

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

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**REPLY BRIEF OF APPELLANT SOUTH CENTRAL POWER COMPANY**

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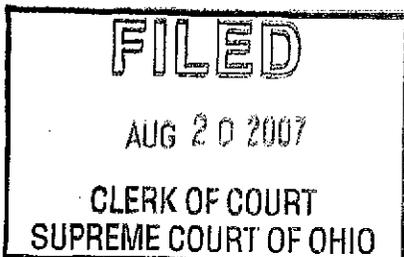
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## INTRODUCTION

Investigating Highway Patrol Trooper Christopher Goss testified as follows:

Q. Did the utility pole obstruct or interfere with traffic on the roadway?

A. No.

(Goss Dep. 72:5-7, Supplement To Merit Brief Of Defendant-Appellant, The Ohio Bell Telephone Company, d/b/a SBC Ohio, at 15.)

Meanwhile, Appellee Lorri Turner shares with the Court some of the undisputed facts. These facts, too, are undisputed and unrebutted: Bryan Hittle was speeding at 14 miles per hour over the speed limit, in the pre-dawn darkness, in a fog so dense that the road was no guide. Instead, he was blindly following the taillights of the vehicle in front of him. As a result of this reckless driving, Mr. Hittle was convicted of manslaughter in the death of Robert Turner.

Ohio law has been clear for generations that utilities (and for that matter governmental entities) are not responsible for damages and injuries caused when recklessly driven vehicles collide with a beyond-berm pole that is no hazard to a safe motorist. Ohio's utilities and governmental entities have relied on that law in placing millions of poles within public road rights-of-way.

The question for this Court is whether, on these facts, it should abandon this well-developed body of law, and substitute a new one which would impose liability regardless of whether the space where the pole is located was intended for travel or other proper highway use, and regardless of whether those motorists are sober, awake, or law-abiding, and despite the statutory grant to public utilities to make use of that unique public space. South Central Power Company ("South Central") respectfully submits that the Court should reaffirm the principles which have consistently guided its jurisprudence, and reverse the appeals court's judgment for Ms. Turner.

## DISCUSSION

### **I. Ms. Turner Is Urging This Court To Adopt An “Errant Driver” Test.**

#### **A. The Eighth District’s New Test, Which Ms. Turner Never Discusses Or Defends, Assumes That Out-Of-Control Drivers Will Leave The Roadway.**

Missing from the Merit Brief of Plaintiff-Appellee, Lorri Turner, Administratrix of the Estate of Robert Turner, Deceased (“Turner Br.”), is Ms. Turner’s own formulation of the proposition of law which she would have this Court adopt. Notably, she does not embrace the appeals court’s new eight-factor test. Indeed, she never even mentions it. That is unsurprising, for the eight-factor test can best be characterized as the “errant driver” test. That is, under the test, utilities should anticipate and determine where motorists will lose control, careen off the road and beyond the berm in violation of the law, and strike utility facilities lawfully placed within the right-of-way. That is precisely what happened here. South Central followed the law and placed a utility pole along a state route with both the state’s general authorization (*i.e.*, via the Revised Code) and the state’s specific authorization (*i.e.*, via the state permit).<sup>1</sup> Bryan Hittle, by contrast, broke the speed limit and the law, and was convicted of vehicular manslaughter.

#### **B. Ms. Turner’s Experts Favor This “Errant Driver” Analysis.**

While Ms. Turner neither discusses nor justifies the Eighth District’s new judge-made “errant driver” test, she does tout prominently the opinion of her expert, James Crawford. As she explains, Mr. Crawford 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.” (Turner Br. 2 (emphasis added).) Mr. Crawford himself is even more direct: “The location of this utility pole

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<sup>1</sup> Ms. Turner also has a companion wrongful death case against the state pending in the Ohio Court of Claims (Case No. C2005-09626). If the new eight-factor test, seven factors of which concern road design, becomes Ohio law, then surely the state must be liable as well for its design of the road and its permitting.

was unreasonably close to the pavement edge, and was situated where *errant* vehicles would reasonably be expected to travel if they drifted off of the roadway in the curve.” (Report of James Crawford (“Crawford Report”) at 6, ¶ 5, Supplement to Merit Brief of Plaintiff-Appellee, Lorrie [sic] Turner, Administratrix of the Estate of Robert Turner, Deceased (“Turner Supp.”), at 14 (emphasis added).) Mr. Crawford opines further that “[i]t is common knowledge that *errant* vehicles can and do travel off of the pavement from time to time, and current roadway design criteria makes [sic] provisions for these *errant* vehicles.” (Crawford Report at 6, ¶ 7, Turner Supp. 14 (emphasis added).)<sup>2</sup>

Ms. Turner’s other expert, Ronald W. Eck, likewise believes that utilities should engineer for the errant driver: “It is foreseeable that from time to time, vehicles will leave the travelled way.” (Eck Aff. at 3, ¶ 14, Turner Supp. 19.) Like Mr. Crawford, Dr. Eck believes that because automobiles lose control and motorists break the law, utilities should expect them to hit their poles: “As noted above, utility poles at such locations [*i.e.*, near the roadway or along a curve], especially those close to the traveled way, are particularly susceptible to being struck by vehicles due to the high probability of vehicles *leaving the pavement*.” (Eck Aff. at 3, ¶ 15, Turner Supp. 20 (emphasis added).) These opinions are ultimately irrelevant on summary judgment—in which the issue is whether a genuine issue of *fact* for trial exists—but the point is that the proposition of law around which Ms. Turner dances has at its core a legal presumption that drivers will break the law.

