

No. 2015-0132

IN THE SUPREME COURT OF OHIO

DOUGLAS V. LINK and DIANE LINK,
Plaintiffs-Appellees-Cross-Appellants,

v.

**THE CLEVELAND ELECTRIC ILLUMINATING COMPANY and
FIRSTENERGY SERVICE COMPANY,**
Defendants-Appellants-Cross-Appellees,

**ON APPEAL FROM THE CUYAHOGA COUNTY COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CASE NO. CA-14-101286**

**COMBINED MEMORANDUM OPPOSING JURISDICTION AS TO APPEAL OF THE
CLEVELAND ELECTRIC ILLUMINATING COMPANY AND FIRSTENERGY
SERVICE COMPANY AND SUPPORTING JURISDICTION AS TO CROSS-APPEAL
OF DOUGLAS V. LINK AND DIANE LINK**

Thomas I. Michals (0040822)
(COUNSEL OF RECORD)
John J. Eklund (0010895)
William E. Coughlin (0010874)
Eric S. Zell (0084318)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, Ohio 44114
Tel: (216) 622-8200
Fax: (216) 241-0816
tmichals@calfee.com
jeklund@calfee.com
wcoughlin@calfee.com
ezell@calfee.com

Joseph J. Triscaro (0081209)
(COUNSEL OF RECORD)
DEMARCO & TRISCARO, LTD.
30505 Bainbridge Road
Suite 110
Solon, Ohio 44139
Tel: (440) 248-8811
Fax: (440) 248-1599
jtriscaro@demarcotriscaro.com

*Attorney for Plaintiffs-Appellees-
Cross-Appellants,
Douglas V. Link & Diane Link*

*Attorneys for Defendants-Appellants-Cross-Appellees,
The Cleveland Electric Illuminating Company and
FirstEnergy Service Company*

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I. INTRODUCTION

This is the third time The Cleveland Electric Illuminating Company (“CEI”), or an affiliate thereof, has sought review of *Turner v. Ohio Bell Tel. Co.*, 118 Ohio St.3d 215, 220, 2008-Ohio-2010 (Ohio 2008) in the last two years. Just as in the first two instances, this Court should again decline to accept jurisdiction. See *Bidar v. Cleveland Elec. Illum. Co.*, Case No. 2012-1894, 2013-Ohio-347 (Ohio 2013); *Toledo Edison Co. v. Bd. of Defiance Cty. Commrs.*, Case No. 2014-0111 (Ohio 2014).

The appeal of CEI and FirstEnergy Service Company (“FESC”) is not of public or great general interest (CEI and FESC are sometimes referred to collectively herein as “Appellants”). It involves a very limited and narrow issue, specifically, whether Appellants had the necessary permissions and approvals to maintain the utility pole that Appellee, Douglas V. Link (“Link”), struck with his motor vehicle, and if so, whether Appellants are immune from liability under *Turner v. Ohio Bell Tel. Co.*, 118 Ohio St.3d 215, 220, 2008-Ohio-2010 (Ohio 2008); (Link and his spouse, Diane Link, are sometimes referred to herein collectively as the “Links”). This is a question of interest primarily to the parties, as opposed to a question of public or great general interest. Consequently, this Court should not grant review thereof. See *Williamson v. Rubich*, 171 Ohio St. 253, 254 (Ohio 1960).

The case of *Bidar v. Cleveland Elec. Illum. Co.*, 2012-Ohio-3686 (8th Dist. 2012), for which this Court previously declined jurisdiction, involved the same set of utility poles that Mr. Link struck, and the same central issue hinging on the applicability of *Turner*. Moreover, this Court also recently declined review of *Toledo Edison Co. v. Bd. of Defiance Cty. Commrs.*, 2013-Ohio-5374 (3rd Dist. 2013), which also involved matters surrounding the application of *Turner*. *Toledo Edison Co.* had much broader reaching consequence than the instant matter since it presented the issue of whether municipalities are monetarily responsible for the relocation of

utility poles deemed to be obstructions, rather than whether a utility had the necessary permission to maintain a single pole.

This case involves a motorcyclist that was forced off of a roadway by a deer into a utility pole which was owned, maintained and controlled by Appellants. Appellants did not have the necessary permissions or approval to maintain the utility pole that Mr. Link struck in its position. There had been a previous road widening project and Appellants agreed, and were obligated, to relocate their utility poles outward based upon safety concerns and the clear zone requirements of the project. Partly through the utility pole relocation undertaking, Appellants abandoned the project. Even after Appellants were notified of the *Bidar* collision, and potential grievous harms the poles caused to others, they continued to refuse to relocate the poles. Mr. Link's collision occurred less than five months after the *Bidar* incident. The court of appeals made a determination that the limited immunity that *Turner* provides was inapplicable to Appellants because they did not have the requisite permission to maintain the pole that Mr. Link struck in its original location after the road widening project.

