

Case No. 2015-0132

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IN THE SUPREME COURT OF OHIO

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**DOUGLAS V. LINK, et al.,**  
*Appellees/Cross-Appellants,*

v.

**THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al.,**  
*Appellants/Cross-Appellees,*

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

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**RESPONSE OF APPELLANTS/CROSS-APPELLEES, THE CLEVELAND ELECTRIC  
ILLUMINATING COMPANY AND FIRSTENERGY SERVICE COMPANY, TO  
MEMORANDUM SUPPORTING JURISDICTION AS TO CROSS-APPEAL**

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**I. STATEMENT OF CROSS-APPELLEES' POSITION THAT THE CROSS-APPEAL IS NOT OF PUBLIC OR GREAT GENERAL INTEREST**

The issue raised by the cross-appeal affects no one other than Plaintiffs-Appellants, Douglas V. Link and Diane Link (“Plaintiffs”). Plaintiffs filed their cross-appeal in the hope that this Court would rescue them from the jury’s verdict and their failure to challenge the jury’s refusal to award Mr. Link damages for past pain and suffering after he climbed on a motorcycle while intoxicated, collided first with a deer, left the roadway and then struck a utility pole. Plaintiffs concede their failure, and thus the resulting waiver of the challenge, by relying only on the “plain error” doctrine as the basis for their appeal. By doing so, however, Plaintiffs have argued themselves out of Supreme Court jurisdiction. Plaintiffs assert that the law is already decided. There is no new law to be pronounced. In addition, Plaintiffs’ cross-appeal is based on a scenario unlikely to occur again (either factually or procedurally), so it does not affect the public interest at all, and by Plaintiffs’ own admission, they do not present the Court with a question that needs to be addressed.

Plaintiffs’ current posture is not the result of only one waiver – the failure to challenge, before the jury was discharged, the jury’s denial of past pain and suffering damages. That failure is only one in a series of at least four waivers by Plaintiffs to preserve the issue even before the jury began its deliberations.

First, Plaintiffs agreed to a set of jury interrogatories that asked, among other things, whether Mr. Link himself struck the utility pole (the “Pole”) owned by Defendant-Appellee The Cleveland Electric Illuminating Company (“CEI”). Another interrogatory asked whether the qualified nuisance found by the jury “was the proximate cause of Douglas Link’s injury,” and another (the last interrogatory in the set) asked the jury to determine whether Mr. Link sustained a major injury in the form of either “loss of use of a limb, permanent and substantial physical

deformity, or loss of a bodily organ system.” Each of these questions was answered in the affirmative, but what the jury did *not* find – because Plaintiffs never asked – was that Mr. Link’s collision with the Pole caused the “loss of use of a limb, permanent and substantial physical deformity, or loss of a bodily organ system.”

Substantial evidence, including testimony from CEI’s expert, demonstrated that before Mr. Link’s motorcycle collided with the Pole, he must have put his right leg (the limb in question<sup>1</sup>) down on the road in an attempt to right himself. Accordingly, because Plaintiffs failed to ask the jury to specify that his striking the Pole caused the injury to the leg, it is reasonable to conclude that the jury found that Mr. Link’s pre-collision attempt to right his motorcycle or pre-collision contact with the roadway, rather than his collision with the Pole, caused the leg injury.<sup>2</sup> We will never know, however, because Plaintiffs waived the issue by failing to present it in an interrogatory.

Second, after the jury returned its verdict, properly exercising its discretion to refuse to award Mr. Link any damages for past pain and suffering, Plaintiffs made no attempt to challenge that finding before the jury was discharged. Effectively conceding this waiver, Plaintiffs now present the Court with the assertion that 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.” Pls.’ Memo. at 6.

The third and fourth waivers involved the failure to preserve this argument post-trial and on appeal. In their motion for new trial, Plaintiffs asserted that it was the alleged lack of

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<sup>1</sup> Plaintiffs assert that “[a]mputation of the leg has been suggested” (Pls.’ Memo. at 7) without informing this Court that the jury heard no such testimony: in fact, the jury heard the opposite; Mr. Link’s attending physician testified that, in light of Mr. Link’s progress in recovery, amputation was inappropriate.

<sup>2</sup> Plaintiffs put on evidence that the injury to the pelvis may have occurred as a result of the impact with the Pole. There was no such testimony about the leg injury.

proportion between Mr. Link's assertion that he sustained \$620,718.84 in medical expenses and the jury's award of \$237,200 in compensatory damages that entitled Plaintiffs either to a new damages trial or to an additur. Then, on appeal to the Eighth District, Plaintiffs referred to the jury's finding on the "loss of use" interrogatory, but Plaintiffs argued only that "because the jury awarded Douglas Link damages for medical expenses, they were required under the law to award him damages for past non-economic harm as well." See *Link v. FirstEnergy Corp.*, 8th Dist. Cuyahoga No. 101286, 2014-Ohio-5432, at ¶ 45. Plaintiffs did not ask the trial court or the Court of Appeals to hold that a jury finding of a "loss of use of a limb, permanent and substantial physical deformity, or loss of a bodily organ system" automatically entitles a plaintiff to past pain and suffering damages, as they now ask this Court to hold. This Court should not accept jurisdiction over an issue that a party failed to preserve or argued differently not only at the trial level but also at the appellate level.

