IN THE SUPREME COURT OF OHIO
CASE NO. 2007-0035, 2007-0112

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

v.

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

MERIT BRIEF OF PLAINTIFF-APPELLEE, LORRI TURNER, ADMINISTRATRIX OF THE ESTATE OF ROBERT TURNER, DECEASED

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II. STATEMENT OF FACTS

The undisputed facts of this case were succinctly summarized by both the trial court and the court of appeals 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. 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 pickup 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.[1] (See Appendix to South Central Merit Brief, A-32, 60-61)

It is also important for this Court to know that, due to the close proximity of the utility pole to the roadway, there was **not** sufficient room for Mr. Hittle to move his vehicle completely off the roadway at the point where the collision occurred. More specifically, the width of Mr. Hittle's vehicle was sixty inches (60") and the utility pole was located three feet, nine inches, from the white edge line of the highway. (Depo. Trpr. Goss, pages 74-75, Supp. at 1-2). As such, when the Hittle vehicle struck the utility pole and when it came to rest after the crash, a portion of the vehicle was still located upon the improved portion of the roadway. The State Highway Patrol took photographs that depict the scene of the accident immediately after the crash occurred. (Goss Depo., pages 78-79; Supp. at 3; Photographs of Accident Scene, Supp at 4-6.)

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[1] Hittle actually plead no contest to vehicular manslaughter, a misdemeanor, in Fairfield Municipal Court. (Exhibit D to Hittle Deposition , Supp. 7.)

In opposing Defendants' motions for summary judgment , Plaintiff also produced affidavits from two experts, James Crawford, an accredited accident reconstructionist, (Supp at 8-16), and Ronald Eck, a professor of civil engineering and recognized expert in roadway design and safety (Supp at 17-22).

Mr. Crawford visited the scene of the accident on several occasions and noted that the utility pole in question was located unreasonably close to the roadway, especially in comparison to the other poles in the area. In particular, the poles on the opposite (east) side of State Route 188 were placed eight to ten feet from the edge of the roadway, whereas the pole in question was only two feet, five inches, away. Mr. Crawford also noted that the berm area adjacent to the roadway where the accident occurred was approximately two feet wide and composed of loose gravel. The berm also sloped away from the roadway at a steep angle, creating a situation where a vehicle could literally be drawn into the utility pole. This opinion was supported by the fact that, before the utility pole was eventually moved, several months after Mr. Turner was killed, there had been over 28 crashes along this section of State Route 188 where a vehicle had run off the road and struck a utility pole or fixed object. Mr. Crawford further opined that, if the utility pole had been placed at a more reasonable distance from the pavement edge—in his opinion, eight to fifteen feet—the errant path of the Mustang would have taken it into the farm fields without striking the pole, thereby eliminating the mechanism for the type of injury that caused Mr. Turner's death. ("Supp" at 8-16.)

As for Dr. Eck, he noted that motor vehicle-utility pole impacts are most common on left-bearing curves where a pole is offset less than ten feet from the edge of the

roadway. He further stated that the pole in question fell within these criteria so as to create a reasonable expectation on the part of the Defendants that a collision would occur. Dr. Eck opined that the utility pole in question was located unreasonably close to the roadway, especially in light of the fact that, at the time of the accident, it was feasible to relocate the pole farther back from the improved portion of the roadway. (Supp at 17-22.)

The opinions of Mr. Crawford and Dr. Eck were also supported by the testimony of Daniel Ochs. For more than fifty (50) years, the Ochs family has owned a home and farm directly across the street from the utility pole where the accident occurred. Mr. Ochs testified that he is aware of at least six automobile accidents involving the utility pole in question which occurred during 2002-2003, before the pole was finally moved. (See Ochs Depo., page 80, Supp at 23-24.) In addition, Mr. Ochs testified that his mail box, which was located on a wooden post next to the utility pole in question, was knocked down approximately two dozen times before he finally removed it and got a post office box. (Ochs Depo., pages 12-13 Supp. at 25.) Mr. Ochs was keenly aware of these accidents because, each time the utility pole was struck, he lost power at his farm. (See Ochs Depo., pages 21-23 Supp. at 26-27.) Since the utility pole was moved further back after Mr. Turner was killed, there have not been any other automobile collisions involving this particular pole. (See Ochs Depo., pages 40, 79 Supp. at 28, 24.)

III. LAW AND ARGUMENT

A. *Appellants' Proposition of Law*

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

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

In the case at hand, the Eighth Appellate District held that there is no requirement that a utility pole be located on an improved portion of the road for liability to be imposed, but, rather, that the relevant inquiry is whether the location of the utility pole was ***in such close proximity*** to the road as to constitute an obstruction dangerous to anyone properly using the highway. (Appendix to South Central Merit Brief, A-38).

This Court must determine the rule of law that governs this case.

B. *Statutory Law*

Since the proverbial horse and buggy days, Ohio's codified law has authorized utility companies to locate their poles within the public right-of-way so long as the location does not interfere with public travel. *Monahan v. Miami Telephone Co.* (1899), 9 Ohio Dec. 532, 1899 WL 1417[2]. However, since the primary purpose of a highway is

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

for travel and transportation, its use by a utility is subordinate to its use by the public for the primary purpose. *Railway Co. v. Telegraph Assn. (1891), 48 Ohio St. 390.*

From 1953 through 1999, Ohio Revised Code Section 4931.01 provided:

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

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

> A telegraph or telephone company may do either of the following in an unincorporated area of the township *** (2) construct telegraph or telephone lines and fixtures necessary for containing and protecting those lines beneath the surface of any of the public roads and highways and beneath waters within that area. **Those lines shall be constructed so as not to incommode the public in the use of roads or highways**, or endanger or injuriously interrupt the navigation of waters. (*Emphasis added)*[3]

The common thread running throughout the statutes referenced above, as well as their predecessors in the General Code, has been that public utility companies may place utility poles within the public right-of-way for roads, subject to the admonition that lines and poles shall not incommode the public in the use of the roads or highways. The legislature granted public utility companies this license so as to obviate the need for the utility to appropriate easements across private lands, presumably to the ultimate benefit of the consumer. However, the statutory license comes with an incumbent duty, i.e., the responsibility for protecting the superior rights of the traveling public.

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[3] Although R.C. 4931.01 and R.C. 4931.03 are limited to "telephone companies",

Curry v. Ohio Power Co. (5th Dist., 2/14/80), Licking App. No. CA-2671, 1980 Ohio App. LEXIS 11996.

C. ***Controlling Ohio Supreme Court Authority***

In Cambridge Home Telephone Co. v. Harrington (1933), 127 Ohio St. 1, plaintiff was a passenger in an automobile being operated on a rural roadway. Similar to the case at hand, the vehicle strayed from the paved portion of the roadway while rounding a curve, came into contact with the berm, and struck a utility pole that was located outside the marked lane of travel but near the roadway. In affirming a jury verdict in favor of the plaintiff, the Ohio Supreme Court held, "The traveling public has a right to use a public highway, **to the entire width of the right-of-way**, against all other persons using such highway for private purposes." Id, at syllabus. The rationale underlying *Harrington, supra*, was explained by this Court as follows:

> The highway is primarily constructed for the purposes of travel, and not for the sight of monuments, billboards, telephone or telegraph poles, or other devices that may create an obstruction within the limits of the right-of-way. The legislature must have had this rule in mind when it enacted Section 9170 of the General Code (the predecessor to Revised Code Section 4931.01). The last clause of this section, "but shall not incommode the public in the use thereof," is a danger signal to public utilities using the highway for their own private purposes. They (public utilities) are placed on notice to the effect that if they erect posts, piers and/or abutments within the right-of-way of the highway, they may not prejudice the superior rights of the traveling public in doing so. Id. at page 5.

