

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

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

v.

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

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

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

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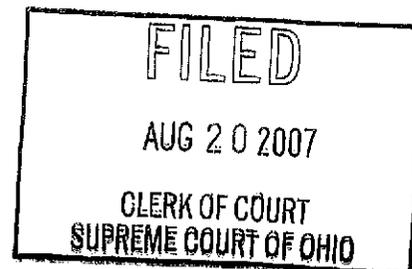
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## I. ARGUMENT

### A. Ohio Case Law Mandates A Reversal.

Plaintiff is asking this Court to adopt a rule of law that has never been the law of Ohio. To adopt Plaintiff's rule of law, this Court must overrule a litany of Ohio case law governing the placement of utility poles.<sup>1</sup> In her effort to convince the Court that it would not be overruling these cases, Plaintiff attempts to distinguish the cases on the basis that the poles were located in an areas where there was sufficient room for a vehicle to pull completely off the roadway in case of an emergency or that the poles were separated from the roadway by a curb. See Merit Brief of Plaintiff-Appellee at 8. These purported "distinctions" are irrelevant here.

First, in this case, the driver was **not** intending to pull his vehicle off the roadway at the time of the accident. He recklessly drove his vehicle off the roadway and struck the pole. Had he been in control of his vehicle and intending to pull his vehicle off the roadway, there was more than ample room in the areas before and after the pole to do so. Second, curbs do not serve as guardrails. A curb does not protect motorists who drive their vehicles off the roadway from striking utility poles. Curbs simply raise the point of contact when an out-of-control vehicle leaves the roadway and hits a pole.

Third, and most importantly, the courts in these cases did not rule in favor of the utilities on either of those bases nor did the courts focus upon the various factors set forth by the Eighth District (i.e., road contour, illumination, warning signs, reflective markers, or prior accidents). Rather, the courts focused upon Ohio's bright-line standard governing the placement of utility poles (i.e., whether the pole obstructed or interfered with the **proper** use of the roadway). SBC

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<sup>1</sup> The cases are discussed in Section III.A of SBC Ohio's Merit Brief.

Ohio's Proposition of Law, which relies upon the same bright-line standard, is in accord with this well-settled case law.

Plaintiff asserts that there are only **seven** intermediate appellate cases involving collisions between vehicles and utility poles since Lung and Harrington were decided in the 1930s, all of which were decided in favor of the utility. See Merit Brief of Plaintiff-Appellee at 18. Plaintiff contends that “[s]even 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.” Id. To the contrary, in those seven cases, the courts applied a bright-line standard (i.e., whether the pole obstructed or interfered with the **proper** use of the roadway) and the courts reached consistent results. Because there has been a clear and uniformly applied rule of law to which utilities and the traveling public could conform their actions, the number of lawsuits have been minimal.

However, if this Court were to adopt the Eighth District’s fact-specific test based on foreseeability and reasonableness, the number of lawsuits undoubtedly will increase a hundred fold (or more) and inconsistent decisions based on similar or identical facts will certainly result. Indeed, summary judgment will be virtually impossible to obtain -- forcing public utilities to re-evaluate the location of hundreds of thousands of utility poles lawfully located throughout the state. As part of this evaluation, public utilities will need to engage outside experts and consultants to ensure that the various factors outlined by the Eighth District, many of which are under the exclusive control of the Ohio Department of Transportation and relate to road design and engineering, are addressed. When considering where to place their poles, public utilities will be required to account for errant driving -- whether due to recklessness, drunkenness, or sleeping behind the wheel. As detailed in SBC Ohio’s and South Central’s Merit Briefs, this is an

unworkable standard that has far-reaching ramifications for the public utility industry and its customers.

**B. Even If Accepted, The Eighth District’s “Close Proximity” Rule Supports SBC Ohio’s Proposition Of Law.**

Plaintiff relies heavily on a portion of the Eighth District’s decision that states:

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.

See Merit Brief of Plaintiff-Appellee at 9. Plaintiff refers to this as the “close proximity” rule and correctly notes that it was applied in many of the cases relied upon by SBC Ohio and South Central. However, Plaintiff glosses over the most critical aspect of this rule – whether the pole is in such close proximity to the roadway as to constitute an obstruction dangerous to anyone **properly** using the roadway. The focus is upon the pole’s impact to those **properly** using the roadway and not upon the proximity of the pole to the roadway. This is the same bright-line standard applied by the First, Second, Fifth, and Ninth Districts and espoused in SBC Ohio’s Proposition of Law.

Although the Eighth District seemingly adopted this standard in its decision, it did not apply it. There is no dispute that Bryan Hittle was not properly using the roadway at the time of the accident. He was driving more than ten miles over the speed limit in dark, foggy conditions. (Supp. at 3, 21). He could not see oncoming traffic and he could not clearly see the center and edge lines of the road. (Id. at 9). Due to the poor visibility, he followed the tail lights of a pick up truck traveling immediately in front of him. (Id. at 4-5, 9). While trying to follow the truck, he drove his car off the road -- striking a utility pole and killing the decedent. (Id. at 6). Rather than apply the standard that it acknowledged was the applicable law and affirm the trial court’s

grant of summary judgment, the Eighth District formulated a new standard based on foreseeability and reasonableness.