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<sup>2</sup> Unlike these opinions, Mr. Crawford’s opinion about Mr. Hittle’s speed does not use the word “errant,” but that is hardly necessary. He opines that at impact, Mr. Hittle was traveling 55-59 miles per hour (“m.p.h.”), in a 45-m.p.h. zone. (Crawford Report at 3 (speed limit), 5 (Hittle’s speed), Turner Supp. 12, 13). Presumably, in a fog so dense that Mr. Hittle was following the taillights of the car in front of him rather than the road, even 45 m.p.h. would have been unsafe for the conditions.

**C. Ms. Turner’s “Fact” Testimony, Though Beyond The Appeals Court’s Jurisdiction To Consider, Demonstrates The Public Policy Disaster That The “Errant Driver” Test Presents.**

Immediately after reciting the opinions of Mr. Crawford and Dr. Eck, Ms. Turner discusses—albeit incorrectly—the testimony of Daniel Ochs, a purported fact witness. The Ochs testimony is inadmissible and should never have been considered by the appeals court, for reasons that will be discussed below. But the testimony, assuming it could have been considered by the appeals court or this Court, illustrates why the Eighth District’s new proposition of law, that utilities must engineer for errant drivers who break the law, is bad public policy.

**1. The Ochs Testimony Has Been Misrepresented.**

Ms. Turner has misrepresented what Mr. Ochs said. She claims that “Mr. Ochs testified that he is aware of at least six automobile accidents involving the utility pole in question which occurred during 2002-2003[.]” (Turner Br. 3 (citing Ochs Dep. 80, Turner Supp. 24); *see also id.* at 19.) In fact, at page 80 of his deposition, Mr. Ochs did not testify that six vehicles had hit the same pole which Bryan Hittle hit. Mr. Ochs, at that point in his deposition, was speaking of accidents generally. Earlier in the deposition, he was asked about the Turner pole specifically:

Q. Let’s talk about other accidents involving these—this particular pole in question. I’m going to call it the Turner pole. Is that okay?

A. Okay.

Q. I guess, first, how many, if you know or can approximate for us, other accidents were you aware of at the Turner pole before Bobby Turner’s accident in September of 2003?

A. Two that I remember specifically. There are others, but they go back over a long period of time.

(Ochs Dep. 20:12-24, Turner Supp. 26.) Mr. Ochs then went on to discuss the only two accidents involving that pole which he could remember. He first recalled a summer 2003 accident. That driver was drunk. (*Id.* 21:1-11, Turner Supp. 26 (discussing accident involving

“two fellows in a black Suburban that were apparently drinking”).) Mr. Ochs also described an accident approximately one year before the drunk driver hit the pole. That driver was apparently sober, although asleep. (*Id.* 23:20-24, Turner Supp. 27 (describing accident “where a fellow had gone to sleep and took out the pole”).) Plaintiff’s counsel tried to elicit testimony on other accidents involving the pole at issue in this case, but Mr. Ochs said this: “And there are other incidents, but they’re out of my memory and I don’t—I’d rather not talk about any before that time.” (Ochs Dep. 25:22-24, Turner Supp. 27.) So instead of six accidents involving this pole as Ms. Turner contends, there were really only two of which Mr. Ochs had any recollection.

These two accidents, even if properly before the Court, raise the following sorts of questions: What blood alcohol content must utilities engineer for? Where should a utility put a pole so that those who cannot see—because they are asleep—won’t hit it? Indeed, why does the fact that there is a road there matter at all if the driver literally cannot see the road, the pole, or anything else, because his eyes are closed? These questions demonstrate precisely why the proposition of law implicitly advocated by Ms. Turner would be awful public policy.

## **2. The Appeals Court Lacked Jurisdiction To Consider The Ochs Testimony.**

Ms. Turner relies upon the Ochs testimony. But the Ochs testimony is not properly before this Court, nor was it properly before the appeals court. Mr. Ochs was deposed on November 28, 2005. (*See* Ochs Dep., at cover page, Turner Supp. 23.) The trial court, after a non-oral hearing date was properly set, entered summary judgment for Defendants and against Plaintiff on December 2, 2005. (*See* Mem. Of Op. And Order, Dec. 2, 2005, South Central Br. A-60 – A-65 (the “Appealed Judgment”).) That same day, unaware of the trial court’s December 2, 2005 entry, Ms. Turner filed the Ochs transcript and Plaintiff’s Supplemental Brief In Opposition To Defendants’ Motion For Summary Judgment. On December 7, 2005, Ms. Turner moved for relief from the December 2, 2005 judgment pursuant to Civil Rule 60(B) (the “Rule

60 Motion”), on the basis that she had just discovered the Ochs testimony, which she contended was relevant, and created a fact issue. Approximately two weeks later, on December 22, 2005, the trial court overruled Ms. Turner’s Rule 60 Motion, and specifically found that the Ochs testimony was not properly before the court. (Mem. Of Op. And Order, Dec. 22, 2005, South Central Br. A-66 – A-67 (the “Rule 60 Judgment”).) On December 29, 2005, Ms. Turner filed her notice of appeal. (Notice of Appeal, Dec. 29, 2005, South Central Br. A-92 – A-99 (attached).) That notice of appeal referenced, and attached, only the Appealed Judgment, and was silent as to the Rule 60 Judgment.