Two years later, in Ohio Bell Telephone Co. v. Lung (1935), 129 Ohio St. 505, this Court was presented with a factual scenario nearly identical to the case at hand. In Lung, plaintiff's decedent was killed when a vehicle in which he was riding as a

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4913.14 provide that these sections also apply to public power companies.

passenger came in contact with a utility pole owned by Ohio Bell, also one of the Defendants herein. The telephone pole in *Lung* was located 5.1 feet from the roadway, in the area of a left-bearing curve. In affirming a jury verdict in favor of the plaintiff, the Supreme Court held:

> When a guest (passenger) is killed while riding in an automobile which collides with a telephone pole located in an improved portion of the highway 5.1 feet from the pavement, the question whether the telephone company is guilty of negligence by placing the pole on the highway so as to incommode the traveling public, and whether such negligence is a proximate cause of such fatality, are properly submitted to the jury for determination. Id., at syllabus.[4]

Taken together, *Harrington*, *supra*, and *Lung*, *supra*, stand for the proposition that the motoring public has an unfettered right to use **the entire right-of-way** (not just the improved portion of the roadway), because the motoring public's rights to the use of the roadway are superior to that of the utility companies.[5] The cases also support the proposition that, under the facts of this case, the question as to whether or not the utility companies were negligent in placing the pole in such close proximity to the traveled portion of roadway must be answered by the jury.

As already noted, there was not sufficient area between the edge of the paved portion of the road and the utility pole for Mr. Hittle to pull his vehicle completely off the paved portion of the roadway. At impact and final rest , a portion of the Hittle vehicle was still located on the improved portion of the roadway. (Supp. 5, 16.)

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[4] The trial court failed to even acknowledge either *Harrington*, *supra*, or *Lung*, *supra*, in its opinion granting summary judgment to Defendants.

[5] It is undisputed that the right-of-way for S.R. 188 extended 15 feet from the edge of the berm: the location to which the pole was eventually moved.

D. ***Intermediate Appellate Authority***

The utility companies reference numerous appellate court decisions as controlling under the circumstances of the case *sub judice;* all are distinguishable. In Ohio Postal Co. v. Yant (1940), 64 Ohio App. 189, the Fifth District was confronted with a utility pole that was located thirteen feet from the hard surface and **eleven feet** from the berm. In Niederbrach v. Dayton Power & Light Co. (1994), 94 Ohio App.3d 334, the Second District dealt with a situation where the utility pole was **sixteen feet** off the traveled portion of the roadway. In Jocek v. GTE North (1995), Ohio App. Lexis 43435, the Ninth District addressed a situation where a utility pole was located **eleven feet** from the traveled portion of the roadway. Again, in Curry v. Ohio Power Co. (1980), 1980 Ohio App. Lexis 11996, the Fifth District addressed a situation where the utility pole was located **fifteen feet, six inches**, from the pavement, and twelve feet, six inches, from the berm.

The other three appellate court cases referenced by the utility companies, each of which went to trial and was not decided by summary judgment, involved a motorist striking a street pole (or in one case, a guy wire anchoring a utility pole) that was located on a tree lawn area that was separated from the roadway by a curb. See, Mattucci v. Ohio Edison Co. (1946), 79 Ohio App. 367; Crank v. Ohio Edison (1997) WL 198768; Cincinnati Gas & Electric v. Bayer (1975), 1975 Ohio App. Lexis 6305.

The common denominator in the "non tree lawn cases" is that the utility pole was located at least ten feet from the edge of the roadway. In each of these instances, the motoring public was allocated sufficient room to move the vehicle completely off the

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

Moreover, the utility companies in this case offered absolutely no explanation why this utility pole was located so close to the roadway, especially since the poles on the opposite side were much further back. (Supp. 5, 12.) Based upon the deposition of Mr. Ochs, the utility companies clearly knew this was a problem. However, it was not until after Mr. Turner was killed that the utility company finally moved the pole further back to the edge of the right-of-way line, i.e., fifteen feet from the edge of the paved surface. (Supp. 12.)

E. <u>The "Close Proximity" Rule</u>

In the case at hand, the Eighth District held:

> 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. (Turner v. Ohio Bell Tel Co. at ¶ 16)

The utility companies argue that the Eighth District's adoption of the "close proximity" test represents a departure from longstanding precedent purportedly holding that a utility company is not liable as a matter of law unless they locate a utility pole on the improved portion of the roadway. However, there is no basis for this rule in any statute or case cited by Appellees.

In fact, a review of the cases relied upon by the utility companies reveals that the "close proximity" test was used by these courts as well. In *Ohio Postal Telegraph-Cable Co. v. Yant, supra* and *Curry v. Ohio Power Co, supra,* the Fifth District held that a utility company would not be liable when a vehicle struck a pole, unless the pole was erected within the traveled portion of the roadway or in **such close proximity** as to constitute a danger to anyone properly using the highway.

The close proximity test was also applied by the Fourth Appellate District in *Short v. Ohio Bell Telephone Co.*, (4th Dist. 1941), 35 Ohio Law Abs. 375, 7 N.E.2d 439; by the Ninth Appellate District in *Mattucci v. Ohio Edison Co., supra, Crank v. Ohio Edison Co, supra,* and *Jocek v. GTE North, supra;* by the First Appellate District in *Cincinnati Gas & Electric Co, supra;* and by the Second Appellate District in *Neiderbrach v. Dayton Power & Light Co, supra.*

More recently, the Sixth Appellate District applied the close proximity rule in *Swaisgood v. Puder,* 2007 WL 196478 (Ohio App. 6 Dist.), 2007-Ohio-307 at ¶ 21. (Appendix at 1.)

F. The Qualified Nuisance Claim.

Section 19, Article I, of the Constitution of Ohio requires that roads shall be kept open to the public and without charge.

In addition to the public use of roads, private uses have arisen, such as the license of utility companies to construct and maintain fixtures, including poles, in any public right-of-way, so long as such fixtures do not incommode the public's use of the roadway. Notwithstanding such license, the right of the traveling public to use the

public road to the entire width of the right-of-way is still paramount. *Black v. City of Berea* (1941) 137 Ohio St. 611, 613, citing *Harrington*, *supra* and *Lung*, *supra*; See, also, *Ganz v. Ohio Postal Telegraph*, 140 F. 692 (Sixth Circuit, C.A. 1905), citing *Railway Co. v. Telegraph Assn.*, *supra*.

In the context of highways, a nuisance is generally defined as an actual physical condition affecting the structure of the roadway or actual physical conditions, such as obstructions, upon the highway. *Williamson v. Pavlovich* (1989), 45 Ohio St.3d 179.

Whether there is a duty to keep a roadway free from nuisance is determined by focusing upon whether a condition exists that creates a danger for ordinary traffic on the regularly traveled portion of the roadway. *Manufacturers National Bank of Detroit v. Erie County* (1992), 63 Ohio St.3d 318.