The potential doomsday scenarios that Appellants submit may occur based upon the court of appeal's decision are improbable and unlikely (*e.g.* performing an audit of all utility poles in unincorporated townships, obtaining easements from private landowners, invoking eminent domain proceedings). The holding by the court of appeals has an extremely limited applicability regarding a set of 8 utility poles in Bainbridge Township. Moreover, its application is further limited based upon its context, a road widening project. It does not have the wide reaching consequence as asserted by Appellants.

The fact that Appellants are public utilities does not, in and of itself, elevate the issues presented to one of public interest. Indeed, this Court has frequently declined to hear numerous appeals filed by these Appellants, or their affiliates, alleging that questions of public or great general interest exist. This matter clearly does not involve a public or great general interest. The

narrow issue submitted for review is whether Appellants had the necessary permissions and approval to maintain a single utility pole in its original location after a road widening project.

As a matter of public policy, Appellants' position lacks common sense and rationality. Appellants submit that as a matter of law they are entitled to install and perpetually maintain utility poles in township right-of-ways. This is not an accurate recitation of the law pursuant to *Turner*. The *Turner* court plainly asserted that utilities are required to obtain approval from the relevant public authority for the placement and maintenance of a pole to be afforded immunity. If Appellants' position were permitted to be advanced, it will no doubt lead to utility poles being maintained in extremely close proximities to roadways, especially after road widening projects, leading to serious risk of harm to users of such roadways.

II. **THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND FIRST ENERGY SERVICE COMPANY'S APPEAL IS NOT OF PUBLIC OR GREAT GENERAL INTEREST**

Appellants present six rationales in support of their position that their appeal is of public or great general interest.

1. Appellants' first assertion is that the "Eighth District disregarded the rule of law that this Court pronounced in *Turner v. Ohio Bell Tel. Co.*, 118 Ohio St.3d 215, 220, 2008-Ohio-2010 (Ohio 2008)" and that this "Court should accept jurisdiction ... to ensure that the Eighth District conforms its decisions to those of this Court[.]" Clearly, this was not the case. In a comprehensive decision, the Eighth District Court of Appeals applied the facts in this matter to *Turner* and decided that the limited immunity that *Turner* provides did not shield Appellants from liability since "CEI did not have the requisite permission to keep the Pole in its original location." *Link v. FirstEnergy Corp.*, 2014-Ohio-5432, ¶24 (8th Dist.).

2. Appellants' second assertion is that the "decision vests local elected officials with the power to effectively repeal, by a letter without the force of law and without due process, the validly enacted laws of the State of Ohio." However, Appellants fail to recognize the evidence

introduced, in addition to the letters, demonstrating that Appellants were in violation of applicable law. Nonetheless, the letters unambiguously made the local officials' positions known, for they stated, *inter alia*:

- “The township has kept the road closed since the start of the road project to protect not only the driving public, but also their and your tort liability.”
- “I would think this is a liability First Energy does not want to absorb and I know this is a liability the township will not allow to exist on a public road.”
- “It is apparent that safety dictates the relocation of these poles to an adequate distance from the roadway and in line with the other poles on Savage Road.”
- “We would like a resolution of this issue with CEI as soon as possible and before there are any further accidents. We look forward to your prompt notification of the schedule for relocating the poles.”

3. Appellants' third assertion indicates that the opinion “will impose an extraordinary, and perhaps insurmountable, burden and expense on all utilities in Ohio” since utilities “would be forced to conduct extensive audits to determine whether permission outside of the statute exists, and if not, the utility would have to either request additional permission or move the poles.” Such averment is not based in reality due to the novelty of this case. This matter involved a road reconstruction project whereby the roadway was being widened. Accordingly, due to safety concerns and clear zone requirements, the original utility poles had to be relocated outward. The court of appeal's decision places no further burden on utilities as it relates to utility poles that have been previously installed. However, utilities will continue to be required (as they previously have) to obtain approval from the owner of the right-of-way, which is generally a public authority, for new pole installations and pole relocations. *Turner v. Ohio Bell Tel. Co.*, 2008-Ohio-2010, at ¶20. The placement of a utility pole along a roadway does not create an irrevocable right to have such pole remain forever in the same place. See *Perrysburg v. Toledo Edison Co.*, 2007-Ohio-1327 (6th Dist. 2007).