It is undisputed that the Ochs testimony was not before the trial court before it entered the Appealed Judgment. It could only properly be before the appeals court or this Court if the trial court had granted Ms. Turner’s Rule 60 Motion. Because Ms. Turner did not appeal from the trial court’s Rule 60 Judgment rejecting the Rule 60 Motion and excluding the Ochs testimony (because the testimony was neither new nor timely submitted), the court of appeals never had jurisdiction to consider that evidence. App.R. 3(D); *Slone v. Bd. of Embalmers & Funeral Dirs.* (8th Dist. 1997), 123 Ohio App.3d 545, 547; *Parks v. Baltimore & O. Railroad* (8th Dist. 1991), 77 Ohio App.3d 426, 428-429; *Robinson v. Allstate Ins. Co.*, Cuyahoga App. No. 84666, 2004-Ohio-7032, at ¶¶ 18-20; *see also State v. Cremeens*, Vinton App. No. 06CA646, 2006-Ohio-7092, at ¶ 7 (appellant’s notice of appeal only mentioned a judgment entry in one case, not a guilty plea entered in a second case); *State v. Browning*, Muskingum App. No. CT2004-0036, 2004-Ohio-6992, at ¶¶ 20-22 (criminal sentencing case); *Maunz v. Eisel*, Lucas App. No L-02-1379, 2003-Ohio-5197, at ¶¶ 31-35 (where notice of appeal identified order granting summary judgment to a particular defendant but did not identify a separate order granting summary judgment to other defendants, court refused to entertain the appeal as to parties in second order).

The evidentiary record was therefore long closed. That evidentiary record could only be reopened (a) by the trial court, or (b) by the appeals court with jurisdiction over the trial court's decision rejecting that evidence on both procedural and substantive grounds. Because the trial court overruled the Rule 60 Motion and Ms. Turner never asked the appeals court to reverse the Rule 60 Judgment by including that judgment in her Notice of Appeal, the appeals court was powerless to tamper with the trial court's judgment properly excluding the Ochs testimony.<sup>3</sup>

Yet, the appeals court inexplicably neither acknowledged nor explained its reversal of the unappealed Rule 60 Judgment and its consideration of the Ochs testimony. The trial court had carefully reasoned why the testimony was neither properly before it nor relevant. A decision overruling a Rule 60 motion is reviewed for abuse of discretion. *Doddridge v. Fitzpatrick* (1978), 53 Ohio St.2d 9, 12, 7 O.O.3d 5, 371 N.E.2d 214. "Abuse of discretion . . . represents an attitude that is unreasonable, arbitrary, or unconscionable." *McGee v. C&S Lounge* (10th Dist. 1996), 108 Ohio App.3d 656, 659, 671 N.E.2d 589 (applying *Doddridge*). The decision of whether evidence is properly before the court is likewise left to the trial court's sound discretion. *See, e.g., Community Mut. Ins. Co. v. Sabatucci* (Apr. 19, 1993), Stark App. No. CA-9137, 1993 Ohio App. LEXIS 2219, at \*3 (holding that trial court did not abuse its discretion in determining not to consider untimely filed evidentiary materials submitted in response to a dispositive motion). The appeals court ignored these standards, never holding that the decision overruling the Rule 60 Motion was an abuse of discretion, and instead simply assumed without explanation or justification that the untimely-submitted "evidence" was properly before the trial court.

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<sup>3</sup> Ms. Turner likewise bends the bounds of the record when she (like Mr. Crawford) points to the post-accident relocation of the pole. (Turner Br. 3, 21; Crawford Report at 3, Turner Supp. 12.) Such evidence is unquestionably inadmissible pursuant to Evidence Rule 407. Moreover, South Central did not move the pole because it had a duty to do so, as Ms. Turner implies, but out of respect for and in response to Ms. Turner's "relentless lobbying" (Turner Br. 21).

**II. Ohio Law Has Always Been Consistent That Duty Ends Where The Space Intended And Used For Travel Ends.**

**A. Ms. Turner Ignores The Words “Properly Using The Highway” In What She Describes As The “Close Proximity” Test, Which Is The Legal Test Which South Central Supports.**

Ms. Turner’s argument, at its core, is based on a false premise. She contends that South Central is urging this Court to adopt “a so-called ‘bright line’ test,” which she claims would be a “new rule of law” created by “judicial fiat.” (Turner Br. 15-16.) Ms. Turner contrasts that “so-called ‘bright line’ test” with what she describes as the “close proximity” rule, which she contends is different. (*See id.* at 9-10.)

Ms. Turner is correct that the propositions of law urged by South Central contemplate a line. Beyond the white line signaling the edge of the travel lane, beyond the edge of the paved surface, and beyond the berm, automobiles do not belong. But Ms. Turner is wrong to the extent that she contends that what she describes as the “close proximity” test is something new or different, or a test which South Central opposes, or a test under which she prevails. In fact, the close proximity test is South Central’s test, as Ms. Turner herself admits: “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.” (*Id.* at 10 (discussing six of the seven intermediate Ohio appellate decisions upon which South Central relies).)

The legal and logical problem with Ms. Turner’s analysis, and that of the court of appeals, is that they each read only some of the words of their own test. According to Ms. Turner, the appeals court proclaimed that “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.” (*Id.* at 9 (emphasis in original).) The words in that formulation which should be italicized are the words “properly using the highway.” A motorist who is off the “roadway” (as defined by R.C. 4511.01(E)) and beyond the berm, and who is convicted of (or even pleads no

contest to) vehicular manslaughter (whether a felony or a misdemeanor), is not properly using the highway. He is committing a crime. Because Mr. Hittle was not properly using the highway when he left it and drove into the ditch, the summary judgment should have been affirmed.