Although the cases specifically reference the "regularly traveled portion of the roadway," the Ohio Supreme Court has specifically held that a nuisance may exist in the shoulder or berm area of the highway which would render the roadway unsafe for normal travel.

For example, in *Dickerhoof v. City of Canton* (1983), 6 Ohio St.3d 128, the Ohio Supreme Court addressed a situation where plaintiff's decedent was killed while riding his motorcycle on Interstate 77. The decedent swerved to miss an object in the roadway, traveled onto the shoulder of the roadway, and struck a chuckhole.

Plaintiff's decedent sued the city, claiming that the presence of the pothole in the shoulder area of the roadway constituted a nuisance. The Supreme Court agreed and held:

> The shoulder of a highway is designed to serve a purpose which may include travel under emergency circumstances. It is for the trier of fact to determine whether swerving to avoid a collision with an object in the highway and driving on the shoulder is a foreseeable and reasonable use of the shoulder. Id at 7.

Based upon the foregoing, it is clear that Ohio case law recognizes that a utility company may be held responsible if it creates a condition which constitutes a nuisance—a danger to the public using the roadway. This extends to not only the traveled portion of the roadway, but, by virtue of *Dickerhoof*, *supra*, to the shoulder area.

As the *Dickerhoof* court noted, the issue as to whether or not a condition present in the shoulder area constitutes a nuisance is an issue of fact for the jury. Here, the collision occurred when a portion of the Hittle vehicle was still on the improved portion of the roadway. By virtue of *Dickerhoof*, *supra*, a jury issue is created as to whether the utility pole in question constituted a qualified nuisance.

The utility companies argue that *Strunk v. Dayton Power & Light Co.* (1983), 6 Ohio St. 3d 428 is not only dispositive of the nuisance claim but also Appellee's entire case. South Central reads *Strunk* as broadly holding that a municipality can never be liable for placing a utility pole in the right-of-way, off the improved portion of the roadway and, ergo it would *be* tantamount to a violation of equal protection to hold a private utility company liable.

South Central not only bastardizes *Strunk* but also ignores its offspring. First, the utility pole in *Strunk* was located on land that was appropriated and used by the municipality as highway whereas the utility companies in the case at bar were utilizing the public's right-of-way pursuant to a statutory license which mandated that the utility

not incommode the public's use of the highway. More importantly, while the Supreme Court opinion in Strunk, *supra,* simply indicates that the location of utility pole was "sufficiently clear of the highway" (*Id at 431),* it is necessary to consult the court of appeals decision to learn the utility pole in *Strunk* was actually located **"13 feet, 8 inches from the traveled portion of the road"**. *Strunk v. Dayton Power & Light Co.* (1986, Ohio App. 2nd Dist.) 1986 WL 1702, at page 1 (Appendix at 6). The utility pole in the case at hand was located only two feet, five inches, from the improved portion of the roadway.

Moreover, this Court's holding in *Strunk* was modified by *Manufacturers National Bank of Detroit v. Erie County*, *supra*, a case that involved two occupants of a motor vehicle who were killed when the driver of their car failed to see oncoming traffic due to the presence of a corn crop growing in the right-of-way. The decedents' estates sued Huron Township, the entity that maintained the road, as well as the farmer who planted the corn in the right-of-way. In reversing summary judgment granted in favor of both defendants, this Court held that the township's duty to keep the roadways free from nuisance extended beyond the paved portion of the roadway. *Id at 321. See also*: Harp v. City of Cleveland Hts. (2000), 87 Ohio St. 3d and Haynes v. City of Franklin (2002), 95 Ohio St. 3d 344 [Both reaffirmed the concept that a municipality can be liable for a nuisance that exists off of the paved portion of the roadway but within the right-of-way.]

Further, in recognizing that the farmer who planted the corn in the right-of-way (who did not own the land but was using it) could also be liable, this Court reaffirmed the longstanding principal that the primary purpose of the right-of-way, which was

appropriated by the government, was for maintenance of a highway, not for private purposes. Accordingly, because the farmer's use of the right-of-way to grow corn was "inconsistent with the right of way's purpose", the farmer could be liable to the plaintiffs in nuisance. Id at 323.

G. Proximate Cause

Defendants argue that the location of the utility pole in question, some two feet from the improved portion of the roadway, was not the proximate cause of Mr. Turner's death. As Defendants see it, if the driver, Brian Hittle, had kept his vehicle on the paved portion of the roadway, this crash would not have occurred.

However, this somewhat myopic interpretation of proximate cause ignores the fact that, if the pole was not located two feet off the improved portion of the roadway, Mr. Turner would not have been killed. As noted in the affidavit and report of accident reconstructionist, James Crawford:

> If South Central Power Company had set this utility pole a more reasonable distance from the pavement edge (in my opinion 8 to 15 feet away), then the errant path of the Mustang would have taken it into the farm field without striking the utility pole and there most likely would have been no mechanism for the type of injuries that caused Mr. Turner's death. (Supp. 14.)

The fact that Mr. Hittle may have been contributorily negligent for driving off the roadway does not insulate Defendants from liability in this case. The Supreme Court specifically rejected this argument in *Lung v. Ohio Bell*, *supra*, holding:

> If Krieger, 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 the 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 the 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. Nor, for reasons hereinafter given, can it be said as a matter of law that the act of the driver was an intervening, independent cause. **The collision between the automobile and the pole produced the compact that resulted in the death; and the 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 fatality, was one of fact for the jury.** Id., at 510-511. *(Emphasis added.)*

The Supreme Court reached a similar result in Cambridge Home Telephone Co. v. Harrington, *supra,* acknowledging that, under a factual situation identical to the case at hand, the issue as to whether the negligence of a driver and a utility company were concurrent was for the jury. Id. at 612-13

Based upon Harrington, *supra*, and Lung, *supra*, there is no question that the issue of proximate causation in this case is one for the jury. The fact that Mr. Hittle may have been negligent in operating his automobile does not change the fact that the Defendants were concurrently negligent in placing the pole too close to the roadway.[6]

It was the pole that killed Bobby Turner. If the pole had been properly located at the edge of the right-of-way, Bobby Turner would not have been killed in this accident.

H. The "Bright Line" Test

In pursuit of a so-called "bright line" test, the utility companies importune this Court to not only abandon Harrington, *supra*, and Lung, *supra*, and Black, *supra,* but to further ignore the clear mandate of over one hundred years of codified law. South Central and Ohio Bell advocate the creation of a new rule of law, not through the

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[6] "Concurrent negligence consists of the negligence of two or more persons concurring, not necessarily in point of time, but in point of consequence, in producing a single indivisible injury." Motorist Mut. Ins. Co. v. Huron Road Hospital (1995), 73 Ohio St. 3d 391.

legislative process but by judicial fiat, whereby utility companies would not be responsible when motorists are injured in collisions involving utility poles located within the public's right-of-way unless the utility pole is located on the improved portion of the roadway.

Appellee respectfully submits that if the legislature had intended such a result, it would have included the appropriate language in either 4931.01 or its predecessors. The fact that the recent promulgation of R.C. 4931.03 (the successor to R.C. 4931.01) does not contain the rule of law espoused by the utility companies is certainly evidence that the legislature intended the rule of law to remain as it has been for more than one hundred years.

