

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. : :

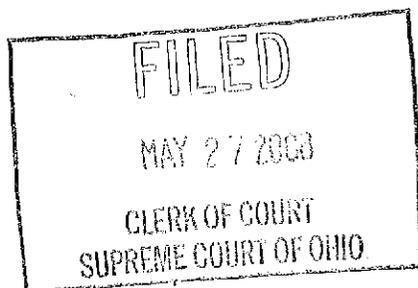
MEMORANDUM OF APPELLANT SOUTH CENTRAL POWER COMPANY
IN OPPOSITION TO APPELLEE'S MOTION FOR
RECONSIDERATION, FILED MAY 14, 2008

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Plaintiff-Appellee Lorri Turner's May 14, 2008 Motion for Reconsideration (the "Motion") should be overruled, for seven reasons.

First, the place to start is of course the applicable legal standard. Here, Plaintiff-Appellee in her Motion ignores the prohibition against using a motion for reconsideration to reargue the case. *See* S. Ct. Prac. Rule XI, Section 2(B). She does not suggest that this Court has ignored or misunderstood any fact in the record. She likewise does not argue that the Court has made an error of law, either by overlooking a particular principle or proposition of law, or by misapplying an existing statute. Instead, Plaintiff-Appellee merely reargues her merit brief, and insists that this Court made the wrong public policy decision when it clarified its existing jurisprudence, and narrowed the universe of plaintiffs to those who are traveling lawfully on the roadways of this state. While that result is objectionable to Ms. Turner, the decision in this case represents nothing more than an unremarkable exercise of the public policy judgments that this Court makes regularly in its decisions.

Second, Plaintiff-Appellee is wrong when she argues that the Court has adopted neither a bright line test nor the "close proximity" test, or has somehow reversed its decisions in *Cambridge Home Telephone Co. v. Harrington* (1933), 127 Ohio St. 1, 186 N.E. 611, and/or *Ohio Bell Telephone Co. v. Lung* (1935), 129 Ohio St. 505, 2 O.O. 513, 196 N.E. 371. (*See* Motion at 3.) As South Central Power Company ("South Central") argued in its merit briefing, the "close proximity" test is precisely the test which South Central urged the Court to adopt, and which the Court has, in practical terms, adopted. (*See* Reply Brief of Appellant South Central Power Company at 8-12 (Aug. 20 2007) ("Reply Brief"); *see also* Merit Brief of Appellant South Central Power Company at 4-10 (May 21, 2007) ("Merit Brief").) Throughout this case, Plaintiff-Appellee has simply ignored the fact that *Harrington* and *Lung*, decided more than

seventy years ago, left open the question of where liability should lie when the pole which is struck is entirely beyond the traveled roadway and any berm or shoulder. *Harrington and Lung*, which spoke in terms of “close proximity,” also spoke in terms of those “properly using the highway.” (See Merit Brief at 9-10; Reply Brief at 9-12.) In answering that formerly unanswered question, this Court simply affirmed that *every* part of this Court’s formulation in *Harrington and Lung* has meaning—that one must be properly using the roadway in order to be eligible for recovery. Plaintiff-Appellee has never contended that Bryan Hittle, the driver who was convicted of manslaughter in the death of Robert Turner, was properly using the highway. Indeed, even the estate’s expert acknowledges that Mr. Hittle was breaking the law. The Court has correctly determined that that fact ends the analysis.

Third, Plaintiff-Appellee’s relentless insistence that this case be decided on evidence that is neither in the record nor relevant should be rejected. She argues that there have been six collisions with this pole, and twenty-eight fixed-object accidents along this “area” of roadway. (Motion at 5.) First, the length of this “area” of roadway has never been defined by Plaintiff-Appellee, nor has she ever identified a time frame for this supposed series of accidents. (See Reply Brief at 2-3.) Indeed, she has never introduced any non-hearsay evidence of those alleged other accidents, or how many miles from the utility pole in question those accidents occurred, or whether any of those accidents involved utility poles, or any other details about those accidents. Second, the trial court properly excluded the evidence concerning other supposed collisions with the pole at issue in this case as having been untimely submitted, which decision by the trial court Plaintiff-Appellee never appealed (nor addressed at any level of the appellate proceedings). (See Reply Brief at 5-7.) Third, and perhaps most importantly, the circumstances of the three accidents (not six) about which the local landowner testified demonstrate precisely why this

Court's decision is the right policy judgment. (*See id.* at 4-5.) The witness whose testimony was untimely proffered by Plaintiff-Appellee claimed to have knowledge of just two accidents. In one, the driver hit the utility pole because he was drunk. In the second, the driver was apparently sober, but asleep, according to Plaintiff-Appellee's witness. As to a third purported accident, the witness could not say when it happened or who was involved, and the accident was never reported to any utility company or law enforcement agency. Of course, in this case, the driver, who was convicted of manslaughter for causing his passenger's death, was found to have been traveling well above the posted speed limit, notwithstanding the fact that the fog at the time was so extraordinary that he could see neither the road nor the vehicle in front of him. Thus, the proposition of law which has been advocated by Plaintiff-Appellee throughout this litigation, and which this Court has properly rejected, would have utility companies engineer against those who are drunk, asleep, or, as Mr. Hittle, profoundly reckless. As South Central has noted before, in the world according to Plaintiff-Appellee, utility companies, in placing their poles, should assume that drivers cannot see them, as allegedly happened in each other instance here.

