclusively to transport a boat between a place of storage and a marina, or in and around a marina, when drawn or towed on a street or highway for a distance of no more than ten miles and at a speed of twenty-five miles per hour or less.

(C) "Motorcycle" means every motor vehicle, other than a tractor, having a saddle for the use of the operator and designed to travel on not more than three wheels in contact with the ground, including, but not limited to, motor vehicles known as "motor-driven cycle," "motor scooter," or "motorcycle" without regard to weight or brake horsepower.

(D) "Emergency vehicle" means emergency vehicles of municipal, township, or county departments or public utility corporations when identified as such as required by law, the director of public safety, or local authorities, and motor vehicles when commandeered by a police officer.

(E) "Public safety vehicle" means any of the following:

(1) Ambulances, including private ambulance companies under contract to a municipal corporation, township, or county, and private ambulances and nontransport vehicles bearing license plates issued under section 4503.49 of the Revised Code;

(2) Motor vehicles used by public law enforcement officers or other persons sworn to enforce the criminal and traffic laws of the state;

(3) Any motor vehicle when properly identified as required by the director of public safety, when used in response to fire emergency calls or to provide emergency medical service to ill or injured persons, and when operated by a duly qualified person who is a member of a volunteer rescue service or a volunteer fire department, and who is on duty pursuant to the rules or directives of that service. The state fire marshal shall be designated by the director of public safety as the certifying agency for all public safety vehicles described in division (E)(3) of this section.

(4) Vehicles used by fire departments, including motor vehicles when used by volunteer fire fighters responding to emergency calls in the fire department service when identified as required by the director of public safety.

Any vehicle used to transport or provide emergency medical service to an ill or injured person, when certified as a public safety vehicle, shall be considered a public safety vehicle when transporting an ill or injured person to a hospital regardless of whether such vehicle has already passed a hospital.

(5) Vehicles used by the motor carrier enforcement unit for the enforcement of orders and rules of the public utilities commission as specified in section 5503.34 of the Revised Code.

(F) "School bus" means every bus designed for carrying more than nine passengers that is owned by a public, private, or governmental agency or institution of learning and operated for the transportation of children to or from a school session or a school function, or owned by a private person and operated for compensation for the transportation of children to or from a school session or a school function, provided "school bus" does not include a bus operated by a municipally owned transportation system, a mass transit company operating exclusively within the territorial limits of a municipal corporation, or within such limits and the territorial limits of municipal corporations immediately contiguous to such municipal corporation, nor a common passenger carrier certified by the public utilities commission unless such bus is devoted exclusively to the transportation of children to and from a school session or a school function, and "school bus" does not include a van or bus used by a licensed child day-care center or type A family day-care home to transport children from the child day-care center or type A family day-care home to a school if the van or bus does not have more than fifteen children in the van or bus at any time.

(G) "Bicycle" means every device, other than a tricycle designed solely for use as a play vehicle by a child, propelled solely by human power upon which any person may ride having either two tandem wheels, or one wheel in the front and two wheels in the rear, any of which is more than fourteen inches in diameter.

(H) "Motorized bicycle" means any vehicle having either two tandem wheels or one wheel in the front and two wheels in the rear, that is capable of being pedaled and is equipped with a helper motor of not more than fifty cubic centimeters piston displacement that produces no more than one brake horsepower and is capable of propelling the vehicle at a speed of no greater than twenty miles per hour on a level surface.

(I) "Commercial tractor" means every motor vehicle having motive power designed or used for drawing other vehicles and not so constructed as to carry any load thereon, or designed or used for drawing other vehicles while carrying a portion of such other vehicles, or load thereon, or both.

(J) "Agricultural tractor" means every self-propelling vehicle designed or used for drawing other vehicles or wheeled machinery but having no provision for carrying loads independently of such other vehicles, and used principally for agricultural purposes.

(K) "Truck" means every motor vehicle, except trailers and semitrailers, designed and used to carry property.

(L) "Bus" means every motor vehicle designed for carrying more than nine passengers and used for the transportation of persons other than in a ridesharing arrangement, and every motor vehicle, automobile for

hire, or funeral car, other than a taxicab or motor vehicle used in a ridesharing arrangement, designed and used for the transportation of persons for compensation.