4. Appellants' fourth assertion provides that the administrative burden on unincorporated townships will be substantially increased because they will have to resolve requests from utilities for permission that the Ohio legislature automatically generated by statute. Consequently, Appellants contend that it is more efficient to interpret R.C. 4931.03 as providing utilities carte blanche authority to place and perpetually maintain utility poles anywhere they please within unincorporated townships, no matter how close they are to the roadway. This Court previously rejected this view when it indicated in *Turner* that the public authority is in the best position to approve a pole location. *Turner v. Ohio Bell Tel. Co.*, 2008-Ohio-2010, at ¶ 20. Consequently, unincorporated townships are already handling these issues. Therefore, there will be no increase on their administrative burden.

5. Appellants' fifth assertion contends that that the Eight District made retroactive changes to statutory law, namely, R.C. 4931.03, by removing the protections it provides to utilities. However, Appellants fail to recognize Section B(2) of R.C. 4931.03, which provides that construction of utility poles is subject to the approval of the legislative authority and county engineer. The Eighth District correctly determined that Appellants did not have the requisite approval to maintain the subject pole in the position it was in when Mr. Link struck it pursuant to a construction project.

6. Appellants' final assertion provides that the Eighth District utilized a different standard for punitive damages than what is applicable to Ohio's other 87 counties. However, the Eighth District Court of Appeals utilized the same standard for punitive damages as promulgated by this Court in *Motorists Mut. Ins. Co. v. Said* (1992), 63 Ohio St.3d 690, 698, and utilized by courts in all 88 counties. Consequently, since the appropriate standard was used, this Court should decline jurisdiction.

Due to the limited application any decision can have related to this extremely unique fact pattern, the Links submit that this is not a matter of public or great general interest.

III. THE LINKS' CROSS-APPEAL IS OF PUBLIC AND GREAT GENERAL INTEREST

As a result of the collision with the utility pole, Mr. Link sustained catastrophic injuries, not limited to a compound fracture to his right femur, multiple fractures to his pelvis and internal bleeding. These injuries resulted in a complete loss of use of his right leg, neurological injury and loss of sexual function. The jury specifically determined based upon a jury interrogatory submitted to them that Mr. Link lost the use of a limb or bodily organ system. Yet, the jury failed to award Mr. Link any damages for past pain and suffering.

The jury's failure to award Mr. Link any damages for past noneconomic loss in light of a finding that he sustained a catastrophic injury is plain error. The citizens of Ohio have a substantial and fundamental right to damages for past pain and suffering when a jury has determined that they have suffered catastrophic injury. It is a manifest miscarriage of justice to hold otherwise.

Accordingly, the Links' cross-appeal is of public and great general interest.

IV. STATEMENT OF THE CASE AND FACTS

On October 8, 2010, Mr. Link was operating his motorcycle southbound on Savage Road in Bainbridge Township, Ohio. Suddenly and unexpectedly, a white tail deer struck Mr. Link under his left arm causing him to veer towards the right side of the road. Mr. Link used his best efforts to try and maintain control of the motorcycle; however, he struck a utility pole owned, maintained and controlled by CEI and FESC. Mr. Link's collision with the utility pole caused catastrophic and permanent injury.

Mr. Link's injuries included a compound fracture to his right femur, neurological injury, multiple fractures to his pelvis and internal bleeding. Thereafter, Mr. Link had multiple surgeries, including insertion of a metal rod into his femur, and the placement of internal fixators into his pelvis. After a significant period of time in the intensive care unit and emergency room,

Mr. Link was discharged to a rehabilitation facility. Mr. Link continues to have plexopathy, foot drop, loss of sexual function and has lost the use of his right leg. Amputation of the leg has been suggested. He continues to endure significant pain on a daily basis.

The pole which Mr. Link struck was one of a set of poles that CEI and FESC were obligated to relocate, but failed to do so. On May 8, 2006, the Bainbridge Township Board of Trustees passed a resolution of convenience and necessity for the improvement and widening of the entire length of Savage Road in Bainbridge Township, Ohio. Appellants were notified of the Savage Road project and sent preliminary road reconstruction project plans in late 2006 by the Geauga County Engineer's Office. On April 2, 2008, Appellants were sent final road reconstruction project plans and informed that the project was expected to commence in late July or early August, 2008. The Geauga County Engineer served as the project manager for the Savage Road project.

On or about September 24, 2008, Appellants sent the Geauga County Engineer's Office a letter providing that they had utility poles in conflict with the Savage Road project and that they were required to rearrange them. On October 30, 2008, Appellants transmitted their original utility pole relocation plans for Savage Road to the Geauga County Engineer's Office. These original plans called for the relocation of the utility pole which Mr. Link struck, and were approved by the county engineer.