**B. *Harrington and Lung* Are Consistent With South Central's Propositions Of Law.**

Ms. Turner likewise selectively edits the rules of law set forth in this Court's 1930s decisions in *Cambridge Home Telephone Co. v. Harrington* (1933), 127 Ohio St. 1, 186 N.E. 611, and *Ohio Bell Telephone Co. v. Lung* (1935), 129 Ohio St. 505, 2 O.O. 513, 196 N.E. 371. (See Turner Br. 6-7.) As South Central explained in its opening brief, its propositions of law are wholly consistent with the holdings of *Harrington* and *Lung*. (See Merit Brief of Appellant ("South Central Br.") 9-10.) Indeed, in her brief, Ms. Turner quotes the key language which makes this clear. In *Lung*, the Court noted that the utility pole at issue was "located in an improved portion of the highway." *Lung, supra*, syllabus ¶ 1 (quoted at Turner Br. 7). While Ms. Turner does not say so, the situation was the same in *Harrington*: The utility pole was located within the improved portion of the road on a water-bound macadam berm fit for travel and in use for travel, according to the plaintiff's own witnesses. *Harrington, supra*, at 1.

This case presents a question which was never raised nor answered in each of those two cases: If the pole is beyond the traveled and improved portion of the roadway, and does not interfere with a motorist properly using the roadway, is the utility liable? The same question has been answered consistently by Ohio's appeals courts for seven decades, as they have interpreted the applicable statutory language—a body of law, every case squarely in conflict with the appeals court's holding in this case, which Ms. Turner simply ignores in her brief. The key command in the applicable statute is that utility facilities within public road right-of-way "shall be constructed so as not to incommode the public in the use of the roads or highways." R.C. 4931.03. The legislature has thus circumscribed the authority of utility companies to place

facilities, creating a legal shield protecting motorists using the roadways. But Ms. Turner argues repeatedly as though that language were a sword. According to Ms. Turner, the right to use the roadway “comes with an incumbent duty, i.e., the responsibility for protecting the superior rights of the traveling public.” (Turner Br. 5.) Indeed, according to Ms. Turner, *Harrington* and *Lung* “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.” (*Id.* at 7 (emphasis in original); *see also id.* at 16 (asserting that the “right to locate utility poles within the public’s right-of-way is inferior to that of the traveling public”).) But that argument begs this question: The “superior” or “unfettered” right to do what? To drive anywhere within the right-of-way, regardless of whether that space is paved, regardless of whether the highway designers intended that space for travel, and regardless of whether the “use” is criminal?<sup>4</sup>

**C. The Only Reasonable Construction Of *Harrington, Lung*, And The Ohio Revised Code Is That “Use” Means “Proper Use.”**

Ms. Turner goes so far as to observe that “the adverb ‘properly’ is not mentioned in any version of the statute.” (Turner Br. 16.) While Ms. Turner is absolutely right about the code language, it must also be observed that the word “improperly” is likewise absent from the statute. The question for this Court is therefore what adverb the legislature did intend or would have

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<sup>4</sup> Ms. Turner also cites *Black v. Berea* (1941), 137 Ohio St. 611, 19 O.O. 427, 32 N.E.2d 1, asserting that it is consistent with *Harrington* and *Lung*. (Turner Br. 11.) While the *Black* Court cited *Harrington* and *Lung*, the distinction which the Court made was that the erection and maintenance of mailboxes upon a post road “is a public use, being for both the delivery and receipt of mail.” *Black*, 137 Ohio St. at 614. To the extent that *Black* has any application, the work of public utilities or the business of public utilities is, as the name implies, also “public.” *Black* held that “[w]here it appears that a passenger in an automobile permits any part of her arm to extend outside the window while traveling along the side of a post road where rural mailboxes are known to be located, there is no reasonable inference other than that such passenger’s negligence was the proximate cause of an injury resulting from her arm coming in contact with one of such mailboxes.” *Id.*, syllabus ¶ 2. The rule in *Black*, if it is to be followed, should embrace public utility services as well.

intended to place before the word “use” in the phrase “so as not to incommode the public in the use of the roads or highways.” South Central respectfully submits that the General Assembly could only have contemplated *proper* use of the highway in that section. The objective of R.C. 4931.03 and its predecessors was and is to authorize an additional public use for this unique public space between the edge of the berm and the edge of the right-of-way. If the legislature had intended that motorists should be able to both use *and* misuse the space throughout the right-of-way, including the space beyond the berm, as Ms. Turner argues, it would not have authorized utilities to occupy and use that space at all. Likewise, had the legislature intended that utility companies always place their facilities abutting the outermost edge of the right-of-way, as Ms. Turner suggests at page 15 of her brief, the legislature would have said so.

This interpretation is not inconsistent with the statement in the syllabus of *Harrington* that “[t]he traveling public has a right to the use of a public highway, to the entire width of the right of way, as against all other persons using such highway for private purposes.” *Harrington*, 127 Ohio St. 1, syllabus ¶1. In *Harrington*, the pole was within the improved portion of the road on a water-bound macadam berm fit for travel and in use for travel, and the driver was within control and proceeding lawfully. *Id.* at 1 (statement of facts). While proceeding lawfully, she pulled from the travel lane to the berm to make room for cars coming the opposite way, hit a “rough spot in the berm,” and then hit the pole located within the berm. *Id.* There was never any suggestion in *Harrington* that the driver’s use of the right-of-way was anything other than proper and lawful, or that she was ever anywhere other than on the traveled and improved portion of the roadway which was intended for travel and used as travel space.

Thus, no court in this state’s history, including this Court, has ever held that a motorist has a right to misuse the right-of-way. Ms. Turner admits that Mr. Hittle’s use was improper. She notes that “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.”