(M) "Trailer" means every vehicle designed or used for carrying persons or property wholly on its own structure and for being drawn by a motor vehicle, including any such vehicle when formed by or operated as a combination of a "semitrailer" and a vehicle of the dolly type, such as that commonly known as a "trailer dolly," a vehicle used to transport agricultural produce or agricultural production materials between a local place of storage or supply and the farm when drawn or towed on a street or highway at a speed greater than twenty-five miles per hour, and a vehicle designed and used exclusively to transport a boat between a place of storage and a marina, or in and around a marina, when drawn or towed on a street or highway for a distance of more than ten miles or at a speed of more than twenty-five miles per hour.

(N) "Semitrailer" means every vehicle designed or used for carrying persons or property with another and separate motor vehicle so that in operation a part of its own weight or that of its load, or both, rests upon and is carried by another vehicle.

(O) "Pole trailer" means every trailer or semitrailer attached to the towing vehicle by means of a reach, pole, or by being boomed or otherwise secured to the towing vehicle, and ordinarily used for transporting long or irregular shaped loads such as poles, pipes, or structural members capable, generally, of sustaining themselves as beams between the supporting connections.

(P) "Railroad" means a carrier of persons or property operating upon rails placed principally on a private right-of-way.

(Q) "Railroad train" means a steam engine or an electric or other motor, with or without cars coupled thereto, operated by a railroad.

(R) "Streetcar" means a car, other than a railroad train, for transporting persons or property, operated upon rails principally within a street or highway.

(S) "Trackless trolley" means every car that collects its power from overhead electric trolley wires and that is not operated upon rails or tracks.

(T) "Explosives" means any chemical compound or mechanical mixture that is intended for the purpose of producing an explosion that contains any oxidizing and combustible units or other ingredients in such proportions, quantities, or packing that an ignition by fire, by friction, by concussion, by percussion, or by a detonator of any part of the compound or mixture may cause such a sudden generation of highly heated gases that the resultant gaseous pressures are capable of producing destructive effects on contiguous objects, or of destroying life or limb. Manufactured articles shall not be held to be explosives when the individual units contain explosives in such limited quantities, of such nature, or in such packing, that it is impossible to procure a simultaneous or a destructive explosion of such units, to the injury of life, limb, or property by fire, by friction, by concussion, by percussion, or by a detonator, such as fixed ammunition for small arms, firecrackers, or safety fuse matches.

(U) "Flammable liquid" means any liquid that has a flash point of seventy degrees Fahrenheit, or less, as determined by a tagliabue or equivalent closed cup test device.

(V) "Gross weight" means the weight of a vehicle plus the weight of any load thereon.

(W) "Person" means every natural person, firm, co-partnership, association, or corporation.

(X) "Pedestrian" means any natural person afoot.

(Y) "Driver or operator" means every person who drives or is in actual physical control of a vehicle, trackless trolley, or streetcar.

(Z) "Police officer" means every officer authorized to direct or regulate traffic, or to make arrests for violations of traffic regulations.

(AA) "Local authorities" means every county, municipal, and other local board or body having authority to adopt police regulations under the constitution and laws of this state.

(BB) "Street" or "highway" means the entire width between the boundary lines of every way open to the use of the public as a thoroughfare for purposes of vehicular travel.

(CC) "Controlled-access highway" means every street or highway in respect to which owners or occupants of abutting lands and other persons have no legal right of access to or from the same except at such points only and in such manner as may be determined by the public authority having jurisdiction over such street or highway.

(DD) "Private road or driveway" means every way or place in private ownership used for vehicular travel by the owner and those having express or implied permission from the owner but not by other persons.

(EE) "Roadway" means that portion of a highway improved, designed, or ordinarily used for vehicular travel, except the berm or shoulder. If a highway includes two or more separate roadways the term "roadway" means any such roadway separately but not all such roadways collectively.

(FF) "Sidewalk" means that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, intended for the use of pedestrians.

(GG) "Laned highway" means a highway the roadway of which is divided into two or more clearly marked lanes for vehicular traffic.

(HH) "Through highway" means every street or highway as provided in section 4511.65 of the Revised Code.

(II) "State highway" means a highway under the jurisdiction of the department of transportation, outside the limits of municipal corporations, provided that the authority conferred upon the director of transportation in section 5511.01 of the Revised Code to erect state highway route markers and signs directing traffic shall not be modified by sections 4511.01 to 4511.79 and 4511.99 of the Revised Code.

(JJ) "State route" means every highway that is designated with an official state route number and so marked.