Prior to the winter of 2008-2009, Appellants relocated certain utility poles; however, Appellants failed to relocate approximately 8 utility poles along the west side of Savage Road. The remaining utility poles are in the Savage Road public right-of-way; they are located within the ditch line; some of these poles ominously lean towards the roadway; they are in close proximity to the roadway; and they are in the clear zone of Savage Road.

Savage Road remained closed for the winter of 2008-2009 since the utility pole relocation project was not completed, and based upon assurances from Appellants that the

project would be finished over the winter pursuant to the original plans. Appellants failed to return to the project, and on March 2, 2009, Appellants sent the Geauga County Engineer an unsolicited set of revised plans, essentially abandoning further pole relocation efforts. Such revised plans did not address the clear zone of the roadway, and moreover, the Geauga County Engineer's Office and Bainbridge Township never approved or agreed to these revised plans.

On March 26, 2009, the Geauga County Engineer's Office sent Appellants a letter concerning the project. The letter stated the following, in pertinent part:

The subject reconstruction project design was started in 2007. Since the middle of 2007, this office has sent several sets of plans to various individuals at FirstEnergy. With all your internal changes, we appear to have difficulty finding the correct contact person. Additionally, your internal system appears not to work, as plans are often misplaced and not delivered to the correct person. As late as August 2008, we were still being told by the new contact person that FirstEnergy did not have any plans from the Geauga County Engineer while other individuals at FirstEnergy had current sets of plans.

All of this aside, on October 30, 2008, we received an E-Mail containing a set of plans to move all the necessary poles on Savage Road ... It was our understanding this work would be done over the winter, so the contractor for the road project could complete his ditching work in the spring. The township has kept the road closed since the start of the road project to protect not only the driving public, but also their and your tort liability.

On March 2, 2009, we received a revised set of plans that does not address the clear zone of the roadway. In some cases the poles are in the ditch line and may not have enough cover, in other areas, poles are in front of the ditch and only four to six feet off the edge of the pavement. I would think this is a liability First Energy does not want to absorb and I know this is a liability the township will not allow to exist on a public road.

As Project Manager for the township road reconstruction project, I am requesting your review of this project with the hope you will agree that it is in the best interest of everyone that First Energy completes the October 2008 plan in a timely fashion and provide a safe, clear zone for the roadway. (Emphasis added.)

Appellants were not responsive to the Geauga County Engineer's Office concerns in the above letter.

On May 23, 2010, David Bidar was driving his motor vehicle on Savage Road when a deer darted into the roadway. *Bidar v. Cleveland Elec. Illum. Co.*, 2012-Ohio-3686 (8th Dist.

2012), ¶2. Mr. Bidar swerved to avoid striking the deer and crashed into one of the remaining utility poles that had not been relocated, and was injured. *Id.* Appellants were notified of this incident on May 27, 2010.

In response to the *Bidar* incident, on June 24, 2010, the Bainbridge Township Board of Trustees sent Appellants a letter. Such letter stated the following, in pertinent part:

The Bainbridge Township Board of Trustees is contacting you directly, as our efforts through standard channels have been largely ineffective. We are concerned about the location of a specific set of utility poles on Savage Road in Bainbridge Township. As a result of a road widening project in 2008-2009, some utility poles were relocated by your company while others were left in place. We were informed that CEI would complete the relocation of the remaining eight poles in 2010.

A car recently struck one of the poles that was to be relocated. Thankfully, no one was seriously injured. It is apparent that safety dictates the relocation of these poles to an adequate distance from the roadway and in line with the other poles on Savage Road.

We would like a resolution of this issue with CEI as soon as possible and before there are any further accidents. We look forward to your prompt notification of the schedule for relocating the poles.

Appellants did not respond to Bainbridge Township's letter for almost three months, and when the response was finally received on September 13, 2010, it provided that Appellants independently decided not to relocate the utility poles; that Appellants do not relocate poles for clear zone; and that Appellants would only relocate the poles at the Township's sole cost and expense. Only twenty-five (25) days after the Township's receipt of Appellants' letter, Mr. Link's incident occurred.

Mr. Link and his spouse filed suit and the matter proceeded to trial. At the close of the Links case, the trial court directed a verdict against the Links on their punitive damages claim. The jury then returned a verdict in favor of the Links and against CEI and FESC on their qualified nuisance and loss of consortium claims. However, despite finding that Mr. Link had

lost the use of his limb or a bodily organ system, the jury failed to award him any damages for past non-economic harm.

The matter proceeded to appeal whereby the Eighth District Court of appeals affirmed the trial court's verdict against CEI and FESC, and granted the Links a new hearing solely on punitive damages.