The “close proximity” rule, as Plaintiff wishes to call it, actually supports SBC Ohio’s Proposition of Law. It is apparent that Plaintiff, like the Eighth District, continues to struggle with the “proper use of the roadway” language, which is the key to the bright-line standard. Under this standard, Plaintiff’s claims fail as a matter of law.

**C. The Traveling Public Has No Unfettered Right To Use The Entire Right-Of-Way.**

With respect to the placement of utility poles, there are two competing public policy interests: (1) the traveling public’s right to use the state’s roadways and (2) the public utilities’ right to place their poles within the public right-of-ways. To effectuate a rule of law that promotes sound public policy, it is important to balance these competing interests. This, the Eighth District’s decision fails to do.

Plaintiff contends that the traveling public’s right is superior to the public utilities’ right. See Merit Brief of Plaintiff-Appellee at 5, 7. In fact, Plaintiff states that the traveling public has “an unfettered right to use the entire right-of-way (not just the improved portion of the roadway)” and that “[public utilities] right to locate utility poles within the public’s right-of-way is inferior to that of the traveling public.” *Id.* at 7, 16. Ohio’s traffic laws dispel this contention.

The traveling public has no right to misuse the roadways or the public right-of-ways. Section 4511.33 sets forth the rules for driving in marked lanes. That Section provides, in pertinent part:

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

(1) A vehicle or trackless trolley shall be driven, **as nearly as practicable**, entirely within a single lane or line of traffic and shall not be moved from

such lane or line **until the driver has first ascertained that such movement can be made with safety.**

See O.R.C. § 4511.33(A)(1) (emphasis added). This Section, among others, makes clear that motorists do not have an unfettered right to use the entire right-of-way. To the contrary, to properly use the roadway, a motorist is required by law to remain, as nearly as practicable, within his or her lane of traffic. Before moving from his or her lane of traffic, the motorist must first ascertain that such movement can be made with safety, which requires the motorist to account for the various objects typically located off the roadway but within the right-of-way, such as utility poles, signs, fire hydrants, light poles, parked cars, and pedestrians.

Plaintiff does not want to balance these interests. Rather, Plaintiff seeks to elevate the right of the traveling public above the right of utility companies and other entities who, as a matter of business, place objects in the right-of-way, which will inevitably force these entities to remove their objects from the right-of-way and to place them within easements procured from private landowners. Otherwise, they will be subject to liability whenever their objects are struck by motorists who, according to Plaintiff, have superior rights. Moreover, in this action, Plaintiff seeks to elevate the rights of a reckless driver over the rights of lawfully-acting utilities who placed their poles only after receiving the requisite approvals from state and local authorities.

The result Plaintiff seeks is inconsistent with Ohio's long-standing policy that confers upon public utilities the right to place utility poles within the right-of-way so long as they do not incommode the public in its proper use of the roads. Moreover, Plaintiff ignores the fact that the right-of-way is under the control of state and/or local authorities. See O.R.C. § 4511.01(UU). Public utilities place poles in the right-of-way pursuant to permits granted to them by the state or local authority. In other words, public utilities obtain the state or local authority's blessing before placing poles in the right-of-way.

**D. Plaintiff Relies On Inapposite Cases To Support Her Qualified Nuisance Claim.**

To support her qualified nuisance claim, Plaintiff relies solely on the following Ohio Supreme Court decisions: Wilamson v. Pavlovich,<sup>2</sup> Dickerhoof v. City of Canton,<sup>3</sup> and Manufacturer's National Bank of Detroit v. Erie County.<sup>4</sup> These cases are inapposite. They concern the statutory duty of political subdivisions to keep roadways, including the berm or shoulder area of the roadway, free from nuisance. See Ohio Revised Code § 2744.02(B)(3). Here, Defendants are not political subdivisions, but rather public utilities. As stated above, the long-standing duty of utilities is to place their poles in locations that do not obstruct or interfere with individuals properly using the roadway. It is undisputed that SBC Ohio did not breach this duty.

**II. CONCLUSION**

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

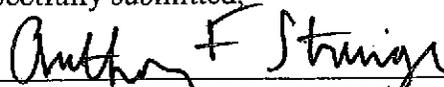
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<sup>2</sup> 45 Ohio St. 3d 179 (1989).

<sup>3</sup> 6 Ohio St. 3d 128 (1983).

<sup>4</sup> 63 Ohio St. 3d 318 (1992).

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A copy of the foregoing Reply Brief of Defendant-Appellant The Ohio Bell Telephone Company, d/b/a SBC Ohio was served this 20th day of August, 2007, by First Class U.S. Mail, postage pre-paid upon:

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