(KK) "Intersection" means:

(1) The area embraced within the prolongation or connection of the lateral curb lines, or, if none, then the lateral boundary lines of the roadways of two highways which join one another at, or approximately at, right angles, or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict.

(2) Where a highway includes two roadways thirty feet or more apart, then every crossing of each roadway of such divided highway by an intersecting highway shall be regarded as a separate intersection. If an intersecting highway also includes two roadways thirty feet or more apart, then every crossing of two roadways of such highways shall be regarded as a separate intersection.

(3) The junction of an alley with a street or highway, or with another alley, shall not constitute an intersection.

(LL) "Crosswalk" means:

(1) That part of a roadway at intersections ordinarily included within the real or projected prolongation of

property lines and curb lines or, in the absence of curbs, the edges of the traversable roadway;

(2) Any portion of a roadway at an intersection or elsewhere, distinctly indicated for pedestrian crossing by lines or other markings on the surface;

(3) Notwithstanding divisions (LL)(1) and (2) of this section, there shall not be a crosswalk where local authorities have placed signs indicating no crossing.

(MM) "Safety zone" means the area or space officially set apart within a roadway for the exclusive use of pedestrians and protected or marked or indicated by adequate signs as to be plainly visible at all times.

(NN) "Business district" means the territory fronting upon a street or highway, including the street or highway, between successive intersections within municipal corporations where fifty per cent or more of the frontage between such successive intersections is occupied by buildings in use for business, or within or outside municipal corporations where fifty per cent or more of the frontage for a distance of three hundred feet or more is occupied by buildings in use for business, and the character of such territory is indicated by official traffic control devices.

(OO) "Residence district" means the territory, not comprising a business district, fronting on a street or highway, including the street or highway, where, for a distance of three hundred feet or more, the frontage is improved with residences or residences and buildings in use for business.

(PP) "Urban district" means the territory contiguous to and including any street or highway which is built up with structures devoted to business, industry, or dwelling houses situated at intervals of less than one hundred feet for a distance of a quarter of a mile or more, and the character of such territory is indicated by official traffic control devices.

(QQ) "Traffic control devices" means all flaggers, signs, signals, markings, and devices placed or erected by authority of a public body or official having jurisdiction, for the purpose of regulating, warning, or guiding traffic, including signs denoting names of streets and highways.

(RR) "Traffic control signal" means any device, whether manually, electrically, or mechanically operated, by which traffic is alternately directed to stop, to proceed, to change direction, or not to change direction.

(SS) "Railroad sign or signal" means any sign, signal, or device erected by authority of a public body or official or by a railroad and intended to give notice of the presence of railroad tracks or the approach of a railroad train.

(TT) "Traffic" means pedestrians, ridden or herded animals, vehicles, streetcars, trackless trolleys, and other devices, either singly or together, while using any highway for purposes of travel.

(UU) "Right-of-way" means either of the following, as the context requires:

(1) The right of a vehicle, streetcar, trackless trolley, or pedestrian to proceed uninterruptedly in a lawful manner in the direction in which it or the individual is moving in preference to another vehicle, streetcar, trackless trolley, or pedestrian approaching from a different direction into its or the individual's path;

(2) A general term denoting land, property, or the interest therein, usually in the configuration of a strip, acquired for or devoted to transportation purposes. When used in this context, right-of-way includes the roadway, shoulders or berm, ditch, and slopes extending to the right-of-way limits under the control of the state or local authority.

(VV) "Rural mail delivery vehicle" means every vehicle used to deliver United States mail on a rural mail delivery route.

(WW) "Funeral escort vehicle" means any motor vehicle, including a funeral hearse, while used to facilitate

the movement of a funeral procession.

(XX) "Alley" means a street or highway intended to provide access to the rear or side of lots or buildings in urban districts and not intended for the purpose of through vehicular traffic, and includes any street or highway that has been declared an "alley" by the legislative authority of the municipal corporation in which such street or highway is located.

(YY) "Freeway" means a divided multi-lane highway for through traffic with all crossroads separated in grade and with full control of access.

(ZZ) "Expressway" means a divided arterial highway for through traffic with full or partial control of access with an excess of fifty per cent of all crossroads separated in grade.

(AAA) "Thruway" means a through highway whose entire roadway is reserved for through traffic and on which roadway parking is prohibited.