V. **ARGUMENT**

A. **Response to Defendants' Proposition of Law No. I: Turner and Revised Code 4931.03 do not provide utilities carte blanche authority to install and permanently maintain utility poles wherever they please within unincorporated townships.**

The Links acknowledge the importance of energy transmission throughout the state of Ohio through the usage of utility poles; however, this permissive right is not supreme. Utility companies "do not enjoy unfettered discretion in the placement of their poles within the right-of-way." *Turner v. Ohio Bell Tel. Co.*, 118 Ohio St.3d 215, 220, 2008-Ohio-2010 (Ohio 2008). Essentially, utility companies are granted a permissive property right by the government, free of charge, in which to locate and maintain their facilities. However, the placement of a utility pole along a roadway does not create an irrevocable right to have such pole remain forever in the same place. See *Perrysburg v. Toledo Edison Co.*, 2007-Ohio-1327 (6th Dist. 2007). A utility company may be required to relocate its poles at its own expense when such relocation is demanded by public necessity and for public safety and welfare. *Id*

Following CEI and FESC's argument to its most logical conclusion, Appellants contend that they are permitted to install and permanently maintain utility poles anywhere they please within township right-of-ways.¹

¹ R.C. 4511.01(UU)(2) defines "right-of-way" as "[a] general term denoting land, property, or the interest therein, usually in the configuration of a strip, acquired for or devoted to transportation purposes. When used in this context, right-of-way includes the roadway, shoulders or berm, ditch, and slopes extending to the right-of-way limits under the control of the state or local authority."

In *Bidar v. Cleveland Elec. Illum. Co.*, 2012-Ohio-3686 (8th Dist. 2012), *review denied*, *Bidar v. Cleveland Elec. Illum. Co.*, Case No. 2012-1894, 2013-Ohio-347 (Ohio 2013), the court found that the limited immunity that *Turner* provides does not apply to CEI regarding the poles on Savage Road. More recently, in *Toledo Edison Co. v. Bd. of Defiance Cty. Commrs.*, 2013-Ohio-5374 (3rd Dist. 2013), *review denied*, *Toledo Edison Co. v. Bd. of Defiance Cty. Commrs.*, Case No. 2014-0111 (Ohio 2014), a case essentially involving the same reliance upon *Turner*, the court found that the utility had erroneously relied on *Turner*, since utilities are “required to obtain approval from the owner of the right-of-way, *i.e.* the public authority.” Again, in this case the court of appeals determined that CEI could not rely on *Turner* as a shield from liability because it did not have the requisite permission to keep the pole in its original location. *Link v. FirstEnergy Corp.*, 2014-Ohio-5432, ¶24 (8th Dist.).

In this matter, no approval was obtained from the project manager, the Geauga County Engineer’s Office, or the owner of the right-of-way, Bainbridge Township, for Appellants to maintain certain utility poles dangerously close to the edge of the roadway after a road widening project. Furthermore, Appellants do not possess any permits, easements, agreements, leases or contracts which permit them to maintain the subject utility pole along Savage Road.

Turner is easily distinguishable from the present matter. The most glaring difference in *Turner* is that the utility pole therein was erected pursuant to a permit issued by the Ohio Department of Transportation (“ODOT”), and therefore the pertinent public authority approved the pole location. See *Turner v. Ohio Bell Tel. Co.*, 2008-Ohio-2010, at ¶26. In the instant matter, the applicable public authorities expressly disavowed the location of the pole after the widening project.

Turner held “that when a vehicle collides with a utility pole located off 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.” *Id.* at ¶21. However, this Court placed a caveat on this holding, for it stated: “Nevertheless, utility companies do not enjoy unfettered discretion in the placement of their poles within the right-of-way, for ***they are required to obtain approval from the owner of the right-of-way***... The appropriate public authority presumably will consider many of the factors in the Eight District’s reasonableness test when deciding whether to approve a pole location.” *Id.* at ¶20. Those factors include (1) the narrowness and general contours of the road, (2) the presence of sharp curves in the road, (3) the illumination of the pole, (4) any warning signs of the placement of the pole, (5) the presence or absence of reflective markers, (6) the proximity of the pole to the highway, (7) whether the utility company had notice of previous accidents at the location of the pole, and (8) the availability of less dangerous locations. *Id.* at ¶15.

Much of Appellants’ jurisdictional memorandum attempts to draw a distinction between the terms “necessary permission” and “approval;” however, this Court drew no such distinction in *Turner*. This Court provided that utilities are required to obtain approval from the owner of the right-of-way for *Turner* to apply. In this matter, the location of the subject pole was expressly disapproved after the widening of the roadway. Consequently, Appellants cannot be afforded the limited protection *Turner* provides.