The fundamental fact that the utility companies refuse to acknowledge is that their right to locate utility poles within the public's right-of-way is inferior to that of the traveling public. The utility pole that killed Bobby Turner was not located on land that was owned by South Central and Ohio Bell, nor had the utility companies purchased an easement or other possessory interest. Instead, the land is within the public's right-of-way and is dedicated for usage as a highway. The utility companies were **given** a license to use the land subject to the admonition that they not "incommode the public in the use of **roads or highway**."

Contrary to the assertions of the utility companies, the adverb "properly" is not mentioned in any version of the statute. Likewise, in each succeeding version of the statutes, the legislature continued to use the terms "roadway **or** highway". The utility companies argue that the term "roadway", as defined in R.C. 4511 does not encompass

the unimproved portion for road. (South Central Merit Brief, p. 11.) However, pursuant to R.C. 4511.01(BB) the term **"highway"** is defined as "the entire width between the boundary lines of every way open to the use of the public as a thoroughfare for purposes of vehicular traffic." Likewise, R.C. 4511.01(UU) defines "right of way" as "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."

The definitions help explains the rationale underlying the requirement that the utility companies account for conditions of the roadway, the contour, the slope, the grade, and the presence of prior accidents, in determining whether to place and/or maintain the locations of their utility poles within the public's right-of-way. Contrary to the assertions of the utility companies: this concept is not something that was created by the Eighth District in this case; this has been the law of Ohio for more than one hundred years. See *Monahan v. Miami Telephone Co.*, *supra*: See, also, *Curry v. The Ohio Power*, *supra,* [Holding that in placing a particular pole within the limits of a public road, a utility company is bound to consider the condition of the road, its direction, its curvature, its width, its grade, its slope, the position of side drains or ditches, and, in view of all facts, to locate the pole so as not to unnecessarily or unreasonably interfere with or obstruct the public's use of the roadway.]

The Eighth District Court of Appeals simply followed the mandates of *Harrington*, *supra*, and *Lung*, *supra*, in deciding that, under the facts of this particular case, a jury

issue was presented as to whether the pole that caused Mr. Turner's death was placed in a location that, given the attendant circumstances, "incommoded" the public's use of the roadway.

I. "It's Too Expensive"

The utility companies argue that the "close proximity" rule is an unworkable standard that will put them out of business. South Central points out that there are approximately 2.5 million utility poles located along Ohio's highways, within the public right-of-way, and that the cost of moving each of these poles is in excess of two billion dollars.[7]

However, the last seventy years of Ohio jurisprudence belie the fallacy of the utility companies' position. Since Lung, *supra*, and Harrington, *supra*, were decided in the 1930s, the utility companies reference a total of seven appellate cases involving collisions between motor vehicles and utility poles. Each one of these cases was decided in favor of the utility company. Seven decisions over more than seventy years, without a loss, hardly support the utility companies' argument that the absence of a "bright line" rule has created an operational dilemma.

Ohio Bell argues that the "eight factors" to be considered in determining whether the location of a utility pole "incommodes" the public's use of the highway, as identified by the court of appeals *sub judice*, will lead to a manifest injustice by allowing "Plaintiffs lawyers and their experts" to avoid summary judgment because "forseeability and proximate cause are typically jury issues". (Ohio Bell's Merit Brief, page 7.) However, if

[7] South Central Memorandum in Support of Jurisdiction, page 1.

the location of a particular utility pole poses a foreseeable risk of causing significant harm to the motoring public, *viz.* six automobile accidents involving the utility pole in two years, should there not be a duty to move it to a safer location? Under the rule of law espoused by the utility companies, the answer would be no.

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

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

Indeed, the only appellate case with similar facts, *Swaisgood v. Puder, supra,* is paid short shrift by the utility companies.

In *Swaisgood*, plaintiff's decedent was killed when a vehicle struck a utility pole in a crash that occurred April 20, 2002. The utility pole, which was owned by Verizon, was located **three feet, nine inches,** from the paved portion of the roadway and had been struck before on October 17, 2000. Id at ¶ 2, ¶32 (Appendix 1, 5). Verizon moved for summary arguing that, as a matter of law, it was not liable since the utility pole was located off of the paved portion of the roadway. In responding to Verizon's motion, plaintiff presented an affidavit from a lineman employed by Verizon stating:

> According to affidavit testimony by lineman/senior lineman Blake, he had previously complained to his supervisors that the location of pole 2007-1 was dangerous. As he put it, "After the October 17, 2000 incident I recall a conversation I had with [supervisor and field engineer/senior field engineer] Steve Thomas in which I told him that the facilities (wires/cables) in the area around the truck stop, including pole number 2007-1, needed to be buried to avoid serious injury or death. I asked Mr. Thomas--'What's it going to take, someone getting killed before corrective action will be taken?' He responded that it would cost too much to do so.' (*Swaisgood*, supra at ¶32, Appendix 5.)

Under the proposition of law advocated by the utility companies, the proliferation of prior collisions involving a utility pole would never even enter the equation in determining whether the location incommodes the public's use of the roadway. As long as the pole is not located in the middle of a lane of travel or on an improved berm, the utility company would be insulated from liability as a matter of law.

Appellee would respectfully submit that the advocation of such a concept is antithetical to our system of tort law and cannot be countenanced by this Court.

South Central waxes philosophical when it attempts to draw parallels between the issues before this Court and the age old question: If a tree falls in the forest and no one hears it, does it make a sound?[8] However, in contemplating the position of the utility companies in this case, as it reflects upon their attitude toward human life, Appellee is reminded of the words of the comedian Lilly Tomlin, portraying Ernestine, the bombastic telephone operator:

> Here at the Phone Company we handle eighty-four billion calls a year. Serving everyone from presidents and kings to scum of the earth. (snort) We realize that every so often you can't get an operator, for no apparent reason your phone goes out of order [snatches plug out of switchboard], or perhaps you get charged for a call you didn't make. We don't care. Watch this [bangs on a switch panel like a cheap piano] just lost Peoria. (snort) You see, this phone system consists of a multibillion-dollar matrix of space-age technology that is so sophisticated,

[8] South Central Merit Brief, page 3.

even we can't handle it. But that's your problem, isn't it? Next time you complain about your phone service, why don't you try using two Dixie cups with a string. **We don't care. We don't have to. (snort) We're the Phone Company**!" [9]

If a utility pole is damaged or destroyed on numerous occasions due to being struck by an automobile, a utility company is on notice that the location of that pole may be "incommoding" the public's use of the highway. In exchange for the privilege of enjoying a license to use public land, *gratis,* these for-profit corporations are required to relocate utility poles the at present a danger to the motoring public.

It took the death of Bobby Turner and the relentless lobbying of his mother, Lorri, to cause the utility companies to "care" enough to bear the expense (which according to South Central was all of $966.10) of moving this particular pole to a more discrete distance from the roadway.[10] Since the pole was moved, there have not been any other collisions at this location.

If this Court adopts the rule of law being championed by Appellants, Ohio utility companies no longer care about moving dangerous utility poles; they won't have to.

IV. CONCLUSION

Based upon the foregoing, Plaintiff-Appellee, Lorri Turner, Administratrix of the Estate of Robert Turner, deceased, requests this Court to affirm the decision of the Eighth District Court of Appeals in the within matter.