(BBB) "Stop intersection" means any intersection at one or more entrances of which stop signs are erected.

(CCC) "Arterial street" means any United States or state numbered route, controlled access highway, or other major radial or circumferential street or highway designated by local authorities within their respective jurisdictions as part of a major arterial system of streets or highways.

(DDD) "Ridesharing arrangement" means the transportation of persons in a motor vehicle where such transportation is incidental to another purpose of a volunteer driver and includes ridesharing arrangements known as carpools, vanpools, and buspools.

(EEE) "Motorized wheelchair" means any self-propelled vehicle designed for, and used by, a handicapped person and that is incapable of a speed in excess of eight miles per hour.

(FFF) "Child day-care center" and "type A family day-care home" have the same meanings as in section 5104.01 of the Revised Code.

(GGG) "Multi-wheel agricultural tractor" means a type of agricultural tractor that has two or more wheels or tires on each side of one axle at the rear of the tractor, is designed or used for drawing other vehicles or wheeled machinery, has no provision for carrying loads independently of the drawn vehicles or machinery, and is used principally for agricultural purposes.

(HHH) "Operate" means to cause or have caused movement of a vehicle, streetcar, or trackless trolley.

(III) "Predicate motor vehicle or traffic offense" means any one of the following:

(1) A violation of section 4511.03, 4511.051 [4511.05.1], 4511.12, 4511.132 [4511.13.2], 4511.16, 4511.20, 4511.201 [4511.20.1], 4511.21, 4511.211 [4511.21.1], 4511.213 [4511.21.3], 4511.22, 4511.23, 4511.25, 4511.26, 4511.27, 4511.28, 4511.29, 4511.30, 4511.31, 4511.32, 4511.33, 4511.34, 4511.35, 4511.36, 4511.37, 4511.38, 4511.39, 4511.40, 4511.41, 4511.42, 4511.43, 4511.431 [4511.43.1], 4511.432 [4511.43.2], 4511.44, 4511.441 [4511.44.1], 4511.451 [4511.45.1], 4511.452 [4511.45.2], 4511.46, 4511.47, 4511.48, 4511.481 [4511.48.1], 4511.49, 4511.50, 4511.511 [4511.51.1], 4511.53, 4511.54, 4511.55, 4511.56, 4511.57, 4511.58, 4511.59, 4511.60, 4511.61, 4511.64, 4511.66, 4511.661 [4511.66.1], 4511.68, 4511.70, 4511.701 [4511.70.1], 4511.71, 4511.711 [4511.71.1], 4511.712 [4511.71.2], 4511.713 [4511.71.3], 4511.72, 4511.73, 4511.763 [4511.76.3], 4511.771 [4511.77.1], 4511.78, or 4511.84 of the Revised Code;

(2) A violation of division (A)(2) of section 4511.17, divisions (A) to (D) of section 4511.51, or division (A) of section 4511.74 of the Revised Code;

(3) A violation of any provision of sections 4511.01 TO 4511.76 of the Revised Code for which no penalty

otherwise is provided in the section that contains the provision violated;

(4) A violation of a municipal ordinance that is substantially similar to any section or provision set forth or described in division (III)(1), (2), or (3) of this section.

History:

GC § 6307-2; 119 v 766, § 2; 120 v 221; 124 v 514; Bureau of Code Revision, 10-1-53; 126 v 392(408) (Eff 3-17-55); 126 v 790 (Eff 9-14-55); 126 v 115 (Eff 10-1-56); 127 v 54 (Eff 8-27-57); 128 v 1270 (Eff 11-4-59); 129 v 1273 (Eff 10-26-61); 130 v 1068 (Eff 8-5-63); 130 v 1074 (Eff 10-10-63); 131 v 1094 (Eff 10-15-65); 132 v H 634 (Eff 11-24-67); 132 v H 380 (Eff 1-1-68); 132 v H 878 (Eff 12-14-67); 132 v S 451 (Eff 2-29-68); 135 v H 200 (Eff 9-23-73); 135 v S 108 (Eff 11-21-73); 135 v H 995 (Eff 1-1-75); 136 v H 338 (Eff 1-9-76); 136 v S 56 (Eff 5-25-76); 136 v H 235 (Eff 10-1-76); 137 v S 100 (Eff 4-1-78); 138 v S 9 (Eff 6-20-79); 139 v H 53 (Eff 7-1-82); 143 v H 258 (Eff 11-2-89); 143 v H 319 (Eff 7-2-90); 143 v S 272 (Eff 11-28-90); 143 v S 382 (Eff 12-31-90); ◆ 144 v H 485 (Eff 10-7-92); ◆ 144 v S 98 (Eff 11-12-92); ◆ 144 v H 356 (Eff 12-31-92); ◆ 146 v S 293 (Eff 9-26-96); ◆ 148 v H 484 (Eff 10-5-2000); ◆ 149 v S 231. Eff 10-24-2002; ◆ 149 v S 123, § 1, eff. 1-1-04; ◆ 150 v H 52, § 1, eff. 6-1-04; ◆ 150 v H 230, § 1, eff. 9-16-04.