Moreover, CEI and FESC fail to recognize subsection B(2) of R.C. 4931.03,² which provides that construction under this section is subject to any applicable law, including, but not limited to, any law requiring ***approval*** of the legislative authority, the county engineer, or the director of transportation.

The letters by the Geauga County Engineer and Bainbridge Township Board of Trustees, referenced above, were not the sole basis of the Eighth District’s finding that Appellants did not

² R.C. 4931.03 provides that utility poles “shall be constructed so as not to incommode the public *in the use of the roads or highways.*”

have the requisite permission to keep the pole in its original location after completion of the road widening project. *Link v. FirstEnergy Corp.*, 2014-Ohio-5432, ¶24 (8th Dist.).

Appellants violated numerous laws passed by the Geauga County Board of Commissioners related to the Savage Road project. On April 28, 2005, the “Gauga County Commissioners Highway Use Manual, Revised 2005” (the “Highway Use Manual”) was adopted into law. The Highway Use Manual provides that “[d]esign of the several elements in utility crossings or occupancies shall conform to the requirements contained herein, but where State, Local and Industry design standards are higher than the treatments and design requirements specified the higher standards shall be used.” Appellants admitted that the utility poles along Savage Road did not satisfy the clear zone requirements with respect to roadway improvement. They did so through acknowledging that they violated ODOT standards and their own internal standards concerning clear zone requirements.

The Highway Use Manual also provides that “[a]ny deviations from the approved plan *must* be approved by the Geauga County Engineer prior to installation.” After approving Appellants’ original pole relocation plans, which called for the relocation of the pole that Mr. Link struck, the county engineer expressly disapproved Appellants’ revised plan to abandon the project. This was another example of Appellants’ violation of applicable law.

The court of appeals merely applied the facts of this case to the limited immunity established by *Turner* and determined that such immunity is inapplicable since CEI and FESC lacked approval from the owner of the right-of-way for the poles to remain in their original positions after the road widening project. The placement of a utility pole along a roadway does not create an irrevocable right to have such pole remain forever in the same place. See *Perrysburg v. Toledo Edison Co.*, 2007-Ohio-1327 (6th Dist. 2007).

Appellants’ proposition that utilities would be compelled to undertake a costly and burdensome audit to determine whether permission exists beyond R.C. 4931.03 is misplaced.

This Court, in *Turner*, determined that the public authority is in the best position to approve a pole location. *Turner v. Ohio Bell Tel. Co.*, 2008-Ohio-2010, at ¶ 20. Consequently, utilities have previously been placed on notice that approval would be determined by the relevant public authority.

In short, the issue that CEI and FESC seek to raise in their first proposition of law is a factual issue, specifically, whether they had the necessary permissions and approval from Bainbridge Township and the Geauga County engineer to maintain the utility pole which Mr. Link struck in its original location after a road widening project. The undisputed evidence demonstrates that Appellants had no such approvals and permissions. Thus, Appellants are not shielded by *Turner*, for utility companies do not enjoy unfettered discretion for the original placement and continued maintenance of their poles within the right-of-way.

- B. **Response to Defendants' Proposition of Law No. II:** The court of appeals utilized the appropriate legal standard when determining that the Links were entitled to a hearing on punitive damages.

CEI and FESC claim that the Eighth District utilized a “mere awareness” standard as opposed to a “near certainty” standard when determining whether the Links were entitled to a hearing on punitive damages.

Under Ohio law, an award of punitive damages in a tort case may be made only upon a finding of actual malice, fraud, oppression, or insult on the part of the defendant. R.C. 2315.21; *Calmes v. Goodyear Tire & Rubber Co.* (1991), 61 Ohio St.3d 470, 473. The Supreme Court has defined actual malice for purposes of punitive damages as “(1) that state of mind under which a person’s conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.” *Preston v. Murty* (1987), 32 Ohio St.3d 334, syllabus.

In the present case, it is the second form of malice defined by the syllabus law of *Preston* that is at issue: whether CEI and FESC’s actions demonstrated a conscious disregard for the

rights and safety of other persons that had a great probability of causing substantial harm. “[A]ctual malice requires consciousness of the *near certainty* (or otherwise stated ‘*great probability*’) that substantial harm will be caused by the tortious behavior. *Motorists Mut. Ins. Co. v. Said* (1992), 63 Ohio St.3d 690, 698. Consequently, the terms “near certainty” and “great probability” are interchangeable.

