

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

LORRI TURNER, etc.
Plaintiff-Appellee,

v.

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

ON APPEAL FROM THE CUYAHOGA COUNTY COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CASE NO. CA-06-087541

APPELLANT, THE OHIO BELL TELEPHONE COMPANY'S, MEMORANDUM
OPPOSING APPELLEE'S MOTION FOR RECONSIDERATION

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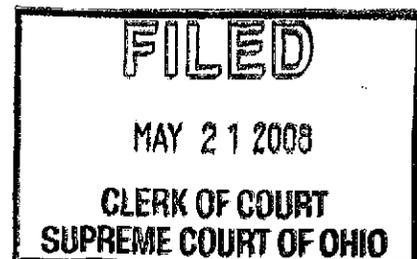
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I. INTRODUCTION

In her Motion for Reconsideration, Plaintiff-Appellee, Lorri Turner, Administratrix of the Estate of Robert Turner (“Appellee”), requests that this Court reconsider its decision reversing, in part, the decision of the Ohio Court of Appeals and enter judgment affirming that Court of Appeals decision. In support for her position, Appellee merely reiterates the same arguments contained in her Merit Brief and which were presented on her behalf at oral argument.

Appellee presents three arguments supporting her Motion. First, she simply disagrees with this Court’s determination that summary judgment was appropriately granted to Appellants by the trial court and re-argues the import of case law that was distinguished in this Court’s opinion. Second, she argues that this Court failed to consider the impact of its ruling to the extent that she believes it creates a disincentive for public utilities to take remedial measures with respect to its poles. Third, Appellee argues that, even if this Court does not reconsider its decision, the case should be remanded to the trial court (which granted summary judgment in the first instance) for further proceedings. As set forth below, Appellee’s Motion should be denied.

Specifically, Appellee’s Motion should be denied because:

- Supreme Court Rule of Practice XI, §2(B) prohibits a party from re-arguing the merits of its case in a motion for reconsideration;
- Appellee’s “impact” argument is misguided because the danger at issue in this case was not the placement of the utility pole, but the driver leaving the roadway under dark and foggy conditions and striking a lawfully placed object;
- Remand is unnecessary because this Court is well-equipped to apply the legal standard it created to the undisputed facts of this case, and has done so.

Accordingly, none of Appellee’s argument supports reconsideration. The fact that Appellee agrees with the dissent authored in this case is no surprise and no reason for this Court to reconsider its ruling.

II. DISCUSSION

A. Appellee's Motion for Reconsideration is Little More Than a Reargument of the Case.

Supreme Court Rule of Practice XI, §2(B) provides the rules governing motions for reconsideration and specifically prohibits any motion that constitutes a mere “reargument of the case.” Sup. Ct. R. Pract. XI, §2(b). Because Appellee's Motion for Reconsideration contains no new argument, her Motion for Reconsideration should be denied.

Indeed, Appellee's Motion for Reconsideration is a combination of her Merit Brief and the dissent that was authored by Justice O'Donnell. Specifically, she argues that the decision of the Eighth District Court of Appeals, and its creation of a “close proximity” test, should have been affirmed by this Court. To reach this conclusion, she relies primarily on the case of Swaigood v. Puder, No. E-06-033, 2007 Ohio App. LEXIS 279 (Erie Cty. 2007), an Ohio Court of Appeals decision that not only was fully briefed by Appellee in her Merit Brief, but also was discussed at length and distinguished by this Court.

Essentially, Appellee argues that this Court misread Swaigood, that it is not distinguishable, and that the holding in that case—in spite of the fact that it was issued by a lower court—somehow should control the disposition of this case. See Motion for Reconsideration, at 3-7. In other words, Appellee, in violation of Sup. Ct. R. Pract. XI, §2(B), simply wishes to quibble with this Court's determination that Swaigood is distinguishable, for the same reasons she set forth in her Merit Brief.

Ultimately, as this Court held, Swaigood is unaffected by the opinion in this case because of distinguishing facts related to the type of traffic that ran past the pole in question. See Opinion, at 10. In Swaigood, the truck driver, in control of his rig, was attempting to avoid the pole. He contacted the pole while making a lawful turn. Here, the driver never saw the pole,

was driving in fog, following the taillights in front of him, exceeding the speed limit, and unlawfully left the “usual and ordinary course of travel.”

Moreover, what Appellee also fails to appreciate is that Swaisgood is not binding on this Court and, thus, was irrelevant to the determination of this case. Indeed, this Court’s opinion did not rely on Swaisgood, but merely distinguished it, in passing, in an effort to demonstrate that it is still good law in light of the decision in this case. Id. (explaining why Swaisgood is not necessarily overruled).

Furthermore, this Court already has considered the remainder of the arguments raised by Appellee’s Motion because those same arguments were set forth in the dissent authored by Justice O’Donnell. In his dissent, Justice O’Donnell opined that the Court’s earlier decisions in Cambridge Home Tel. Co. v. Harrington, 127 Ohio St. 1 (1933) and Ohio Bell Tel. Co. v. Lung, 129 Ohio St. 505 (1935) dictate that the issue of a public utility’s negligence with regard to the placement of its poles is an issue of fact, inappropriate for summary judgment. Not surprisingly, Appellee agrees with the dissent and argues that the majority decision should be reconsidered on the basis of Harrington and Lung. See Motion for Reconsideration, at 2-3. However, because those cases already were thoroughly considered by, this Court, Appellee’s Motion for Reconsideration should be denied.

