

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. : :

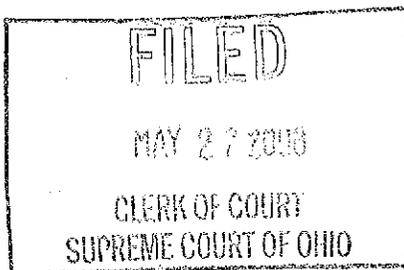
MEMORANDUM OF *AMICI CURIAE* CINCINNATI BELL TELEPHONE CO., THE OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, THE TOLEDO EDISON COMPANY, FIRSTENERGY CORP., OHIO RURAL ELECTRIC COOPERATIVES, INC., THE OHIO TELECOM ASSOCIATION, UNITED TELEPHONE COMPANY OF OHIO, DBA EMBARQ, WINDSTREAM OHIO, INC., AND WINDSTREAM WESTERN RESERVE, INC. IN OPPOSITION TO PLAINTIFF-APPELLEE'S MOTION FOR RECONSIDERATION, FILED MAY 14, 2008

Sean P. Allan (0043522)
ALLAN & GALLAGHER LLP
614 W. Superior Avenue, Suite 1300
Cleveland, Ohio 44113
Telephone: (216) 377-0598
Facsimile: (216) 664-6999
sallan@agllp.com

John J. Spellacy (065700)
526 Superior Avenue, Suite 1540
Cleveland, Ohio 44114
Telephone: (216) 241-0520
Facsimile: (216) 241-6961
jspellacy@spellacylaw.com
*Attorneys for Plaintiff-Appellee
Lorri Turner*

William R. Case (0031832) (Counsel of Record)
Scott A. Campbell (0064974)
Jennifer E. Short (0070054)
THOMPSON HINE LLP
10 W. Broad Street, Suite 700
Columbus, Ohio 43215-3435
Telephone: (614) 469-3200
Facsimile: (614) 469-3361
Bill.Case@ThompsonHine.com
Scott.Campbell@ThompsonHine.com
Jennifer.Short@ThompsonHine.com
*Attorneys for Defendant-Appellant
South Central Power Company*

Thomas L. Michals, Esq. (0040822)
Anthony F. Stringer (0071691)
CALFEE, HALTER & GRISWOLD LLP
1400 McDonald Investment Center
800 Superior Avenue, Suite 1400
Cleveland, Ohio 44114-2688
Telephone: (216) 622-8200
Facsimile: (216) 241-0816
tmichals@calfee.com
astringer@calfee.com
*Attorneys for Defendant-Appellant Ohio Bell
Telephone Company dba SBC Ohio*



Douglas E. Hart (0005600)
441 Vine Street, Suite 4192
Cincinnati, OH 45202
Telephone: (513) 621-6709
Facsimile: (513) 621-6981
dhart@douglasshart.com
*Attorney for Amicus Curiae Cincinnati
Bell Telephone Company LLC*

Richik Sarkar, Esq. (006993)
ULMER & BERNE LLP
Skylight Office Tower
1660 West 2nd Street, Suite 1100
Cleveland, Ohio 44113-1448
Telephone: (216) 583-7000
Facsimile: (216) 583-7001
rsarkar@ulmer.com

*Attorney for Amici Curiae The Ohio
Edison Company, The Cleveland Electric
Illuminating Company, The Toledo
Edison Company, and FirstEnergy Corp.*

Kurt P. Helfrich (0068017)
THOMPSON HINE LLP
10 W. Broad Street, Suite 700
Columbus, Ohio 43215-3435
Telephone: (614) 469-3200
Facsimile: (614) 469-3361
Kurt.Helfrich@ThompsonHine.com
*Attorney for Amicus Curiae Ohio
Rural Electric Cooperatives, Inc.*