Fourth, Plaintiff-Appellee's attempt to win reconsideration by arguing the facts of *Swaisgood v. Puder*, 6th Dist. No. E-06-033, 2007-Ohio-307, which this Court spent just one paragraph discussing (§25), is the proverbial tail wagging the dog. (*See Motion* at 3-7.) First, this case and this Motion is not the place for parties who have nothing to do with *Swaisgood* to be arguing the facts and significance of a case not yet decided by this Court. The record of *Swaisgood* is not before the Court in this case; the parties in *Swaisgood* have not yet briefed it on the merits in this Court; and the parties in *Swaisgood* deserve to have it decided on its own facts and terms, and not via a paragraph in the decision in this case, or via reconsideration briefing in this case. Second, Plaintiff-Appellee appears to have missed altogether the distinction which this

Court drew in its summary discussion of *Swaisgood*. Apparently in reliance on argument in this case (and not on the record of *Swaisgood*), this Court reasoned as follows: “There was evidence 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.” *Turner v. Ohio Bell Telephone Co.*, Slip Op., 2008-Ohio-2010, ¶25 (emphasis added). The Court’s explanation makes clear the line which it sought to draw: that the legally dispositive question is whether the vehicle operator was operating properly, and whether his or her wheels remained on the regularly traveled and improved portion of the pavement. Thus, the distinction which the Court drew in its limited hypothetical discussion of *Swaisgood* did not concern whether some bit of rubber could be said to touch some portion of the traveled roadway or berm immediately following the moment of impact—the distinction suggested by Plaintiff-Appellee. (See Motion at 6.) Rather, the distinction which the Court drew is that between (a) “proper” operation, where (at least at the outset of the turn) all of the wheels are on the traveled and improved way, but because of the unique geometry of a tractor-trailer rig making a right-hand turn, the rig may clip a pole; and (b) unlawful operation, where most if not all of the vehicle has left the road. The Court’s commentary concerning *Swaisgood* represents nothing more than a narrow exception to the general rule, limited to facts supposed in argument of this case, which could be constrained to truck stops. There is simply no way to fit the square peg of the accident in this case into the round hole of ¶25 of the Court’s decision.

Fifth, the decision in this case is not “*terra incognita*” (Motion at 3), but an unremarkable clarification of the law which is entirely consistent with the intermediate appellate court precedent which remained the law of Ohio from the days of *Harrington* and *Lung* in the 1930s, until the Cuyahoga County Court of Appeals’ decision in this case. Through seventy years and

at least seven intermediate appellate decisions from four different appellate districts, the judiciary of this state had construed *Harrington* and *Lung* to mean that utility companies would only be exposed to liability where the utility facility at issue is located where lawfully operated vehicles belong—*i.e.*, within the traveled roadway or on the berm. (See Merit Brief at 5-10.) Thus, Ohio law has been consistently interpreted by the courts of this state, beginning with *Ohio Postal Telegraph-Cable Co. v. Yant* (5th Dist. 1940), 64 Ohio App. 189, except for the very limited interruption in that body of law between the time of the decision below in this case and the Court’s May 7, 2008 decision reversing the court of appeals. It is Plaintiff-Appellee, not South Central or Appellant Ohio Bell Telephone Company, who seeks to upend the law in this state and depart from the settled expectations of the utility companies who have placed approximately two million poles in rights-of-way all over Ohio.

Sixth, the ultimate question which this case presented, and which the Court has answered, is who should bear the risk for the misconduct, whether criminal or otherwise, of wayward motorists. Tort law is about duty, and the balancing of duties where multiple parties may share in certain duties. The stunning proposition of law advocated by Plaintiff-Appellee, which this Court properly rejected, would be a first for Ohio. Plaintiff-Appellee would have this Court relieve criminal motorists of their duty to protect themselves and their passengers, and instead shift any and all such duty for motorist safety entirely to law-abiding utilities who enjoy government permission to place their facilities within the road right-of-way. South Central is aware of no other area of tort law where one party must assume liability for criminal wrongdoing by another party over whom it has no control as a cost of doing business, on the theory that because “crime happens,” one should plan for it. If this Court were to explode the concept of

duty to include a duty to protect the criminal against the consequences of his or her own mischief, it would be inviting anarchy, not balancing duty.

Finally, a remand in this case would be pointless. Plaintiff-Appellee wants the trial court to take another look because “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.” (Motion at 7.) First, this Court has already determined that as a matter of law, not fact, the pole in this case was in a location where no law-abiding motorist would ever collide with it. Second, the trial court has already found, based on the undisputed facts of this case, that “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.” *Turner v. Ohio Bell Telephone Co.*, Cuyahoga C.P. Case No. 555394, Memorandum of Opinion and Order, at ¶8 (“In this instance, the record demonstrates that the pole was neither placed in the traveled portion of the road nor in such close proximity as to constitute an obstruction dangerous to anyone properly using the highway.”). Third, there is absolutely no evidence in the record that the Turner vehicle was engaged in the “usual and customary course of travel.” The errant driver: (1) was, according to Plaintiff-Appellee’s own expert, traveling 15 miles per hour over the speed limit, (2) in a fog so dense that he could not see the road, but only the taillights in front of him, when (3) he flew off the edge of the road in violation of several traffic laws, (4) for which recklessness he was convicted of manslaughter. With all due respect, it is disingenuous to suggest that there is an issue of fact on this point. Because both this Court and the trial court have already decided that the “fact” which would be the subject of any remand is neither legally relevant nor disputed, a remand would serve no purpose.

For all of the foregoing reasons, the Motion should be overruled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing, *Memorandum Of Appellant South Central Power Company In Opposition To Appellee's Motion For Reconsideration, Filed May 14, 2008*, was served upon the following by regular U.S. mail, postage pre-paid, on May 27, 2008:

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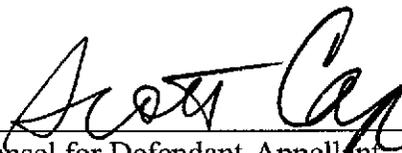
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