§ 4511.25 Lanes of travel upon roadways.

(A) Upon all roadways of sufficient width, a vehicle or trackless trolley shall be driven upon the right half of the roadway, except as follows:

(1) When overtaking and passing another vehicle proceeding in the same direction, or when making a left turn under the rules governing such movements;

(2) When an obstruction exists making it necessary to drive to the left of the center of the highway; provided, any person so doing shall yield the right of way to all vehicles traveling in the proper direction upon the unobstructed portion of the highway within such distance as to constitute an immediate hazard;

(3) When driving upon a roadway divided into three or more marked lanes for traffic under the rules applicable thereon;

(4) When driving upon a roadway designated and posted with signs for one-way traffic;

(5) When otherwise directed by a police officer or traffic control device.

(B) Upon all roadways any vehicle or trackless trolley proceeding at less than the normal speed of traffic at the time and place and under the conditions then existing shall be driven in the right-hand lane then available for traffic, or as close as practicable to the right-hand curb or edge of the roadway, except when overtaking and passing another vehicle or trackless trolley proceeding in the same direction or when preparing for a left turn.

(C) Upon any roadway having four or more lanes for moving traffic and providing for two-way movement of traffic, no vehicle or trackless trolley shall be driven to the left of the center line of the roadway, except when authorized by official traffic control devices designating certain lanes to the left of the center of the roadway for use by traffic not otherwise permitted to use the lanes, or except as permitted under division (A)(2) of this section.

Division (C) of this section shall not be construed as prohibiting the crossing of the center line in making a left turn into or from an alley, private road, or driveway.

*HISTORY: 135 v H 995. Eff 1-1-75.

The effective date of H 995 is set by section 3 of the act.

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TITLE 45. MOTOR VEHICLES -- AERONAUTICS -- WATERCRAFT
CHAPTER 4511. TRAFFIC LAWS -- OPERATION OF MOTOR VEHICLES
TRAFFIC RULES

◆ **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

ORC Ann. 4511.25 (2007)

§ 4511.25. Lanes of travel upon roadways

(A) Upon all roadways of sufficient width, a vehicle or trackless trolley shall be driven upon the right half of the roadway, except as follows:

(1) When overtaking and passing another vehicle proceeding in the same direction, or when making a left turn under the rules governing such movements;

(2) When an obstruction exists making it necessary to drive to the left of the center of the highway; provided, any person so doing shall yield the right of way to all vehicles traveling in the proper direction upon the unobstructed portion of the highway within such distance as to constitute an immediate hazard;

(3) When driving upon a roadway divided into three or more marked lanes for traffic under the rules applicable thereon;

(4) When driving upon a roadway designated and posted with signs for one-way traffic;

(5) When otherwise directed by a police officer or traffic control device.

(B) (1) Upon all roadways any vehicle or trackless trolley proceeding at less than the prevailing and lawful speed of traffic at the time and place and under the conditions then existing shall be driven in the right-hand lane then available for traffic, and far enough to the right to allow passing by faster vehicles if such passing is safe and reasonable, except under any of the following circumstances:

(a) When overtaking and passing another vehicle or trackless trolley proceeding in the same direction;

(b) When preparing for a left turn;

(c) When the driver must necessarily drive in a lane other than the right-hand lane to continue on the driver's intended route.

(2) Nothing in division (B)(1) of this section requires a driver of a slower vehicle to compromise the driver's safety to allow overtaking by a faster vehicle.

(C) Upon any roadway having four or more lanes for moving traffic and providing for two-way movement of traffic, no vehicle or trackless trolley shall be driven to the left of the center line of the roadway, except when

authorized by official traffic control devices designating certain lanes to the left of the center of the roadway for use by traffic not otherwise permitted to use the lanes, or except as permitted under division (A)(2) of this section.