Thomas E. Lodge (0015741)
Carolyn Flahive (0072404)
THOMPSON HINE LLP
10 West Broad Street, Suite 700
Columbus, OH 43215-3435
Telephone: (614) 469-3200
Facsimile: (614) 469-3361
Tom.Lodge@ThompsonHine.com
Carolyn.Flahive@ThompsonHine.com
*Attorneys for Amicus Curiae The Ohio
Telecom Association*

Joseph R. Stewart (028763)
UNITED TELEPHONE COMPANY OF OHIO,
DBA EMBARQ
50 W. Broad St., Suite 3600
Columbus, OH 43215
Telephone: (614) 220-8625
Facsimile: (614) 224-3902
joseph.r.stewart@embarq.com
*Attorney for Amicus Curiae United Telephone
Company of Ohio, dba Embarq*

Andrew H. Cox (0071459)
William J. Hubbard (0077033)
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, Ohio 44114-1216
Telephone: (216) 566-5500
Facsimile: (216) 566-5800
Andrew.Cox@ThompsonHine.com
Bill.Hubbard@ThompsonHine.com
Attorneys for Amicus Curiae Verizon North Inc.

William A. Adams (0029501)
BAILEY CAVALIERI LLC
10 West Broad Street, Suite 2100
Columbus, OH 43215-3422
Telephone : (614) 229-3278
Facsimile: (614) 221-0479
William.Adams@baileycavalieri.com
*Attorney for Amici Curiae Windstream Ohio, Inc. and
Windstream Western Reserve, Inc.*

MEMORANDUM IN OPPOSITION

Amici Curiae Cincinnati Bell Telephone Co. (“Cincinnati Bell”), The Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company, and FirstEnergy Corp. (the “FirstEnergy Companies”), Ohio Rural Electric Cooperatives, Inc. (“OREC”),¹ The Ohio Telecom Association (“OTA”),² United Telephone Company of Ohio, dba Embarq (“Embarq”), Windstream Ohio, Inc. and Windstream Western Reserve, Inc. (the “Windstream Companies”) (all of the foregoing being the “Utility Amici”) respectfully urge the Court to deny the Motion for Reconsideration of Plaintiff-Appellee, Lorri Turner, Administratrix of the Estate of Robert Turner, Deceased (the “Motion for Reconsideration”). The Court’s decision is not “counterintuitive to our system of tort law,” as argued by Plaintiff-Appellee. (Motion for Reconsideration, p. 1.) Rather, the Court’s decision is a fair and appropriate allocation of liability as between Ohio’s public utilities and the motoring public, and an appropriate result for Ohio utility customers and landowners, for at least eight reasons:

First, the Court’s decision strikes the proper balance between the right of the public to travel safely on Ohio’s public roads, and the rights of the Utility Amici and all Ohio utility companies to use for public utility purposes the space beyond the traveled and improved portion

¹ OREC is a statewide association which provides various services to twenty-four of Ohio’s non-profit electric cooperatives, including representing the cooperatives before the United States Congress and the Ohio General Assembly. For more information regarding OREC and its interest in this litigation, please see the Brief of Amicus Curiae Ohio Rural Electric Cooperatives, Inc. in Support of Appellants, Urging Reversal.

² OTA is a statewide trade association which promotes the common interests of telecommunications companies. The OTA currently represents 41 landline telecommunications providers. For more information regarding the OTA and its interest in this litigation, please see the Brief of Amici Curiae The Ohio Telecom Association, Verizon North Inc., Cincinnati Bell Telephone Company, LLC, United Telephone Company, dba Embarq, Windstream Ohio, Inc. and Windstream Western Reserve, Inc. in Support of Appellants, Urging Reversal.

of the roadway and berm, where no motorist, other than one who has lost control, would ever find himself or herself.

Second, the Court's decision is consistent with the Ohio General Assembly's determination that public utilities should be afforded the opportunity to locate their facilities in public right-of-way because those utility companies serve an important and unique public function. *See* R.C. 4939.02(A)(2) (announcing that the public policy of Ohio concerning the use of public ways is to "promote the availability of a wide range of utility, communication, and other services to residents of this state at reasonable costs"); R.C. 4931.03 (authorizing telegraph and telephone companies to construct lines and poles along public roads and highways); R.C. 4933.14 (authorizing electric utilities to construct lines and poles along public roads and highways).