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[9] Lily Tomlin from "Saturday Night Live: The First 20 Years" (1994 Cader Company).
[10] South Central Memorandum in Support of Jurisdiction, page 1.

Respectfully submitted,

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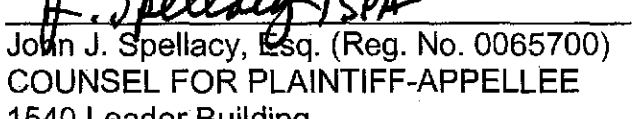

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief has been served upon William R. Case, Scott A. Campbell, Counsel for Defendant South Central Power Company, Thompson Hine LLP, 10 West Broad Street, Suite 700, Columbus, Ohio 43215-3435; and upon Anthony F. Stringer, Counsel for Defendant Ohio Bell, Calfee, Halter & Griswold LLP, 1400 McDonald Investment Center, 800 Superior Avenue, Cleveland, Ohio 44114-2688, by ordinary U.S. Mail, postage prepaid, this 9th of July, 2007.

Sean P. Allan, Esq. (Reg. No. 0043522)
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W

Swaisgood v. Puder
Ohio App. 6 Dist.,2007.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Sixth District, Erie County.
Vicki SWAISGOOD, Individually and as Executrix of the Estate of Myron Swaisgood, Appellant
v.
Weldon PUDER, et al., Appellee.
No. E-06-033.

Decided Jan. 26, 2007.

Charles M. Murray and William H. Bartle, for appellant.
Andrew W. Cox and William J. Hubbard, for appellee Verizon North, Inc.
SKOW, J.
*1 {¶ 1} Appellant, Vicki Swaisgood, appeals from a decision by the Erie County Court of Common Pleas granting summary judgment in favor of appellee, Verizon North, Inc. For the reasons that follow, we reverse the decision of the trial court.

{¶ 2} The facts of this case are clear and undisputed. This case arises out of an accident that occurred on April 20, 2002, and began when an unknown tractor-trailer that was heading north on C.R. 1575 made a right-hand turn onto Route 250 and struck a divided highway sign and a Verizon utility pole located on the southeast corner of the intersection. The pole in question, which Verizon identifies as "2007-1", was in a grassy area, three feet, nine inches from the paved portion of the road. Attached to the pole, at a height of between 18 and 21 feet, was Verizon's telephone line, which crossed Route 250 and was attached to another Verizon pole located on the north side of Route 250. The telephone line ran above the wires for the traffic signals at the intersection of C.R. 1575 and Route 250.

{¶ 3} After the pole was struck by the unidentified tractor-trailer, a box truck driven by Larry Fisher approached the intersection from the west, headed eastbound on Route 250. As Fisher attempted to go through the intersection, the box truck became entangled in the low-hanging wires, pulling them even lower.

{¶ 4} Mick Swaisgood and appellant's husband, Myron Swaisgood, were the next upon the scene, traveling in a Suburban motor vehicle that was pulling a trailer. Mick was the driver of the vehicle, and Myron was his passenger. Like Fisher, they were headed eastbound on Route 250. On reaching the intersection, they pulled up to the right of the box truck and stopped, unable to proceed any further.

{¶ 5} Terry Hamilton, a lieutenant for the Ashland County Sheriff's Department, was the next to arrive, and came upon the box truck and the Swaisgood vehicle. The box truck was in the inside, or passing, lane with its four-way flashers on. The Swaisgood vehicle was in the outside or right-hand lane, also with its four-way flashers on. Hamilton noticed a traffic light sitting on top of the box truck. Almost immediately after Hamilton stopped his cruiser, Myron approached the passenger side of the vehicle and told Hamilton that a truck had come out of the truck stop and clipped a pole, and that, as a result, some wires were handing low. He further stated that he was trying to direct his brother's vehicle around the problem area. At that point, a tractor-trailer driven by Weldon Puder entered the intersection, traveling westbound on Route 250. The vehicle became entangled in the low-hanging wires, causing the cables and traffic light to fall, and the debris to become airborne. Myron was struck with the debris and was found lying in a ditch. He died 18 days later, as a result of his injuries.

{¶ 6} On June 11, 2003, appellant, individually and as executrix of the estate of Myron Swaisgood, filed a complaint against, among others, appellee, Verizon, for negligence and nuisance with respect to the location of the utility pole. Thereafter, appellant filed a motion to amend her complaint, adding a claim of willful and wanton misconduct of Verizon. On March 23, 2004, Verizon filed a motion for summary judgment. The trial court granted this motion in a judgment entry file stamped April 14, 2006. On May 14, 2006, appellant timely appealed the judgment, raising the following assignments of error:

*2 {¶ 7} I. "SINCE A QUESTION OF FACT EXISTS AS TO WHETHER THE VERIZON POLE IN QUESTION (2007-1) WAS LOCATED WITHIN

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THE TRAVELED PORTION OF THE ROADWAY OR IN CLOSE PROXIMITY THERETO, THE TRIAL COURT ERRED IN GRANTING DEFENDANT VERIZON'S MOTION FOR SUMMARY JUDGMENT."

{¶ 8} II. "SINCE A QUESTION OF FACT EXISTED AS TO WHETHER DEFENDANT VERIZON FAILED TO EXERCISE REASONABLE CARE IN POLE LINE DESIGN AND POLE PLACEMENT IN ACCORDANCE WITH GENERALLY ACCEPTED ENGINEERING PRINCIPLES, THE TRIAL COURT ERRED IN GRANTING DEFENDANT VERIZON'S MOTION FOR SUMMARY JUDGMENT."

{¶ 9} III. "THE TRIAL COURT ERRED IN GRANTING VERIZON'S MOTION FOR SUMMARY JUDGMENT EVEN THOUGH A QUESTION OF FACT EXISTS AS TO WHETHER VERIZON VIOLATED THE TERMS OF ITS 1989 PERMIT APPLICATION AND THE TERMS OF THE PERMIT COVERING THE PLACEMENT OF THE POLE IN QUESTION (2007-1). VERIZON ASSUMED BY AGREEMENT LIABILITY FOR VIOLATIONS OF THE TERMS OF THE PERMIT."

{¶ 10} IV. "A QUESTION OF FACT EXISTED AS TO WHETHER DEFENDANT VERIZON'S CONDUCT WAS WILLFUL AND WANTON GIVEN VERIZON'S FAILURE TO TAKE ANY CORRECTIVE ACTION WHATSOEVER IN SPITE OF PRIOR SIMILAR INCIDENTS, GENERALLY ACCEPTED ENGINEERING PRINCIPLES, AND AN EMPLOYEE'S WARNING TO HIS SUPERVISOR THAT THE PLACEMENT OF THE POLE CREATED A SERIOUS HAZARD TO THE MOTORING PUBLIC. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIM FOR COMPENSATORY AND PUNITIVE DAMAGES ARISING FROM VERIZON'S WILLFUL AND WANTON MISCONDUCT."