(Turner Br. 1.)<sup>5</sup> Therefore, if the Court is to affirm, it must depart from the consistent line of jurisprudence begun in *Harrington* and followed consistently for more than seventy years, and hold that “use” in the statute means any use, whether proper or improper, lawful or criminal.

**III. This Court Cannot Affirm Without Either Overruling *Strunk v. Dayton Power & Light Co.*, Or Establishing Different Rules For Different Utilities.**

**A. Ms. Turner Never Explains Why Liability Should Depend Solely On Ownership Of The Pole.**

In its Merit Brief, South Central challenged Ms. Turner to justify the disconnect which would exist in Ohio law between the liability of municipalities for utility pole placement on the one hand, and the liability of cooperative and private utility companies for utility pole placement on the other hand, if this Court were to affirm. (See South Central Br. 14-16.) In *Strunk v. Dayton Power & Light Co.* (1983), 6 Ohio St.3d 429, 6 O.B.R. 473, 453 N.E.2d 604, this Court held that as a matter of law, a municipal utility cannot be liable for negligence in placing its pole beyond “the portion of the highway considered the berm or shoulder.” *Id.* at 431. Instead of justifying, on public policy grounds or otherwise, why the duty of a utility company should thus depend not upon what the utility company does, but upon who owns it, Ms. Turner argues that “South Central not only bastardizes *Strunk* but also ignores its offspring.” (Turner Br. 12.) Ms. Turner then makes three points about *Strunk*; each will be addressed in turn.

First, she makes the factual observation that the municipality in *Strunk* held fee simple title to the ground on which the pole was placed, whereas South Central merely had a statutory

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<sup>5</sup> This is akin to saying that a basketball player is inbounds because a portion of his left sneaker is inbounds, even though his other foot, the rest of his body, and the ball are sprawled on the ground out of bounds. As a matter of Ohio criminal law, Mr. Hittle was not supposed to have only “a portion” of his car “upon the improved portion of the roadway,” nor was he supposed to be able “to move his vehicle completely off the roadway at the point where the collision occurred.” (Turner Br. 1.) He was supposed to keep all four wheels on the portion of the right-of-way intended and in use for travel—either the asphalt or the berm—and to maintain control.

license. (*Id.*) That much may be true as a matter of property law, but it does not answer the legal question presented. Instead, it merely raises this question: How and why is it that duty depends on title? Duty has always turned on the actions or inaction of the tortfeasor, or the circumstances of the tort, and not on ownership of the instrumentality involved in the tort.

Ms. Turner next argues—citing not this Court’s opinion in *Strunk* but the appeals court’s opinion—that the *Strunk* pole was thirteen feet, eight inches from the traveled portion of the road, whereas the pole in this case was approximately two-and-a-half feet from the outermost edge of the berm. (Turner Br. 13.)<sup>6</sup> First, foraging in the appellate history of *Strunk* tells us nothing about what this Court did and did not hold. *Strunk* clearly holds that a municipal utility has no duty beyond the traveled way, and if the distance mattered this Court would have said so. See *Strunk*, 6 Ohio St.3d at 431 (“We are unwilling to extend a municipality’s duty past the portion of the highway considered the berm or shoulder. . . . Appellant has failed to persuade a majority of this court that the city of Dayton possesses a duty with respect to property adjacent to the roadway.”). Second, like the observation concerning the fee simple ownership of the ground in *Strunk* and this case, it is an irrelevant fact that pointedly ignores the Court’s holding as well as the important public policy question presented to this Court by this case.

Unlike her first two arguments concerning *Strunk*, which are limited to factual observations, Ms. Turner’s third argument does discuss the law. She argues that in *Manufacturer’s National Bank of Detroit v. Erie County Road Commission* (1992), 63 Ohio St.3d 318, 587 N.E.2d 819, this Court “held that the township’s duty to keep the roadways free from nuisance extended beyond the paved portion of the roadway.”<sup>7</sup> (Turner Br. 13 (citing

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<sup>6</sup> Actually, footnote 1 of the court of appeals’ decision in *Strunk* indicates there was evidence that the pole was eight feet from the driving lane.

<sup>7</sup> This Court in *Strunk* understood that its decision would not block the imposition of liability upon political subdivisions for visual obstructions to those properly using the roadway, and

*Manufacturer's*, 63 Ohio St.3d at 321).) South Central respectfully submits that this Court did not go nearly that far in *Manufacturer's*. This is what the Court said in that case:

The township directs our attention to *Strunk, supra*, in which we refused to extend a municipality's duty under R.C. 723.01 past the portion of the highway considered the berm or shoulder, and held that as a matter of law a light pole located adjacent to a roadway or the shoulder was not a portion of the highway within the meaning of R.C. 723.01. . . . On closer examination, however, the court in *Strunk* focused on whether the light pole was a condition that made the roadway unsafe for the usual and ordinary course of travel. In *Strunk*, the placement of the light pole adjacent to the roadway's shoulder did not jeopardize the safety of ordinary traffic on the highway. To the extent the language in *Strunk* is inconsistent with our holding today, our opinion in *Strunk* is hereby modified.

*Manufacturer's*, 63 Ohio St.3d at 322 (emphasis added).