In the instant case, the court of appeals made the following findings:

- The Links argue that the trial court erred because there was substantial evidence in the record to support a finding that CEI and FESC *consciously disregarded* Douglas Link’s safety. We agree. *Link v. FirstEnergy Corp.*, 2014-Ohio-5432, ¶51.
- There was sufficient evidence presented from which a jury could conclude that there was a *great probability* of harm. *Id.* at ¶52.
- [S]ufficient evidence was presented from which a jury could conclude that the harm caused could be *substantial*. *Id.*
- We conclude that reasonable minds could differ as to whether CEI and FESC were aware that their acts had a *great probability* of causing *substantial harm*. *Id.* at ¶53.

These findings were based upon a number of facts supported by the record, including: (1) knowledge of a recent prior similar accident at the same set of utility poles; (2) prior notification that the poles posed a safety risk; and (3) a substantial speed limit upon the subject road. *Id.* at ¶¶ 51-52. Moreover, the Links presented additional evidence supporting their claim for punitive damages. Specifically, that CEI and FESC ignored their own engineering standards, they failed to properly communicate through their various departments, they ignored their own employees warning regarding their failure to meet the clear zone requirements, and they had knowledge that there was a great probability of harm to others.

In support of Appellants’ position, they extract a single sentence from the Eighth District’s opinion. This sentence provides that “[w]e conclude that reasonable minds could differ as to whether CEI and FESC were aware that their acts had a great probability of causing

substantial harm.” *Id.* at ¶53. CEI and FESC claim that this statement invokes a more relaxed standard for the determination of punitive damages. Specifically, Appellants claim that the court is imposing a “mere-awareness” standard as opposed to a “near certainty” standard. This argument is unsubstantiated for a number of reasons. First, *Motorists Mutual* provided that the terms “great probability” and “near certainty” are interchangeable. The Eighth District simply elected to utilize the “great probability” option. Second, CEI and FESC attempt to draw a distinction between the court’s usage of the term “aware” rather than the term “conscious.” However, no tangible distinction exists.

Consequently, since the Eighth District Court of Appeals used the correct legal standard to determine whether the Links were entitled to a hearing on punitive damages, jurisdiction on this proposition of law should be declined.

- C. **Plaintiffs’ Proposition of Law No. III:** Failure to award a plaintiff any damages for past non-economic loss is plain error when a jury has determined that the plaintiff has suffered catastrophic injury through a determination that he or she sustained loss of use of a limb, permanent and substantial physical deformity or loss of a bodily organ system.

In this case, despite finding that Mr. Link sustained loss of use of a limb, permanent and substantial physical deformity or loss of a bodily organ system, the jury failed to award him any damages for past noneconomic loss. “Noneconomic loss” means nonpecuniary harm that results from an injury or loss to person or property that is a subject of a tort action, including, but not limited to, pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, disfigurement, mental anguish, and any other intangible loss. R.C. 2315.18(A)(4).

The failure to award a plaintiff any damages for noneconomic loss after a determination that the plaintiff has proved liability and catastrophic injury is plain error. The plain error doctrine permits correction of judicial proceedings where error is clearly apparent on the face of the record and is prejudicial to the appellant. *Reichert v. Ingersoll*, 18 Ohio St.3d 220, 223 (Ohio

1985). The plain error doctrine may be applied in civil cases if the error complained of would have a material adverse affect on the character and public confidence in judicial proceedings. *Id.*; *Schade v. Carnegie Body Co.*, 70 Ohio St.2d 207, 209 (Ohio 1982); *Yungwirth v. McAvoy*, 32 Ohio St. 2d 285, 288 (Ohio 1972).

There has been a multitude of caselaw supporting a plaintiff's right to damages for past pain and suffering. See *Boldt v. Kramer*, 1st Dist. No. C-980235, 1999 Ohio App. LEXIS 2140 (1st Dist. May 14, 1999); *Elston v. Woodring*, 3d Dist. No. 4-2000-12 (3rd Dist. Feb. 1, 2001); *Hacker v. Roddy*, 2013-Ohio-5085 (3rd Dist. 2013); *Michael T. Claussen v. Jay P. Piper*, 94-LW-3120 (6th Dist. 1994); *Yock v. Kovalyk*, 2007-Ohio-6259 (7th Dist. 2007); *Vieira v. Addison*, 11th Dist. No. 98-1-054 (11th Dist. Aug. 27, 1999); *Cooper v. Moran*, 2011-Ohio-6847 (11th Dist. 2011); *Farkas v. Detar*, 126 Ohio App.3d 795 (9th Dist.1998); *Slivka v. C.W. Transport, Inc.*, 49 Ohio App.3d 79 (10th Dist.1988); and *Ford v. Sekic*, 2013-Ohio-1895 (8th Dist. 2013). However, in this matter the Eighth District determined that Mr. Link waived his right to a new hearing on past noneconomic harm based upon his failure to object to inconsistent jury interrogatories prior to the discharge of the jury. *Link v. FirstEnergy Corp.*, 2014-Ohio-5432, ¶46 (8th Dist.). Nevertheless, there can be no waiver of plain error.