{¶ 11} An appellate court reviewing a trial court's granting of summary judgment does so *de novo,* applying the same standard used by the trial court. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Civ.R. 56(C) provides:

{¶ 12} " * * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as considered in this rule. * * * "

{¶ 13} Summary judgment is proper where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) when the evidence is viewed most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, a conclusion adverse to the nonmoving party. *Ryberg v. Allstate Ins. Co.* (July 12, 2001), 10th Dist. No. 00AP-1243, citing *Tokles & Son, Inc. v. Midwestern Indemnity Co.* (1992), 65 Ohio St.3d 621, 629, 605 N.E.2d 936.

{¶ 14} The moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of fact as to an essential element of one or more of the non-moving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292, 662 N.E.2d 264. Once this burden has been satisfied, the non-moving party has the burden, as set forth at Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. *Id.*

*3 {¶ 15} Appellant argues in her first assignment of error that there is a question of fact as to whether the Verizon pole in question was located within the traveled portion of the roadway or in close proximity thereto. She argues in her second assignment of error that there is a question of fact as to whether Verizon failed to exercise reasonable care in placing the pole. As these assignments of error both deal with aspects of appellant's negligence claim, we will consider them together in our analysis.

{¶ 16} In order to establish a claim for negligence, a plaintiff must demonstrate: 1) the existence of a duty; 2) a breach of that duty; and 3) 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, Verizon's duty is created by R.C. 4931.03, which deals with construction by a telegraph or telephone company in an unincorporated area of a township. R.C. 4931.03 relevantly provides:

{¶ 17} "(A) A telegraph or telephone company may do either of the following in the unincorporated area of the township:

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{¶ 18} "(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.*" (Emphasis added.)

{¶ 19} Applying R.C. 4931.03 to the instant case, we find that Verizon had a duty to position utility pole 2007-1 in a location that would not incommode the public's use of the roadway. To ascertain the meaning and scope of this duty under the circumstances of the instant case, we begin with the general observation that Ohio public utility companies enjoy the right to place and maintain utility lines and poles within the right of way for public roads, but in exercising this right they must not unnecessarily or unreasonably interfere with or obstruct the public in the reasonable and ordinary use of the road for public travel. *Turner v. Ohio Bell Telephone Co.,* 8th Dist. No. 87541, 2006-Ohio-6168, ¶ 10, citing *Curry v. The Ohio Power Co.* (Feb. 14, 1980), 5th Dist. No. CA-2671.

{¶ 20} Factors that may be considered in determining whether a utility pole's location constitutes an unreasonable risk of harm to users of the road include, but are not limited to: 1) the narrowness and general contours of the road; 2) the presence of sharp curves in the road; 3) the illumination of the pole; 4) any warning signs of the placement of the pole; 5) the presence or absence of reflective markers; 6) the proximity of the pole to the highway; 7) whether the utility company had notice of previous accidents at the location of the pole; and 8) the availability of less dangerous locations. *Id.,* ¶ 18.

*4 {¶ 21} Courts 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 have generally recognized 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." *Curry,* supra. (Emphasis added.) Contrary to appellee's suggestion, there is no requirement that a pole 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." *Turner,* supra, at ¶ 12.

{¶ 22} Here, the relevant chain of events began when the unknown tractor-trailer made a right-hand turn onto Route 250 and struck Verizon utility pole 2007-01. Although the pole was located some three feet, nine inches from the paved portion of the road, it was the opinion of appellant's expert, civil engineer William Berg, Ph.D., P.E., that the pole was hazardously positioned in a nonpaved, "traveled way." As stated by Dr. Berg at paragraph seven of his affidavit:

{¶ 23} "7. In addition to the concern for the safety of motorists resulting from impacts by errant vehicles, for obvious reasons it has been national and Ohio practice to place utility poles outside the traveled portion of the roadway, or areas typically traversed by non-errant vehicles. The subject intersection is frequently used by large trucks due to the presence of a truck stop in the southeast quadrant. When these large vehicles make right turns from CR 1575 onto U.S. 250, a minimum-radius turning path which would preclude encroachment onto adjacent traffic lanes would pass immediately adjacent to the location of pole No.2007 with no effective clearance between the truck and the pole. In other words, the pole would be within the area that large vehicles would typically travel. As a consequence, to avoid striking the pole some truckers would be expected to swing wide into the opposing traffic lane of CR 1575 and/or into the inside traffic lane of eastbound U.S. 250. Other truckers would be expected to travel on a path that would force their right-rear trailer tires to off-track onto the non-paved area and come very close to the subject pole. It would also be expected, that there would be an occasional truck that would make contact with the pole during the turning maneuver. Thus, at the subject intersection, the 'traveled way' as defined in AASHTO and Ohio DOT publications includes areas that are not paved even though they are regularly traversed by non-errant vehicles. The pole in question was placed within this non-paved 'traveled way.' "

*5 {¶ 24} Other evidence reveals that prior to April 20, 2002, there had been several crashes involving the subject utility pole. At least one such accident, which occurred on October 17, 2000, was substantially similar to the accident at issue inasmuch as it resulted when a truck that was headed north on C.R. 1575 turned right onto Route 250. Verizon

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employee, lineman/senior lineman Leo Denis Blake, testified that he replaced the pole under these same circumstances approximately six to ten times before April 20, 2002.

{¶ 25} Evidence provided by Dr. Berg established that Verizon's placement of the pole was in violation of engineering guidelines promulgated by the American Association of State Highway and Transportation Officials ("AASHTO") and the Ohio Department of Transportation. According to Dr. Berg, the pole could have been placed in a safer location, and in conformity with the stated guidelines, had it been placed further east along the Route 250 right-of-way.[FN1]

FN1. Although courts have held that engineering standards such as those relied on by Berg are suggestive and not mandatory, see *Neiderbrach v. Dayton Power and Light Co.* (1994), 94 Ohio App.3d 334, 342, 640 N.E.2d 891; *Jocek v. GTE North, Inc.* (Sept. 27, 1995), 9th Dist. No. 17097, we find that they are properly considered by the trier of fact in determining whether a utility pole's location constitutes an unreasonable risk of harm to users of the road.

{¶ 26} Under the circumstances of this case, we find that the evidence is sufficient to establish a genuine issue for trial regarding whether Verizon placed or maintained the pole so close to the road as to create an unreasonable risk of harm for the traveling public.[FN2] Accordingly, appellant's first and second assignments of error are found well-taken.

FN2. Appellants seek to introduce in support of their claim for negligence additional evidence consisting of an e-mail sent by Verizon manager, Stephen E. Euton, to other Verizon supervisors. The e-mail provides:
"Mark and Steve....I have been told by you Steve T, Brent and Davy that [the relevant] section of cable was going to be placed under the road. There was even discussion on Saturday about doing it that day, we suggested to place it temporary across the road due to the amount of time to get a crew there for a road bore.
"What is the story? Why are we even discussing not removing the poles and placing this under the road?
"Mark, how many times does this cable and poles have to be damaged? ? ? (and people get hurt)
"Hopefully, what I am hearing is a rumor and we are in the process of placing the cable under the road. Mark, please advise, thanks."
Unfortunately for appellant, evidence of Verizon's post-accident remedial measures is inadmissible to prove negligence or culpable conduct. See Evid.R. 407.

{¶ 27} Appellant argues in her third assignment of error that the trial court erred in granting Verizon's motion for summary judgment, because: 1) there is a question of fact as to whether Verizon violated the terms of its 1989 permit application and the terms of the permit covering the placement of the pole; and 2) Verizon assumed by agreement liability for violations of the terms of the permit. We are not persuaded by this argument.