B. Appellee’s “Impact” Argument Fails Because the Danger at Issue Here Was Not the Conduct of the Public Utility, But the Conduct of the Driver.

In her Motion, Appellee argues that this Court’s decision is “unworkable” because, according to Appellee, it holds that “a utility company will not be held responsible where it clearly has notice that a pole location has become danger [sic] to motorists (as in Turner), thereby creating a disincentive to undertake remedial measures to remove the danger.” Motion

for Reconsideration, at 3. In other words, Appellee argues that this Court failed to consider the full impact of its ruling. She is wrong.

Indeed, Appellee's "impact" argument fails to consider, as this Court did, that the danger involved in this case was not the utility pole, but the actions of the driver, who was driving in dark and foggy conditions and was trying to follow the taillights of a truck in front of him. The driver left the "usual and ordinary course of travel." See Opinion, at 8. By contrast, Appellee wishes to focus on the conduct of the public utilities, who lawfully erected their pole in an ODOT-approved location. See id. ("Placement that complies with the requirements of the public authority that owns the right of way is indicative that the object is not an obstacle to the traveling public.").

As this Court found, "there is no evidence that the utility pole . . . interfered with the ordinarily and usually traversed portion of State Route 188. *Had Hittle stayed within the marked lanes as required by R.C. 4511.33, or even on the improved portion of the roadway, his vehicle would not have come into contact with the utility pole.*" Opinion, at 10 (emphasis added). Accordingly, there is no need for this Court to reconsider its decision. As this Court recognized, the lawful placement of utility poles creates no danger to a driver unless and until he veers from the "usual and ordinary course of travel," unlawful conduct for which the public utility is not responsible. For this reason also, Appellee's Motion should be denied.

C. Remand is Unnecessary.

In the alternative, Appellee argues that this Court should remand this case for application of the test created by this Court. However, because there are no remaining issues of fact, remand is unnecessary and Appellee's Motion should be denied.

First, it should be noted that Appellee's request for remand is legally indistinguishable from the remainder of her Motion. That is, Appellee is quibbling with this Court's decision and wishes for this Court to adopt the dissent that was filed in this case. Because this case was before this Court at the summary judgment stage, the question of whether there existed an issue of fact sufficient to warrant a remand and trial was the primary issue in this case. That question has been answered by this Court. In his dissent, Justice O'Donnell disagreed with the majority's ruling that remand was unnecessary and opined that the case should have been sent back for a determination by a jury. In her Motion for Reconsideration, Appellee does nothing but assert that she believes this Court was wrong in determining that there are no issues of fact sufficient to warrant a remand. However, as stated above, she presents nothing in support of this position beyond the arguments that were already presented in her Brief and/or raised in the dissent. Accordingly, remand is unnecessary and Appellee's Motion for Reconsideration should be denied.

Indeed, under Ohio law, a court of appeals need not remand a case to a trial court unless there is an outstanding issue of fact that needs determination in light of the higher court's ruling. Ohio R. App. P. 12(B) ("When the court of appeals determines that the trial court committed no error prejudicial to the appellant in any of the particulars assigned and argued in appellant's brief and that the appellee is entitled to have the judgment or final order of the trial court affirmed as a matter of law, the court of appeals shall enter judgment accordingly."); see Luttgens, Inc. v. Liquor Control Comm'n., No. 76AP-311, 1976 Ohio App. LEXIS 6051 (Franklin Cty. May 4, 1976) ("However, since there is no factual issue to be resolved, no useful purpose would be served by remanding these matters to the Liquor Control Commission for making the only

possible determination upon the issue of entrapment — namely, that the evidence is insufficient to establish that defense.”).

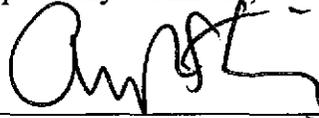
Here, as this Court made clear in its opinion, there are no outstanding issues of fact. Indeed, the record was complete and this Court found that “there is no evidence that the utility pole, which was located in a grassy area two feet five inches from the berm and three feet nine inches from the white edge line of the road, interfered with the ordinarily traversed portion of State Route 188.” Opinion, at 10. For this reason, this Court held that summary judgment was properly granted to Appellants as a matter of law.

In her Motion, Appellee presents nothing new that should alter this Court’s decision. Her Motion, as stated above, relies on Swaisgood, Harrington, and Lung, three cases that were briefed to this Court and addressed in its decision. Because Appellee’s Motion is nothing more than a re-argument of the case, it should be denied.

III. CONCLUSION

For the foregoing reasons, Appellee's Motion for Re-Consideration should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

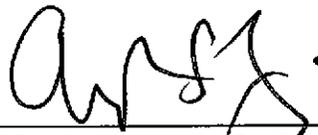
This is to certify that a copy of the foregoing was served this 21st day of May, 2008, by

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