The Links submit that the failure to award Mr. Link damages for noneconomic harm is plain error. Mr. Link sustained a complete loss of use of his right leg, neurological injury and loss of sexual function. There was further testimony that Mr. Links endures perpetual and substantial pain each day. The failure to award Mr. Link past noneconomic damages is clearly apparent on the face of the record and is prejudicial to Mr. Link.

In *Garaux v. Ott*, 2010-Ohio-2044 (5th Dist. 2010), plaintiff's hands were burned in a fire caused by defective workmanship. The jury awarded plaintiff damages for his medical expenses, but declined to award damages for pain and suffering. *Id.* at ¶4. Plaintiff did not object to the jury's award of damages before the jury was discharged. *Id.* at ¶25. After the jury was

discharged, plaintiff filed a motion for a new trial to compensate him for the “corresponding pain, suffering or inability to perform usual activities.” *Id.* at ¶6. The trial court overruled such motion. On appeal, the defendants argued that an objection to an inconsistent answer to a jury interrogatory is waived unless the party raises the objection prior to the jury’s discharge; however, the court determined that the plain error doctrine was applicable. In doing so, the court stated:

We find that the plain error doctrine must be applied in this case to prevent a manifest miscarriage of justice. We further find that the trial court abused its discretion in failing to grant appellant a new trial on the issue of damages because the damages were inadequate and against the weight of the evidence. In the case *sub judice*, there was unrefuted evidence that appellant suffered pain and suffering as a result of the burns on his hands and that he was unable to perform his usual activities. Alisha Garaux, appellant’s companion who has limited vision, testified that when she saw appellant ... after the fire, appellant’s hands were red and blistered and very swollen. She further testified that appellant was in a lot of pain and shaking.

Id. at ¶27.

Clearly, Mr. Link’s injuries were more substantial to burns to his hands. He had a compound fracture of his right femur, a portion of his pelvis was sheared off, and his pelvis had sprung open causing multiple fractures and internal bleeding.

Where liability is established and there is a determination that a plaintiff has sustained a catastrophic injury (through a jury interrogatory finding that plaintiff sustained loss of use of a limb, permanent and substantial physical deformity or loss of a bodily organ system), a plaintiff should be entitled to damages for past noneconomic loss. To find otherwise is a gross miscarriage of justice and plain error.

VI. CONCLUSION

For the above reasons, this Court should reject jurisdiction over CEI and FESC’s appeal since those propositions of law present a private dispute between the parties, of primary interest to those parties. Appellants’ propositions of law do not implicate any question of public or great

general interest. Rather, the court of appeals properly applied the test enunciated in *Turner*, and properly determined that Appellants are not entitled to immunity. Moreover, Appellants cannot advance their argument that the court of appeals diluted a higher standard required of punitive damages since the court utilized the correct standard as enumerated in *Motorists Mut. Ins. Co. v. Said* (1992), 63 Ohio St.3d 690.

Alternatively, the Links respectfully request that this Court accept jurisdiction over their cross-appeal since failure to award a plaintiff any damages for past noneconomic harm when liability and catastrophic injury has been established is plain error.

Respectfully submitted,

/s/ Joseph J. Triscaro

Joseph J. Triscaro (#0081209)
(COUNSEL OF RECORD)
DEMARCO & TRISCARO, LTD.
30505 Bainbridge Road, Suite 110
Solon, Ohio 44139
Tel: (440) 248-8811
Fax: (440) 248-1599
jtriscaro@demarcotriscaro.com

*Attorney for Plaintiffs-Appellees-
Cross-Appellants,
Douglas V. Link & Diane Link*

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of February, 2015, a copy of this *Combined Memorandum Opposing Jurisdiction as to Appeal of CEI and FESC and Supporting Jurisdiction as to Cross-Appeal of the Links* was served via U.S. mail, postage prepaid, to the following persons:

Thomas I. Michals, Esq. (0040822)
John J. Eklund, Esq. (0010895)
William E. Coughlin (0010874)
Eric S. Zell (0084318)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, Ohio 44114
Tel: (216) 622-8200
Fax: (216) 241-0816
tmichals@calfee.com
jeklund@calfee.com
wcoughlin@calfee.com
ezell@calfee.com

*Attorneys for Defendants-Appellants-Cross-Appellees,
The Cleveland Electric Illuminating Company and
FirstEnergy Service Company*

/s/ Joseph J. Triscaro

Joseph J. Triscaro (0081209)
DEMARCO & TRISCARO, LTD.