{¶ 28} In 1989, Mark Wojnar, on behalf of GTE (Verizon's predecessor), completed an application for a permit to place an aerial communications cable across Route 250, 20 feet east of the intersection with C.R. 1575. The Department of Transportation approved the permit application. Both the application and the utility permit provided that the telephone line was to be placed 20 feet east of the intersection. According to Dr. Berg, the location of telephone poles is always measured and referenced to the edge of the pavement or traveled way adjacent to the pole location.[FN3] Here, the pole was placed approximately three feet from the paved edge of the roadway, and not 20. Therefore, appellant contends, Verizon violated the terms of its 1989 permit application and the terms of the permit covering the placement of the pole.

FN3. Former Verizon employees Steven R. Thomas and Mark Wojnar testified that they were unaware of the precise point from which the measurement was to be made. They also stated that there was no standard practice as to whether the 20 feet measurement would be from the east side of the pavement, the middle of the roadway, or some other point.

{¶ 29} Even assuming, arguendo, that the placement of the pole was in violation of the permit application and the permit, appellant's argument necessarily fails. Appellant does not provide-and this court's research

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does not reveal-any authority in support of her position that Verizon owed her or the decedent a duty under the permit. In fact, the general rule is that " '[a] plaintiff in an action for negligence, who bases his suit upon the theory of a duty owed to him by the defendant as a result of a contract must be a party or privy to the contract; otherwise he fails to establish a duty toward himself on the part of the defendant, and fails to show any wrong done to himself.' " *Toman v. Pennsylvania RR. Co.*, 51 N.E.2d 231, 39 Ohio Law Abs. 32, quoting 38 Am.Jur. 662; see, also, *Doe v. Choices*, 2d Dist. No. 21350, 2006-Ohio-5757, ¶ 19. Appellant did not allege that either she or the decedent was a party to the permit, and, without more, she cannot establish a duty owed to her or the decedent under that permit. Appellant's third assignment of error is therefore found not well-taken.

*6 {¶ 30} In her fourth, and final, assignment of error, appellant argues that the trial court erred in granting appellee's motion for summary judgment because there was a question of fact as to whether Verizon's conduct was willful and wanton, given Verizon's failure to take corrective action despite prior similar accidents, generally accepted engineering principles, and Blake's warning to his supervisor that the placement of the pole created a serious hazard to the motoring public.

{¶ 31} The test for determining wanton misconduct has two parts, and requires a plaintiff to show: 1) that there was a failure to exercise any care whatsoever by those who owe a duty of care; and 2) that the failure occurred under circumstances in which there was a great probability that harm would result from the lack of care. *Matkovich v. Penn Central Transportation Co.* (1982), 69 Ohio St.2d 210, 212, 431 N.E.2d 652.

{¶ 32} As indicated above, the October 17, 2000 incident was substantially similar to the one at hand because it involved damage to pole 2007-1 caused by a truck headed north on CR 1575 and turning right, or east, on SR 250. According to affidavit testimony by lineman/senior lineman Blake, he had previously complained to his supervisors that the location of pole 2007-1 was dangerous. As he put it, "After the October 17, 2000 incident I recall a conversation I had with [supervisor and field engineer/senior field engineer] Steve Thomas in which I told him that the facilities (wires/cables) in the area around the truck stop, including pole number 2007-1, needed to be buried to avoid serious injury or death. I asked Mr. Thomas-'What's it going to take, someone getting killed before corrective action will be taken?' He responded that it would cost too much to do so.' "

{¶ 33} Steve Thomas testified at deposition that his job duty was to design, on behalf of Verizon, items that needed to be placed within the right-of-way. He further testified that it was his responsibility to safely design those items, and that this responsibility included paying attention to the safety of motorists using the roadway. In particular, Thomas stated that in designing line placement and placement of poles, he would take into consideration whether or not the pole would be struck by motor vehicles, causing injury to others using the highway. He stated that he would do this in connection with every placement of a pole that he was involved in as an engineer and senior engineer. In the case of pole 2007-01, however, he never made such an engineering evaluation until after April 2002, when Myron Swaisgood was fatally injured.

{¶ 34} Evidence of the prior similar incident/incidents, together with the evidence that Verizon ignored its own engineering guidelines, and ignored Blake's warning to his supervisor, is sufficient to establish a question of fact as to whether Verizon failed to exercise any care whatsoever and under such circumstances that there was a great probability that harm would result from the lack of care. Appellant's fourth assignment of error is, therefore, found well-taken.

*7 {¶ 35} For all of the foregoing reasons, the judgment of the Erie County Court of Common Pleas is reversed, and this case is remanded for further proceedings consistent with this decision and judgment entry. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Erie County.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

PETER M. HANDWORK, ARLENE SINGER and WILLIAM J. SKOW, JJ., concur.
Ohio App. 6 Dist.,2007.
Swaisgood v. Puder
Slip Copy, 2007 WL 196478 (Ohio App. 6 Dist.), 2007 -Ohio- 307

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Glen E. STRUNK, et al., Plaintiffs-Appellants, v. DAYTON POWER & LIGHT COMPANY, et al., Defendants-Appellees.
Ohio App.,1986.
Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Second District, Montgomery County.
Glen E. **STRUNK**, et al., Plaintiffs-Appellants,
v.
DAYTON POWER & LIGHT COMPANY, et al., Defendants-Appellees.
No. CA 9457.

Feb. 5, 1986.

David M. Deutsch, E.S. Gallon & Associates, Dayton, Ohio, for plaintiff-appellant, Glen E. Strunk.
Dale Ann Goldberg, Dayton, Ohio, for plaintiff in intervention-appellant, United States of America.
Michael W. Krumholtz, Bieser, Greer & Landis, Dayton, Ohio, for defendant-appellee, Dayton Power & Light Company.
Gordon D. Arnold, Dayton, Ohio, for defendant-appellee, David Tharp.

OPINION

WOLFF, Judge.
*1 Appellant Glen E. Strunk appeals from a June 19, 1985 order of the Court of Common Pleas of Montgomery County granting appellee Dayton Power & Light Company (DP&L) summary judgment.[FN1]

This lawsuit arises out of an automobile accident which occurred on September 12, 1979. Appellant Strunk was traveling southbound on State Route 4 when David Tharp's vehicle collided with the rear end of his vehicle causing Strunk's vehicle to skid into a light pole located adjacent to the berm. The trial court found the pole was 13 feet, 8 inches from the travelled portion of the road.[FN2] The light pole was a nonbreakaway type pole owned, maintained, and controlled by DP&L. Appellant was rendered comatose as a result to this accident and ultimately died on September 25, 1981, without regaining consciousness.

On September 11, 1981, appellant filed a personal injury action against numerous defendants. Subsequently, on December 30, 1982, appellant filed a wrongful death and survivor action against DP&L, Tharp, and the City of Dayton. On April 11, 1983, the trial court ordered the cases consolidated.

For the purposes of this appeal, the only relevant defendants are DP&L and Tharp. Other defendants have been dismissed for various reasons.