From this passage, two points are clear. First, this Court has construed *Strunk* to mean that a municipality has no duty past the berm or shoulder. Second, a municipality's duty to motorists can extend beyond the berm, *but only if* the condition beyond the berm makes the *roadway itself* unsafe "for the usual and ordinary course of travel," or "jeopardize[s] the safety of ordinary traffic on the highway." A third point about *Strunk* bears noting. Since *Strunk*, the legislature has amended the statutes related to government liability for nuisances in the streets and highways to make them more restrictive against recovery. *Strunk* was decided under a more plaintiff-friendly version of the applicable language. In what was then R.C. 723.01, the statute provided that municipalities had the affirmative duty of having ". . . the care, supervision and control of public highways, [and] streets . . . within the municipal corporation, and shall cause them to be kept open, in repair, and free from nuisance." South Central respectfully submits that

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contrasted such visual obstructions with utility poles. The *Strunk* court, in distinguishing the holding in *Royce v. Smith* (1981), 68 Ohio St.2d 106, 22 O.O.3d 332, 429 N.E.2d 134, explained:

[I]n *Royce*, this court construed R.C. 5571.10 to impose liability upon township officials for failure to trim back trees from blocking the view of a stop sign. In the present case, we find no relation in the failure to trim trees which obstruct visibility and the placement of a light pole which is sufficiently clear of a highway.

*Strunk*, 6 Ohio St.3d at 431.

the then-statutory duty to keep the public highways and streets “free from nuisance” was arguably more onerous on municipalities than the conditions for pole placement prescribed by R.C. 4931.03. Given the wording of those two statutes, it would create a complete inconsistency and anomaly to affirm the court of appeals’ decision, when a municipality would clearly have prevailed as a matter of law had it, rather than a utility, owned the pole.

Ms. Turner can only prevail if this Court decides that a utility company owes a duty to travelers who find themselves beyond the berm. But this Court in *Manufacturer’s* specifically considered and rejected that notion, limiting any duty to those who remain on the road. Whereas the growing corn beyond the berm, but within the right-of-way, impaired the visibility of the motorist in *Manufacturer’s* who (a) was making ordinary—and lawful—use of (b) the paved and improved portion of the roadway, and thereby (c) did not see another law-abiding motorist, Mr. Hittle was out of control, off the traveled portion of the roadway, and indeed off the berm.

Ms. Turner also briefly cites two other decisions by this Court which she contends “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”: *Harp v. Cleveland Heights*, 87 Ohio St.3d 506, 2000-Ohio-467, 721 N.E.2d 1020; and *Haynes v. Franklin*, 95 Ohio St.3d 344, 2002-Ohio-2334, 767 N.E.2d 1146. (Turner Br. 13.) In fact, those decisions are entirely consistent with the foregoing analysis. In *Harp*, the overhanging limb of a tree whose roots were beyond the berm posed a threat (of falling to the pavement) to motorists properly using the paved portion of the roadway. *Harp, supra*, at 512 (“Clearly, an unsound tree limb that threatens to fall onto a public road from adjacent property can be a nuisance that makes the usual and ordinary course of travel on the roadway unsafe.”). As in *Manufacturer’s*, this Court’s focus in *Harp* was the protection of and the duties owed to those properly using the roadway.

In *Haynes*, the claim was for an “elevation drop” between the roadway and the berm. This Court reasoned that one could be properly using the roadway; be forced to divert to the defective berm, due to an emergency or otherwise; and thereby be traveling lawfully within the space intended for travel. See *Haynes, supra*, at ¶ 18 (describing two-part test for plaintiff to defeat summary judgment, the first prong of which is that the condition “creates a danger for ordinary traffic on the regularly traveled portion of the road”).

South Central’s propositions of law are entirely consistent with the consistent body of jurisprudence that has been developed in *Harrington, Lung, Manufacturer’s, Harp*, and *Haynes*. As the appeals court acknowledged by certifying its decision as being in conflict with the uniform body of law which has developed in Ohio’s appellate courts for seventy years, this Court cannot affirm without opening a new chapter in Ohio tort law.

**B. *Strunk* Is About Duty, Not Distance.**

The decision in *Strunk* is also supported by this Court’s opinion in *Lovick v. Marion* (1975), 43 Ohio St.2d 171, 72 O.O.2d 95, 331 N.E.2d 445, upon which the *Strunk* court heavily relied. *Strunk*, 6 Ohio St. 3d at 430-431. In *Lovick*, the plaintiff was walking on the paved portion of the street, which had no sidewalk. His foot slipped off the edge of the street, and he fell down a sloping asphaltic concrete apron, which sloped surface immediately adjoined the road, connecting the edge of the street and a catch basin located about six feet from the pavement edge. *Id.* at 171 (statement of facts). The Court held that there was no liability despite the immediate proximity of the sloping concrete apron to the road’s edge, because the condition did not render the street “unsafe for usual and ordinary modes of travel.” *Id.* at 172. The Court held that “the catch basin and drainage slope were not part of the paved or traveled portion of the street; they did not render the street unsafe for customary vehicular or pedestrian travel and did not cause injury to a person using the street in an expected and ordinary manner.” *Id.* at 174.

The *Lovick* case is particularly instructive because the “concrete slope” was immediately adjacent to the traveled portion of the roadway. Again, if proximity mattered, as Ms. Turner contends, the Court would have so held.

If *Strunk* (or any of the seven appellate decisions in conflict with this one) were premised upon the pole’s distance from the traveled portion of the roadway (or the presence of a curb), the Court would have said so. Instead, the *Strunk* Court cited *Lovick* with approval, indicating that the pole in *Strunk*, like the immediately sloping drainage basin in *Lovick*, did not render the roadway unsafe for customary travel; and thus, it was not within the ambit of the statutory duty.

