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.

MOTION FOR RECONSIDERATION OF PLAINTIFF-APPELLEE, LORRI TURNER, ADMINISTRATRIX OF THE ESTATE OF ROBERT TURNER, DECEASED

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MOTION FOR RECONSIDERATION

Now comes Plaintiff-Appellee, Lorri Turner, Administratrix of the Estate of Robert Turner, deceased, by and through counsel, and respectfully requests this Court, pursuant to Rule XI, Section 2 (A)(4) of the Ohio Supreme Court Practice Rules, to reconsider the judgment entry issued in the case *sub judice*.

Plaintiff-Appellee respectfully submits that reconsideration is appropriate in that the standard adopted by this Court is counterintuitive to our system of tort law and, if applied, would prove unworkable. In the alternative, even if this Court does not see fit to revisit the standard, the appropriate disposition would nonetheless be to remand this matter back to the trial court for additional proceedings not inconsistent with the Court's opinion.

As this Court is well aware Plaintiff's decedent, Robert Turner, was killed when a vehicle in which he was riding as a passenger struck a utility pole that was located three feet, nine inches, off the paved portion of State Route 188, just north of Lancaster, Ohio. Plaintiff sued several utility companies, alleging, *inter alia,* that the utilities were negligent in placing the utility pole in such close proximity to the roadway and, further, that location of the pole constituted a nuisance.

In granting summary judgment in favor of the utility companies, the Cuyahoga County Court of Common Pleas held that a utility company could not be liable when a motorist strikes one of its poles unless such pole was located within the marked lanes of travel or on an improved berm. (The "bright line" test)

On appeal, the Eighth District declined to adopt this "bright line" test and held that liability may be imposed where a utility company places a pole is in such close proximity to the edge of the roadway that the location constitutes a foreseeable and unreasonable risk of harm to anyone properly using the highway. Turner v. Ohio Bell, 2006 Ohio 6160, ¶ 16. (The "close proximity" test)

This Court declined to adopt either "bright line" test or the "close proximity" test opting instead to fashion its own metric. When a vehicle collides with a utility pole located off of the improved portion of the roadway, but within the right-of-way, a public utility is not liable, as a matter of law, if the utility has obtained any necessary permission to install the pole and the pole does not interfere with the **usual and ordinary course of travel**. Turner v. Ohio Bell, 2008-Ohio-2010, ¶ 21. The rule of law adopted by this Court is different than standard that was applied by the trial court and represents a modification, if not an out right reversal, *sub silentio*, of prior Ohio Supreme Court precedent. See Cambridge Home Telephone Co. v. Harrington (1933), 127 Ohio St. 1; Ohio Bell Telephone Co. v. Lung (1935), 129 Ohio St. 505. 1

It cannot be disputed that the trial court did not apply this new metric in reviewing the motions for summary judgment filed by the utility companies. Nonetheless, this Court reversed, in part, the judgment of the Court of Appeals and entered judgment in favor of the utility companies. (Turner v. Ohio Bell, 2008-Ohio-2010, ¶ 27.)

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1 Holding that where a passenger is killed while riding in an automobile which collides with a telephone pole 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

Based upon the syllabus law announced in the Slip Opinion, the relevant inquiry is now whether the location of the utility pole, albeit off the paved portion of the roadway, nonetheless, interferes with the usual and ordinary course of travel.

In declining to adopt either the "bright line test" endorsed by utility companies, or the "close proximity" espoused by the Eight District and further abandoning the prior holdings in Cambridge Home Telephone Co. v. Harrington, *supra* and Ohio Bell Telephone Co. v. Lung, *supra*, this court has ventured into *terra incognita*. The element of notice, long the *sine qua non* of tort liability, is no longer part of the equation. Under the new standard, a utility company may be liable for a pole related collision if a plaintiff can show that, at the time of the crash (and not necessarily at the time of placement) the pole was located an unimproved portion of the right of way that had become ordinarily and usually traveled, regardless of whether the utility company was on notice of such change in use. By contrast, under this Court's decision in Turner, a utility company will not be held responsible where it clearly has notice that a pole location has become danger to motorists (as in Turner), thereby creating a disincentive to undertake remedial measures to remove the danger. Beware the law of unintended consequences.

Even if this Court declines to reconsider the practical difficulties created by the new metric announced in Turner, the appropriate disposition would be to remand this case back to the trial court.

In the process of explaining the rationale underpinning its decision, this Court distinguished Swaisgood v. Puder, (2007) 6th Dist. No. E-06-033, 2007-Ohio-307. In Swaisgood, an unidentified tractor-trailer making a right-hand turn struck a utility pole

located at the corner of the intersection, three feet, nine inches, from the paved portion of the roadway. Plaintiff's decedent was killed while directing traffic around the area where wires from the pole had fallen onto the roadway.