On May 21, 1985, the trial court sustained DP&L's motion for summary judgment for the following reasons:
1. The pole was not a roadside hazard, since it was sufficiently clear of the highway. *Strunk v. Dayton Power & Light Co.*, 6 Ohio St.3d 429 (1983).
2. The location of the pole was not the proximate cause of the accident. *Mattucci v. The Ohio Edison Co.*, 79 Ohio Ap. 367 (1946).
3. Title 23 U.S.C. para. 152 does not require the Dayton Power and Light Company to retrofit; nor does it expand the tort liability of this defendant. *Daye v. Commonwealth of Pennsylvania*, 483 Fed.2d 294 (3d. Cir.1973); *Strunk v. Department of Transportation, State of Ohio*, Case No. 84 AP 114 (10th Dist.1984), unreported.
4. Strict liability in tort does not apply to this defendant in this case. *Rickert v. The Dayton Power and Light Company*, Case No. 1105 (2d Dist.1984), unreported.

Final judgment was rendered on June 19, 1985, dismissing appellant's claims against DP&L. On July 8, 1985, appellant filed his notice of appeal from that judgment.

Appellant asserts two assignments of error. The first states: " The court erred as a matter of law by holding that there is no legal duty upon defendant, Dayton Power & Light to retrofit a lightpole by adding breakaway devices when said lightpole is owned, controlled, and maintained by said defendant and located adjacent to a limited access highway."

DP&L was required to follow the specifications of the State of Ohio with regard to the location of, and the type of, lightpoles installed on State Route 4. (*Deposition of Charles Helldoerfer*, Defendant's

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Exhibit B, attached to Summary Judgment Motion, at 9-11). Furthermore, the State designed the poles. *Id.* at 7-8. Although the City of Dayton and the State had an " outstanding commitment to safety upgrade State Route 4 which included protecting or making breakaway the existing lightpoles" (*Affidavit of Richard Holten,* Exhibit D, attached to Summary Judgment Motion), both the City and the State have been found to owe appellant no duty with regard to the safety upgrading of the poles on State Route 4. *Strunk v. Dayton Power & Light Co.* (1983), 6 Ohio St.3d 429, 431; *Strunk v. ODOT* (Sept. 27, 1984), 10th App. No. 114, 115, unreported, at 6.

*2 In the instant case, the trial court found that there were no issues of material fact and that DP&L was entitled to judgment as a matter of law. Assuming *arguendo* there was a jury question on proximate cause,[FN3] the trial court would have had to find that DP&L owed Strunk no duty with respect to the light pole or that DP&L had not breached any duty of care it owed to Strunk.

The existence of a legal duty is a question of law for the court. More precisely, " [i]t is the ... function of the court to determine whether, upon the facts in evidence which the jury may reasonably find to be true, the law imposes upon the defendant any legal duty to act or to refrain from acting for the protection of the plaintiff." Restatement of the Law 2d, Torts (1965) 151, Section 328B(b), Comment e; *see also* Prosser and Keeton, Law of Torts (5 Ed.1984) at 236, Section 37. In Ohio, " [t]he existence of a duty depends on the foreseeability of the injury.... The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was *likely* to result from the performance or non-performance of an act." *Manifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77. (Emphasis ours.)

Essentially appellant argues that DP&L had an affirmative duty to make this lightpole less dangerous by either retrofitting the existing pole with a breakaway device or providing a guardrail for the pole. We note that traditionally courts have been much more reluctant to find liability for nonfeasance than for misfeasance. *Prosser, supra,* at 373-74, Section 56. As *Prosser* states: " [I]t is necessary to find some definite relation between the parties, of such a character that social policy justifies the imposition of a duty to act." *Id.* at 374.FN4 In this case we cannot find that a relationship existed between the parties which would justify placing the duty on DP&L to make the lightpole less dangerous for highway travellers.

It is not uncommon for vehicles to collide with lightpoles located adjacent to the roadway. It is desirable that all such lightpoles eventually be of the breakaway type. We do not, however, think DP&L's not retrofitting the lightpole should be a basis of liability in damages. We do not believe that DP&L should have reasonably anticipated that injury to Strunk was *likely. Manifee, supra.* Therefore, we hold that DP&L did not owe appellant a duty to safety upgrade the lightpole by either providing a guardrail or retrofitting it with breakaway devices. *Cf. Boylan v. Martindale* (1982), 103 Ill.App.3d 335; 431 N.E.2d 62; *Hoffman v. Vernon Township* (1981), 97 Ill.App.3d 721, 423 N.E.2d 519; *Southern Bell Telephone & Telegraph Company v. Martin* (1972), 229 Ga. 881, 194 S.E.2d 910, 912.

Accordingly, appellant's first assignment of error is overruled.

Appellant's second assignment of error states: " The lower court erred as a matter of law by holding that the Supreme Court's ruling in *Strunk, et al. vs. Dayton Power & Light, et al.* 6 Ohio St.3d 429, limits the legal duty of the defendant, Dayton Power & Light to the plaintiff herein."

*3 Specifically, the trial court stated: " The pole was not a roadside hazard, since it was sufficiently clear of the highway. *Strunk v. Dayton Power & Light Co.,* 6 Ohio St.3d. 429 (1983)." Appellant contends that the issue of DP&L's liability was not decided by the Supreme Court in *Strunk.*

Although the Court in *Strunk* decision did not decide the issue of DP&L's liability and the trial court may have erred in relying on *Strunk,* such error was harmless since we have held that DP&L owed no duty to safety upgrade the lightpole.

Accordingly, appellant's second assignment of error is overruled.

As both assignments of error are overruled, the judgment of the trial court will be affirmed.

KERNS and WILSON, JJ., concur.

FN1. The United States of America

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(plaintiff in intervention) also appealed from the June 19 order on July 18, 1985. On August 19, 1985, the USA filed a statement concurring in the arguments set forth in Strunk's brief.

FN2. Appellant's expert testified that the center of the lightpole was thirteen feet, eight inches from the outside edge of the right driving lane. Deposition of Edward R. Post, Ph.D. Exhibit C, attached to DP&L's Motion for Summary Judgment, at 58. In his brief, appellant relies on a distance of thirteen feet. On the other hand, retired Police Officer Donald Arney testified that the lightpole was located eight feet from the driving lane. Deposition of Donald J. Arney, at 21. Apparently, appellant decided to abandon Arney's testimony.

FN3. Although the trial court found the *Matucci* case controlling on proximate cause, we do not agree. Generally, the question of proximate cause is an issue of fact for the jury, *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 288, and the Ohio Supreme Court has held that the issue was for the jury in a case similar to this one. *See Ohio Bell Telephone Co. v. Lung* (1935), 129 Ohio St. 505, paragraph one of the syllabus.

FN4. *Prosser* further states:
In such relationships the plaintiff is typically in some respect particularly vulnerable and dependent upon the defendant who, correspondingly, holds considerable power over the plaintiff's welfare. In addition, such relations have often involved some existing or potential economic advantage to the defendant. Fairness in such cases thus may require the defendant to use his power to help the plaintiff, based upon the plaintiff's expectation of protection, which itself may be based upon the defendant's expectation of financial gain.
Prosser, supra, at 374, Section 56 (footnotes omitted). In this case, the relationship between DP&L and Strunk does not meet these criteria.

Ohio App.,1986.
Strunk v. Dayton Power & Light Co.
Not Reported in N.E.2d, 1986 WL 1702 (Ohio App. 2 Dist.)

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