This division shall not be construed as prohibiting the crossing of the center line in making a left turn into or from an alley, private road, or driveway.

(D) Except as otherwise provided in this division, whoever violates this section is guilty of a minor misdemeanor. If, within one year of the offense, the offender previously has been convicted of or pleaded guilty to one predicate motor vehicle or traffic offense, whoever violates this section is guilty of a misdemeanor of the fourth degree. If, within one year of the offense, the offender previously has been convicted of two or more predicate motor vehicle or traffic offenses, whoever violates this section is guilty of a misdemeanor of the third degree.

History:

GC § 6307-25; 119 v 766, § 25; Bureau of Code Revision, 10-1-53; 129 v 1032 (Eff 9-9-61); 130 v 1086 (Eff 6-10-63); 135 v H 995. Eff 1-1-75; ◆ 149 v S 123, § 1, eff. 1-1-04; ◆ 151 v H 389, § 1, eff. 9-21-06.

§ 4511.33 Rules for driving in marked lanes.

Whenever any roadway has been divided into two or more clearly marked lanes for traffic, or wherever within municipal corporations traffic is lawfully moving in two or more substantially continuous lines in the same direction, the following rules apply:

(A) A vehicle or trackless trolley shall be driven, as nearly as is 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.

(B) Upon a roadway which is divided into three lanes and provides for two-way movement of traffic, a vehicle or trackless trolley shall not be driven in the center lane except when overtaking and passing another vehicle or trackless trolley where the roadway is clearly visible and such center lane is clear of traffic within a safe distance, or when preparing for a left turn, or where such center lane is at the time allocated exclusively to traffic moving in the direction the vehicle or trackless trolley is proceeding and is posted with signs to give notice of such allocation.

(C) Official signs may be erected directing specified traffic to use a designated lane or designating those lanes to be used by traffic moving in a particular direction regardless of the center of the roadway, and drivers of vehicles and trackless trolleys shall obey the directions of such signs.

(D) Official traffic control devices may be installed prohibiting the changing of lanes on sections of roadway and drivers of vehicles shall obey the directions of every such device.

*HISTORY: 135 v H 995. Eff 1-1-75.

The effective date of H 995 is set by section 3 of the act.

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ORC Ann. 4511.33 (2007)

§ 4511.33. Rules for driving in marked lanes

(A) Whenever any roadway has been divided into two or more clearly marked lanes for traffic, or wherever within municipal corporations traffic is lawfully moving in two or more substantially continuous lines in the same direction, the following rules apply:

(1) A vehicle or trackless trolley shall be driven, as nearly as is 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.

(2) Upon a roadway which is divided into three lanes and provides for two-way movement of traffic, a vehicle or trackless trolley shall not be driven in the center lane except when overtaking and passing another vehicle or trackless trolley where the roadway is clearly visible and such center lane is clear of traffic within a safe distance, or when preparing for a left turn, or where such center lane is at the time allocated exclusively to traffic moving in the direction the vehicle or trackless trolley is proceeding and is posted with signs to give notice of such allocation.

(3) Official signs may be erected directing specified traffic to use a designated lane or designating those lanes to be used by traffic moving in a particular direction regardless of the center of the roadway, or restricting the use of a particular lane to only buses during certain hours or during all hours, and drivers of vehicles and trackless trolleys shall obey the directions of such signs.

(4) Official traffic control devices may be installed prohibiting the changing of lanes on sections of roadway and drivers of vehicles shall obey the directions of every such device.

(B) Except as otherwise provided in this division, whoever violates this section is guilty of a minor misdemeanor. If, within one year of the offense, the offender previously has been convicted of or pleaded guilty to one predicate motor vehicle or traffic offense, whoever violates this section is guilty of a misdemeanor of the fourth degree. If, within one year of the offense, the offender previously has been convicted of two or more predicate motor vehicle or traffic offenses, whoever violates this section is guilty of a misdemeanor of the third degree.

History:

GC § 6307-33; 119 v 766(779), § 33; Bureau of Code Revision, 10-1-53; 135 v H 995. Eff 1-1-75; ◆ 149 v S 123, § 1, eff. 1-1-04; ◆ 150 v H 95, § 1, eff. 9-26-03; ◆ 150 v H 95, § 3.13, eff. 1-1-04.