

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
-vs- : : District Court of Appeals
: : Case No. CA-05-087541
OHIO BELL TELEPHONE COMPANY, : :
et al., : :
Appellants. : :

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

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I. INTRODUCTION

In accordance with Ohio's established law and public policies, this Court should reject the arguments of the Appellee, overturn the Eighth District's decision in *Turner v. Ohio Bell Telephone Co.*, and formally recognize that pole owners owe no duty to motorists who strike poles which are properly placed within rights-of-way pursuant to ODOT permits. Such a rule would properly recognize that the State of Ohio directs and approves the placement of poles in public rights-of-way and will promote certainty for the owners of the millions of poles properly placed in public rights-of-way throughout the state. Thus, for all of the reasons set forth below and in their original *amicus* brief, The Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company, and FirstEnergy Corp. ("the FirstEnergy *Amici*") urge this Court to reverse the *Turner* decision.

II. THE APPELLEE AND THE *TURNER* COURT EITHER DELIBERATELY IGNORE OR SIMPLY FAIL TO RECOGNIZE THAT ORC § 5515.01 COMPREHENSIVELY REGULATES THE PLACEMENT OF POLES IN PUBLIC RIGHTS-OF-WAY.

Appellee argues that the "license" that public utilities receive under ORC § 4931 and similar statutes place an "incumbent duty, i.e., the responsibility for protecting the superior rights of the traveling public." (Appellee's Brief at 5). **This argument and the court's opinion in *Turner v. Ohio Bell Telephone Co.*, 2006-Ohio-6168 (Cuyahoga County App. No. CA-05-087541) incorrectly presume that utility companies have free reign in placing poles in rights-of-way.** This conclusion is legally and factually wrong and fails to recognize – or deliberately ignores – the State's strict regulation of pole placement in public rights-of-way.¹

¹ Both the Appellee and the *Turner* Court contend that prior to placing a pole in a public right of way, the pole owner must take into consideration (1) a pole's 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.

While utilities have access to public rights-of-way, they have no discretion in locating their poles. **By statute, after formally applying for and obtaining a permit from the Ohio Department of Transportation (“ODOT”) to use a public right-of-way, the placement of the pole “shall be in the location prescribed by” ODOT. ORC § 5515.01(A). Moreover, the placing of the pole “shall be at a grade and in accordance with such plans, specifications, or both, as shall first be approved” by ODOT. ORC § 5515.01(B).** The legislature re-emphasized this lack of discretion by writing an express exception into ORC § 5515.01. As set forth in the statute, and consistent with public policy, Ohio will not prohibit telecom and power companies from constructing and maintaining power lines along “roads or highways” and will not force utilities to get permits to do such work **“except with respect to the location of poles, wires, conduits, and other equipment comprising lines on or beneath the surface of such road or highways.”** ORC § 5515.01 (emphasis added).

These requirements are reinforced by ODOT’s “Policy for Accommodation of Utilities” (available on line at <http://www.dot.state.oh.us/real/>) which specify that ODOT:

Is responsible for review and approval of the utility relocation plan with respect to the location of the utility to be installed or the manner of attachment. This includes the measures to be taken to preserve the safe and free flow of traffic, structural integrity of the roadway or highway structure, ease of highway maintenance, appearance of the highway and the integrity of the utility facility during highway construction.

ODOT’s Policy for Accommodation of Utilities at § 8106.02 (emphasis added).²

² In the Introduction to the Policy, ODOT explains that it

Has the responsibility to maintain the rights of way of highways under its jurisdiction to preserve the integrity, operational safety and function of the highway facility. **Since the manner in which utilities cross or otherwise occupy highway rights of way can materially affect the appearance, safe operations and maintenance of the highway, it is necessary that such use and**

Based upon their false presumptions, the Appellee and the Eighth District contend that utility companies should be held liable if they “fail” to take into consideration the pole’s proximity to the road and the surrounding terrain when placing utility poles in public rights-of-way. As previously explained by the FirstEnergy *Amici*, Ohio’s statutory scheme completely contradicts the Appellee’s argument and completely preempts the *Turner* test.