**C. *Dickerhoof v. Canton*, Like Every Other Case Ms. Turner Discusses, Is Consistent With And Indeed Supports South Central’s Propositions Of Law.**

Ms. Turner’s reliance upon *Dickerhoof v. Canton* (1983), 6 Ohio St.3d 128, 6 O.B.R. 186, 451 N.E.2d 1193, is similarly unavailing. (See Turner Br. 11-12.) Ms. Turner correctly explains that the decedent in that case “swerved to miss an object in the roadway, traveled onto the shoulder of the roadway, and struck a chuckhole.” (*Id.* at 11.) First, South Central has always maintained, consistent with every Ohio decision on point, that the dispositive distinction is between the areas of the right-of-way intended and used for travel, *including* the shoulder/berm area, and that part of the right-of-way beyond the shoulder/berm. The decedent in *Dickerhoof* was, by Ms. Turner’s own admission, within the shoulder when the accident occurred. As such, the motorist was proceeding lawfully at the moment of the accident.

Second, as the *Dickerhoof* court observed, the shoulder “is designed to serve a purpose which may include travel under emergency circumstances.” *Dickerhoof*, 6 Ohio St.3d at 130. Agreed. But in this case, Mr. Hittle was not faced with any emergency or any obstacle in the road (he was simply speeding in the fog), he did not leave the asphalt due to a sudden emergency within the roadway (he simply lost his way while speeding in the fog), and he was not on the shoulder (he was beyond the shoulder). Therefore, *Dickerhoof* is inapposite and irrelevant. See

also *Steele v. State of Ohio, Dept. of Transp.* (10th Dist. 2005), 162 Ohio App.3d 30, 36, 2005-Ohio-3276, at ¶ 15, 832 N.E.2d 764 (citing *Manufacturer's, supra*, and explaining that “the test is whether ODOT is responsible for maintaining a condition that renders the regularly traveled portions of the highway unsafe for the usual and ordinary course of travel”).

#### **IV. What This Case Is And Is Not About.**

The best way to summarize what this case is about is to analyze what it is not about.

##### **A. What This Case Is Not About.**

This case is not a situation such as that which confronted this Court in *Manufacturer's*, where a permanent obstruction to a driver's visibility (growing corn), was a nuisance because it made “the usual and ordinary course of travel *on the roadway* unsafe.” See *Manufacturer's*, 63 Ohio St.3d at 323 (emphasis in original). This is not a case in which it can be seriously argued that the subject pole rendered “the regularly travelled portions of the highway unsafe for the usual and ordinary course of travel,” as was the case in *Manufacturer's*. *Id.*, syllabus ¶ 1.

This is also not a case in which the motorist was properly driving at a reasonable speed within his marked lane as required by R.C. 4511.33(A) and 4511.25(A).

Nor is this a case in which the motorist kept his vehicle within the berm of the highway, which is designed for travel under emergency circumstances. *Dickerhoof*, 6 Ohio St.3d at 128. This is also not a case, as was *Dickerhoof*, in which a motorist, while proceeding in a reasonable fashion in normal travel, confronted an object in the road, forcing a swerve to the berm. Unlike *Dickerhoof*, this is also not a case in which there was a dangerous chuckhole in the berm—an area intended and used for travel—rendering the roadway “unsafe for normal travel.” *Id.* at 131.

Finally, this case does not present a situation such as was true in *Lung*, in which the pole “was on an improved portion of the highway which the driving public used at times . . . .” *Lung*, 129 Ohio St. at 509. Similarly, the scenario in *Turner* was unlike that presented in *Harrington*,

in which, according to the testimony of the plaintiff's witnesses, the telephone pole, which was the subject of the dispute, was actually on the paved berm. *Harrington*, 127 Ohio St. at 1.

Ms. Turner tries to wrap her argument in the garb of what she refers to as the “close proximity rule,” when it is clear that adherence to that rule would require reversal, and the entry of summary judgment. In discussing the “close proximity” rule, Ms. Turner conveniently forgets that the claimed obstruction must be in such close proximity to the traveled portion of the highway as to constitute an obstruction dangerous to anyone “*properly using the highway.*” *Mattucci v. Ohio Edison Co.* (1946), 79 Ohio App. 367, 369, 35 O.O. 131, 73 N.E.2d 809. South Central submits that those situations are rare, but some do exist, such as the cornfield obstruction in *Manufacturer's*, or the obstruction in the berm itself in *Dickerhoof*. Therefore, while it may be possible to hypothesize a situation where an obstruction off the traveled portion of the roadway can pose a problem to motorists who are properly within the roadway, this case is not one of them, and the common pleas court properly found that it was not.

**B. What This Case Is About.**

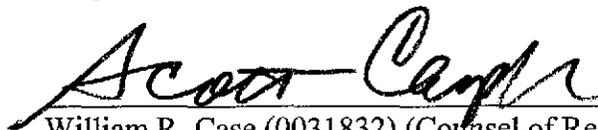
What this case clearly is about is a motorist who was speeding at 14 m.p.h. over the speed limit around a curve, on a morning so foggy that he was following the taillights of the vehicle in front of him instead of the road, which he could not see. Mr. Hittle was convicted of vehicular manslaughter as a result. While there is nominal discussion in both the opinion below and the Turner Brief as to whether the pole was in unreasonably “close proximity” to the road, what Ms. Turner and her expert are really advocating (and for that matter the court below held) is the imposition of liability for the placement of a pole which they concede would never have been hit in the absence of “errant” driving. Indeed, Mr. Hittle himself did not claim that anything unusual happened to force him off the roadway and berm: “The truck veered, I veered, and I veered further than he did, and I ran off the road.” (Hittle Dep. 40:12-13, South Central Supp. 29.)