Third, the Court's decision is consistent with the Ohio General Assembly's determination that the Ohio Department of Transportation, counties, and municipalities, all of whom manage public road right-of-way on a daily basis, are in a better position than a lay jury to evaluate and determine whether a utility pole is in the right place within the right-of-way. *See* R.C. 5515.01 (state); R.C. 5547.04 (counties); R.C. 4939.03 (municipalities). As noted by the Court, when considering the proper placement of a utility pole, the appropriate regulatory authority will undoubtedly consider some, if not all, of the eight factors which the court of appeals would have had jurors apply. *Turner v. Ohio Bell Tel. Co.*, Slip Opinion, 2008-Ohio-2010, ¶20. In any event, those regulatory agencies are best-positioned, in terms of skill, experience, and judgment, to balance and manage the interests of all concerned.

Fourth, the Court's decision is consistent with the Ohio General Assembly's determination regarding the duties and responsibilities of motorists to properly use the road and

to maintain control of their vehicles. *See* R.C. 4511.33; R.C. 4511.25. The decision does not interfere with or alter the rights of the motoring public; it simply recognizes and reaffirms that motorists do not have a superior right to use—or more to the point, misuse—that portion of the right-of-way beyond the pavement and not intended for travel.

Fifth, the Court's decision is consistent with over seventy years of Ohio case law holding that where a utility pole is located off the paved and improved portion of the road, the utility pole does not constitute a danger or obstruction to anyone properly using the road, and therefore, a utility company cannot be liable in tort for such pole placement. The decision is neither a modification of nor a departure from *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, as argued by Plaintiff-Appellee. (Motion for Reconsideration, p. 2.) Rather, it is an unremarkable affirmation of seventy years of authority developed by this state's intermediate appellate courts, and an answer to the question left unanswered by *Harrington* and *Lung*.

Sixth, the Court's decision provides consistency, continuity, and certainty to public utilities as they make decisions regarding pole placement. A public utility should not be required to determine an appropriate pole placement, in consultation with the applicable governmental authority, and based on their respective best engineering judgment, yet still run the risk that a jury or judge will second-guess those transportation and utility engineering judgments, and decide that a pole located off the traveled and improved portion of the roadway should have been located in a different place off the traveled and improved portion of the roadway.

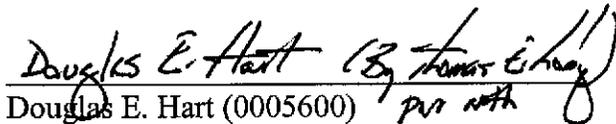
Seventh, the Court's decision benefits Ohio utility consumers, as they will not have to bear the monumental cost of inspecting, re-engineering, and relocating millions of existing poles

and lines, many into private easements, which would further undermine the public policy of this state that utility services should be available at a reasonable cost.

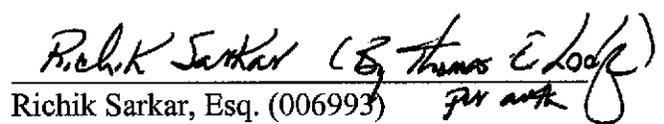
Eighth, the Court's decision benefits Ohio landowners located along public roads, as they will not be forced to sell or surrender by eminent domain significant portions of their road frontage to accommodate utility poles and lines which would have to be moved farther still away from the road.

In conclusion, the Utility Amici, including Cincinnati Bell, the FirstEnergy Companies, OREC, the OTA, Embarq, and the Windstream Companies, urge the Court to overrule the Motion for Reconsideration.