ODOT evaluates the grade and terrain of the rights of way, existing property rights, the location of existing utilities, and historical road traffic when it prescribes the placement of utility poles and other safety decisions. This analysis is conducted by professional road and highway planners and is much more rigorous than the *Turner* test. ORC § 5515.01. **Once ODOT determines where the pole should be placed, the pole owner has no discretion when it places it the pole. ORC § 5515.01 (A) and (B). This is the fatal flaw in both the Appellee’s and the *Turner* Court’s analysis – they both incorrectly assume that pole owners can place poles in rights-of-way as they see fit.** Because their underlying presumption is false,

occupancy be reasonably regulated. Authority to implement the above is Chapter 5515 ORC. The purpose of this policy is to set forth the conditions under which utility facilities may be accommodated on State Highway rights of way. It is the intent of this policy to permit use of State Highway rights of way consistent with preservation of the highway investment, safety to the highway user, highway maintenance requirements, proposed future highway improvements and environmental considerations. This policy provides for uniform practices throughout the State for the accommodation of utilities and recognizes the need for special consideration of unusual or hardship situations.

ODOT’s Policy for Accommodation of Utilities at § 8101 (emphasis added).

their ultimate legal conclusion is wrong. Accordingly, the Appellee's arguments must be rejected and the Eighth District's opinion is *Turner*.³

III. THIS COURT SHOULD ESTABLISH AS A MATTER OF LAW THAT ONCE A POLE IS PROPERLY PLACED IN ACCORDANCE WITH AN ODOT PERMIT, THE POLE OWNER OWES NO DUTY TO MOTORISTS WHO SUBSEQUENTLY STRIKE THE POLE.

Ohio's public policy supports public utilities making efficient use of public rights-of-way to minimize the environmental and land use impact on public and private property. Despite this support, as directed by the legislature, ODOT and/or other appropriate government agencies still analyze and dictate proper pole placement and pole owners can only place their poles "as prescribed" by the government. ORC §5515.01(A) & (B). **It is completely unfair and inequitable for poles owners to be held liable for placement decisions they did not make – which is exactly what the *Turner* decision requires and the Appellee demands.** Accordingly, this Court should hold that if a pole's location adheres to ODOT or other government specifications, the pole owner has no further duty to review the pole's placement and owes no duty to motorists who subsequently strike the pole.

In analyzing similar governmental regulations and pole owner liability when their properly placed poles are struck, the New Jersey Supreme Court found in *Contey v. New Jersey Bell Telephone Co.*, 136 N.J. 582, 590 (1994) that while "utility companies have a duty to

³ In addition to arguing that the pole owner had the discretion to move the pole at issue – which it did not – the Appellee also presumes that the pole owner could have unilaterally erected some sort of barrier, i.e., a curb or guard rail, to prevent the accident at issue. That is wrong. ODOT and/or other appropriate government agencies have total jurisdiction and control over all aspects of highways and roads; including but not limited to: designing and/or modifying the direction, curvatures, and paths of the roads, banking of highways, establishing speed limits, putting up warning signage, and if necessary, erecting and grading any curbs or guardrails. Thus, neither of the proposed "failures" of the pole owner could have been corrected by the pole owner: it did not determine the placement of the pole and it could not have unilaterally erected a curb or guardrail. The unfortunate reality is that it is unlikely that any curb or guardrail would have protected Mr. Turner in this accident. The only person who could have saved Mr. Turner was Mr. Hittle. He should never have hit the pole which was properly placed in the right-of-way.

foresee that motorists will leave the traveled portion of the highway, the governmental bodies and highway planners are best suited to determine how the utilities should fulfill that duty.” *Id.* **Recognizing this, the New Jersey Supreme Court held that if a “public utility has located its poles or structures within public rights-of-way in accordance with the location and design authorized by the public body, the utility, in the absence of countermanding directions from the public body, [the utility] should have no further duty to protect the motoring public.” *Id.* at 591.**⁴

Although the Appellee completely ignored this cogent analysis in her briefing, this Court should not ignore this logic in rendering its decision. This rule properly recognizes the State’s role in regulating the placement of poles while still requiring utilities and other pole owners to completely adhere to the plans and specifications dictated by the State. Because this rule achieves the appropriate balance between government regulations and private liability, this Court would be well-served to follow the *Contey* precedent.