Ms. Turner's Merit Brief for the most part sidesteps Mr. Hittle's criminal conduct, except to say that there can be more than one proximate cause of an accident, and that Mr. Hittle's negligence does not preclude a finding of negligence with respect to another party. (Turner Br. 14-15.) That statement is true so far as it goes. A utility pole owner could be jointly liable with a motorist if, for example, the pole was obstructing the traveled portion of the highway, and the motorist had sufficient time to react to the obstruction but failed to do so. That hypothetical scenario is one in which the pole would be a hindrance to a motorist properly using the highway. But that is not this case under any stretch of the facts. The trial court noted this when it held that the pole "does not incommode the public in its proper use of the traveled portion of State Route 188. In this instance, the record demonstrates that the pole was neither placed on the traveled and improved portion of the road nor in such close proximity as to constitute an obstruction to anyone properly using the highway." (See Appealed Judgment, South Central Br. A-63.) The trial court got the legal analysis exactly right, and the appeals court should therefore be reversed.

### CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,



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The undersigned certifies that a copy of the foregoing, *Reply Brief Of Appellant South Central Power Company*, was served upon the following by regular U.S. mail, postage pre-paid, on August 20, 2007:

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2005 DEC 29 8:10 CUYAHOGA COUNTY, OHIO

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CLERK OF COURTS  
CUYAHOGA COUNTY, OHIO

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CLERK OF COURTS  
CUYAHOGA COUNTY  
LORRI TURNER, Administratrix et al.

CASE NO. CV-05-555394

Plaintiff-Appellant )

JUDGE STUART A. FRIEDMAN

-vs- )

OHIO BELL TELEPHONE CO., et al., )

NOTICE OF APPEAL

Defendant-Appellee )

Judge:



CA 05 087541

Notice is hereby given that the Plaintiff, Lorri Turner, Administratrix of The Estate of Robert Turner, hereby appeals to the Court of Appeals of Cuyahoga County, Ohio, Eighth Appellate District, from the judgment rendered by this Court on Defendants' Motion for Summary Judgment. (See Exhibit A attached hereto).

Respectfully submitted,

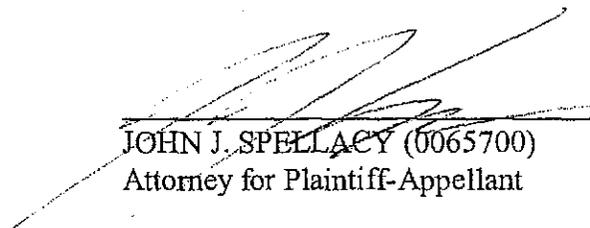
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THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

LORRI TURNER, INDIVIDUALLY  
AND AS ADMINISTRATOR OF THE  
ESTATE OF ROBERT W. TURNER,  
DECEASED

Plaintiff

vs.

THE OHIO BELL TELEPHONE  
COMPANY, ET AL.

Defendants

CASE NUMBER 555394

JUDGE STUART A. FRIEDMAN

MEMORANDUM OF OPINION  
AND ORDER

FRIEDMAN, J:

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

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

<sup>1</sup> The Court granted Plaintiff until November 9, 2005 to file briefs in opposition to the motions for summary judgment.

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EXHIBIT

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from the highway's edge line and two feet, five inches from the road's berm. Mr. Turner died as a result of the accident. Mr. Hittle was later convicted of vehicular manslaughter.

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

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

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There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the [non-moving party's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

*Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 249-250.

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

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

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

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

{¶8} Although Ohio law imposes a duty upon Defendants not to incommode the public in its use of the roads when constructing and placing utility poles, the Court is reluctant, without further specifics from the related statutes and from Plaintiff, to apply the doctrine of negligence *per se* in this instance. With respect to the remaining negligence claim, it is clear from the overwhelming case law on the matter that the placement of a utility pole by the Defendants three feet, nine inches from the roadway's edge line and two feet, five inches from the highway's berm does not incommode the public in its proper use of the traveled portion of State Route 188. In this instance, the record demonstrates that the pole was neither placed on the traveled and improved portion of the road nor in such close proximity as to constitute an obstruction dangerous to anyone properly using the highway. See *The Ohio Postal Telegraph-Cable Co. v. Yant* (Licking Cty. App. 1940), 64 Ohio App. 189, 195; *Mattucci* (Summit Cty. App. 1946), 79 Ohio App. at 370; *Curry v. The Ohio Power Co.* (Licking Cty. App. 1980), 1980 Ohio App. LEXIS 11996, \*3; *Cincinnati Gas & Electric Co. v. Bayer* (Hamilton Cty. App. 1975), 1975 Ohio App. LEXIS 6305, \*8; *Crank v. Ohio Edison Co.* (Wayne Cty.

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<sup>2</sup> Incommode is defined as to inconvenience or give distress to.

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

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

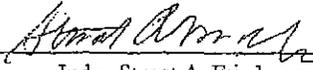
{¶10} Given that Plaintiff is unable to satisfy the elements of negligence in this case, as discussed above, the Court grants summary judgment in favor of Defendants on Plaintiff's qualified nuisance claim. With respect to the absolute nuisance cause of action, it is clear from the record that, by placing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

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

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

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

IT IS SO ORDERED.

  
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Judge Stuart A. Friedman

Dated: December 2, 2005

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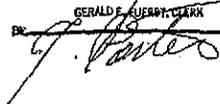
Copies of the foregoing Memorandum of Opinion and Order were sent via facsimile to all counsel of record this date: December 5, 2005

  
\_\_\_\_\_  
Judge Stuart A. Friedman

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DEC 02 2005

GERALD F. QUERRY, CLERK

By:  DEP.