Ironically, the respective utility poles in Turner and Swaisgood were both located exactly three feet, nine inches from the paved portion of the roadway. Nonetheless, this Court endorsed the Sixth District's finding that a genuine issue of fact existed so as to preclude summary judgment and held:

> There was evidence *(in Swaisgood)* that the pole did not allow sufficient clearance for long vehicles, such as tractor-trailers, making a proper right-hand turn from the traveled portion of one highway to the traveled portion of the other. Due to the presence of a truck stop at the southeast corner of the intersection, the need for sufficient clearance for such vehicles should have been anticipated. Although it relied upon the Eighth District's eight-factor test instead of the test we endorse today, the Sixth District's finding that there is a material issue of fact as to whether the Verizon pole interfered with the usual and ordinary course of travel is not inconsistent with the holding in this case. No such interference with normal turns has been demonstrated here. (See Swaisgood v. Puder, 2007-Ohio-307, ¶ 25.)

This Court found that the Sixth District's decision in Swaisgood passed muster under the new standard announced in Turner because the Sixth District essentially applied the "interference with the usual and ordinary course of travel" test. However, a review of the Swaisgood opinion indicates that the terms "interference with the ordinary course of travel" are mentioned nowhere in the opinion. Instead, the Swaisgood court held that as long as a utility pole is located 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. Swaisgood v. Puder, 2007-Ohio-307, ¶ 25. This is identical to the principal of law announced by the Eighth District.

Indeed, a side by side comparison Turner and Swaisgood reveals that identical pole proximity is by no means the only common fact shared between these two cases.

At the summary judgment phase in the trial court, the plaintiffs in both Turner and Swaisgood presented expert testimony by way of affidavit.

In Swaisgood, plaintiffs demonstrated that there several prior crashes involving the utility pole at issue. (Swaisgood v. Puder, 2007-Ohio-307, ¶ 24.) In Turner, plaintiff presented evidence that there were twenty-eight (28) crashes along this area of State Route 188 that involved a vehicle striking utility poled or other fixed objects, including the particular pole in question. (Supplement to Merit Brief, p. 13.) The plaintiff in Turner also presented evidence that, in the span of two years, there had been at least six other collisions involving this particular pole before the utility company finally moved it to a safer location. (Supp. 23-28) 2

In Swaisgood, plaintiffs presented evidence that the pole location violated standards promulgated by the American Association of State Highway and Transportation Officials (AASHTO). (¶ 23) In Turner, plaintiff presented evidence that the location of the utility pole violated the same standards. (Supp. 12.)

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2. Mr. William Ochs, who owns a home and farm directly across the street from the utility pole that killed Bobby Turner, testified that he is aware of at least six automobile crashes involving the utility same pole during 2002-2003. (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. (Supp. at 25.) 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. (Supp. at 28, 24.)

In Swaisgood, plaintiffs presented evidence that the geometry of the intersection where the crash occurred created a situation where vehicles frequently went off the roadway when making right turns. (¶ 23.) In Turner, plaintiff presented evidence that the crash occurred was on a left-bearing curve with a two foot wide, loose gravel berm that sloped steeply away from the roadway. (Supp. at 12.). Turner's experts opined that it was the geometry of the roadway that caused vehicles to frequently stray off of the pavement when traversing the curve. (Supp. at 12; 20) In Turner, plaintiff also presented evidence that it was common knowledge that vehicles using this area of State Route 188 went off the paved portion of the roadway on a regular basis. (Supp. 14.)

In Swaisgood, the tractor-trailer that allegedly struck the utility pole did not entirely leave the paved portion of the roadway when the impact occurred. (¶23) In Tuner, a portion of the car in which Bobby Turner was riding as a passenger was still located on the paved (i.e. usually and ordinarily traveled) portion of the roadway when the impact occurred. (Supp. 14, 16.)

In both Swaisgood and Turner, there was no evidence that the utility companies failed to obtain a permit to place the respective utility poles.

Despite all of these similarities, this Court found that the Swaisgood case can survive summary judgment whereas the Turner case cannot.

Based upon this syllabus law adopted by this Court, the relevant inquiry for courts facing these types of cases is whether the location of the pole interfered with the usual and ordinary course of travel. In analyzing Swaisgood, this Court found that it was not unusual or extraordinary for vehicles to stray from the paved portion of the

roadway at the intersection where the collision occurred. Despite the fact that the tractor trailer that struck the Swaisgood pole had left the portion of the road that was designed and intended for travel, this Court found that a utility company could nonetheless be held liable if it was not unusual or extraordinary for vehicles to do so.

Plaintiff-Appelle respectfully submits that, based upon the evidence submitted in response to the utility companies motions for summary judgment, there is an issue of fact as to whether the pole in Turner was placed in a location where it was not unusual or extraordinary for the utility companies to expect that vehicles would travel. Certainly, after replacing or repairing the pole six (6) times over two years, the utility companies had a good idea that this was indeed the case.

Plaintiff-Appellee Lorri Turner would request this Court to reconsider the import of the new rule of law announced in the Slip Opinion and instead adopt the "close proximity" test.

In the alternative, Plaintiff-Appellee Lorri Turner would request that this case be remanded back to the Cuyahoga County Court of Common Pleas for additional proceedings not inconsistent with the Court's opinion. Based upon the evidence submitted to the trial court in response to the utility companies' motions for summary judgment, there remains an issue of fact as to whether the location of the Turner pole interfered with the usual and customary course of travel in this area of State Route 188.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Reconsideration has been served by ordinary U.S. Mail, postage prepaid, this 13th day of May, 2008 upon:

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