IV. THE APPELLEE SHORT SIGHTEDELY IGNORES THE REALITY THAT THE *TURNER* DECISION WILL OPEN COURTHOUSE DOORS TO A POTENTIALLY ENDLESS STREAM OF CASES INVOLVING OBJECTS AND INDIVIDUALS LOCATED IN RIGHT-OF-WAYS.

According to the Appellee, if *Turner* is adopted, “the question as to whether or not the utility companies were negligent in placing [poles] in such close proximity to the traveled portion of roadway must be answered by the jury.” (Appellee’s Brief at 7). This analysis is

⁴ The Appellee goes to great lengths to argue – in hindsight – how the pole should have been placed. However, these arguments have two large holes: First, there is no evidence that the placement of the pole at issue violated permits issued by ODOT. Second, there is no evidence that the pole placements proposed by Appellee and her experts would have conformed to the existing government issued permits, plans, or specifications. Moreover, while stating that the pole at issue was hit 6 other times, Appellee does not provide any information about those instances or how the placement of the poles contributed – if at all – to the accidents. For example, did these other accidents involve excessive speeds? Did these accidents involve impaired motorists? Were these other accidents caused by a road that was improperly designed? Without such information the relevance of the pole placement to the accident at issue cannot be gauged.

legally incorrect, ignores the fact that pole placements are dictated by ODOT, and would unfairly involve utility companies in litigation for decisions it could not make.

If the Appellee's view is allowed to stand, it would mean that even in cases where motorists were driving recklessly, going at excessive speeds, driving while impaired, or otherwise breaking Ohio law – if a pole was involved in an accident – a trial court or jury would have to determine if the pole's placement was proper, even if the pole owner was simply adhering to ODOT or other government directives. If such a driver hits a car legally parked at the curb, there is no question that only the driver would be liable. However, under the Appellee's view, if the same driver were to strike a utility pole located beyond the curb, the pole owner would suddenly become potentially liable. If allowed to stand, eventually this analysis could be extended by Plaintiff's counsel to include a multitude of things in public rights-of-ways – mailboxes, trees, signposts, fire hydrants, and even people, etc. – and trials would have to be held in each instance to determine if such objects and people were properly placed in the public right-of-way. In addition, as the FirstEnergy *Amici* predicted in its original brief, the Appellee's view would make it impossible for courts to utilize summary judgment, a preferred judicial tool, in cases where poles were properly placed in accordance with government specifications yet hit by motorist.

Such results are not only illogical but irresponsible, and this Court should not even risk creating such a chaotic situation, much less allow it. By finding for the Appellants and overruling *Turner*, this Court can avoid generating needless litigation and creating uncertainty for pole owners who placed their poles in locations “prescribed” by the government. Cf. *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St. 3d 660; *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216, 2003-Ohio-5849; see also, e.g., ORC 5515.01.

V. CONCLUSION AND SUMMARY OF THE ARGUMENT

Ohio law has established a comprehensive statutory scheme governing the proper placement of poles in public rights-of-way. Based upon these laws, for over 70 years Ohio courts have found that pole owners are not liable to motorists who strike poles that are properly placed in right-of-ways that are not intended or used for travel. The Appellee and the *Turner* decision ignore these precedents and statutes and, in so doing, risk converting simple liability suits into complex multiparty litigation, clogging the dockets of Ohio courts and creating confusion state-wide. Accordingly, **the FirstEnergy Amici ask this Court to strike down *Turner* and, consistent with decades of Ohio appellate court decisions and findings of other state Supreme Courts, formally recognize that pole owners owe no duty to motorists who – for whatever reason – strike poles which are properly placed under Ohio law off the paved roadway, but in public rights-of-way.**

Respectfully submitted,



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