Respectfully submitted,

 (By Thomas E. Hart) *per north*

Douglas E. Hart (0005600)
441 Vine Street, Suite 4192
Cincinnati, OH 45202
Telephone: (513) 621-6709
Facsimile: (513) 621-6981
dhart@douglasshart.com
Attorney for Amicus Curiae Cincinnati Bell Telephone Company LLC

 (By Thomas E. Loeff) *per north*

Richik Sarkar, Esq. (006993)
ULMER & BERNE LLP
Skylight Office Tower
1660 West 2nd Street, Suite 1100
Cleveland, Ohio 44113-1448
Telephone: (216) 583-7000
Facsimile: (216) 583-7001
rsarkar@ulmer.com
Attorney for Amici Curiae The Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company, and FirstEnergy Corp.

Kurt P. Helfrich

Kurt P. Helfrich (0068017)
THOMPSON HINE LLP
10 W. Broad Street, Suite 700
Columbus, Ohio 43215-3435
Telephone: (614) 469-3200
Facsimile: (614) 469-3361
Kurt.Helfrich@ThompsonHine.com
*Attorney for Amicus Curiae Ohio Rural Electric
Cooperatives, Inc.*

Thomas E. Lodge

Thomas E. Lodge (0015741)
Carolyn Flahive (0072404)
THOMPSON HINE LLP
10 West Broad Street, Suite 700
Columbus, OH 43215-3435
Telephone: (614) 469-3200
Facsimile: (614) 469-3361
Tom.Lodge@ThompsonHine.com
Carolyn.Flahive@ThompsonHine.com
*Attorneys for Amicus Curiae The Ohio
Telecom Association*

Joseph R. Stewart (By Thomas E. Lodge)
per auth

Joseph R. Stewart (028763)
UNITED TELEPHONE COMPANY OF
OHIO, DBA EMBARQ
50 W. Broad St., Suite 3600
Columbus, OH 43215
Telephone: (614) 220-8625
Facsimile: (614) 224-3902
joseph.r.stewart@embarq.com
*Attorney for Amicus Curiae United Telephone
Company of Ohio, dba Embarq*

William A. Adams (By Thomas E. Lodge)
per auth

William A. Adams (0029501)
BAILEY CAVALIERI LLC
10 West Broad Street, Suite 2100
Columbus, OH 43215-3422
Telephone : (614) 229-3278
Facsimile: (614) 221-0479
William.Adams@baileycavalieri.com
*Attorneys for Amici Curiae Windstream Ohio,
Inc. and Windstream Western Reserve, Inc.*

CERTIFICATE OF SERVICE

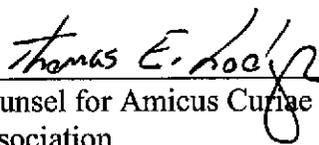
The undersigned certifies that a copy of the foregoing, *Memorandum Of Amici Curiae Cincinnati Bell Telephone Co., The Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company, FirstEnergy Corp., Ohio Rural Electric Cooperatives, Inc., The Ohio Telecom Association, United Telephone Company Of Ohio, dba Embarq, Windstream Ohio, Inc., And Windstream Western Reserve, Inc. In Opposition To Plaintiff-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:

John J. Spellacy, Esq.
1540 Leader Building
526 Superior Avenue
Cleveland, Ohio 44114

Sean P. Allan, Esq.
ALLAN & GALLAGHER LLP
1300 The Rockefeller Building
614 W. Superior Avenue
Cleveland, Ohio 44113
Attorneys for Plaintiff-Appellee

Thomas L. Michals, Esq.
Anthony F. Stringer, Esq.
CALFEE HALTER & GRISWOLD LLP
800 Superior Avenue, Suite 1400
Cleveland, Ohio 44114-2688
*Attorneys for Defendant-Appellant
Ohio Bell Telephone Company*

Andrew H. Cox, Esq.
William J. Hubbard, Esq.
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, Ohio 44114-1291
Attorneys for Amicus Curiae Verizon North Inc.



Counsel for Amicus Curiae The Ohio Telecom
Association