Asking the Court to ignore their waivers, Plaintiffs seek refuge in the "plain error" doctrine. But, "[i]n appeals of civil cases, the plain error doctrine is not favored and may be applied only in the *extremely rare case involving exceptional circumstances* where error, to which no objection was made at the trial court, seriously affects the *basic fairness, integrity, or public reputation of the judicial process*, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, syl. ¶ 1, 1997-Ohio-401, 679 N.E.2d 1099 (citing cases) (emphasis added). This is not such a case. The judicial process allows a party not only to challenge a jury verdict before the jury's discharge but also allows a party who misses that opportunity to challenge plainly erroneous jury verdicts at the appellate level. The judicial process underlying Plaintiffs' appeal is sound – they simply failed to avail themselves of it.

Moreover, even if the Court were inclined to consider Plaintiffs' "plain error" argument, Plaintiffs have presented their issue in such a way as to leave the Court with nothing new to announce. Plaintiffs assert that "[t]here has been a multitude of caselaw supporting a plaintiff's right to damages for past pain and suffering." Pls.' Memo. at 17. Plaintiffs' own argument indicates that there is no legal principle for this Court to decide. "As eloquently stated in *State v. Bartrum*, 121 Ohio St.3d 148, 2009-Ohio-355, 902 N.E.2d 961, ¶ 31 (O'Donnell, J., dissenting), 'our role as a court of last resort is not to serve as an additional court of appeals on review, but rather to clarify rules of law arising in courts of appeals that are matters of public or great general interest.'" *Gauthier v. Gauthier*, 137 Ohio St.3d 562, 567, 2013-Ohio-5479, 2 N.E.3d 239 (Kennedy, J. dissenting); *see also State v. Noling*, 136 Ohio St.3d 163, 180, 2013-Ohio-1764, 992 N.E.2d 1095 (O'Donnell, J. dissenting) ("we are not an error-correcting court; rather, our role as the court of last resort is to clarify confusing constitutional questions, resolve uncertainties in the law, and address issues of public or great general interest").

Plaintiffs seek this Court's review not of an issue of public or great general interest but of a fact-intensive and waiver laden situation. Factually, Plaintiffs' appeal involves a single intoxicated motorcyclist that careened out of control after colliding with a deer and then struck a pole located several feet off the roadway. Such a fact pattern is unlikely to be repeated. Procedurally, Plaintiffs waived their issue not once but four times – in failing to craft the necessary jury instruction, in failing to challenge the verdict before the jury was discharged, in failing to raise their argument in post-trial briefing and in failing to present the issue to the Court of Appeals. No other person or entity in the State of Ohio has any interest in Plaintiffs' cross-appeal.

Plaintiffs' posture stands in stark contrast with the questions posed by Appellants. That is: whether a utility has statutory permission, sufficient to satisfy *Turner v. Ohio Bell Telephone Co.*, 118 Ohio St.3d 215, 2008-Ohio-2010, 887 N.E.2d 1158, to leave an existing pole in place absent legislative action from an unincorporated township, and whether the Eighth District has relaxed the high burden that must be met before a jury may decide punitive damages. Appellants' first issue seeks a new statutory interpretation to be applied to thousands of utility poles around the State of Ohio, and their second issue affects a significant portion of the roughly 7,000 civil cases pending in Cuyahoga County.<sup>3</sup> Plaintiffs present to the Court a proposed proposition of law that would pertain to no one but themselves (and, perhaps, some minute number of litigants who fail, at various junctures, to preserve a legal issue). They have failed to show a public or great general interest in their appellate question, so this Court should not accept jurisdiction over their cross-appeal.

## **II. ARGUMENT AGAINST CROSS-APPELLANTS' PROPOSITION OF LAW**

The primary problem with Plaintiffs' cross-appeal is that they seek a ruling from this Court that a "loss of use" finding automatically entitles a plaintiff to past pain and suffering damages. However, Plaintiffs failed to present the "loss of use" question to the jury in a way that required the jury to determine that the "loss of use" actually resulted from Mr. Link's collision with the Pole (for which Plaintiffs might recover damages from CEI) rather than his attempt to right his motorcycle before the collision (for which there could be no recovery). However, even if the issue had been properly preserved, the issue should be decided against Plaintiffs in order to preserve the jury's discretion in deciding whether to award damages.

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<sup>3</sup> See, e.g., Cuyahoga County Court of Common Pleas January-December 2014 statistics, [http://cp.cuyahogacounty.us/internet/courtdocs/20150226\\_2014December.pdf](http://cp.cuyahogacounty.us/internet/courtdocs/20150226_2014December.pdf).

As the Court of Appeals held, “[t]he assessment of damages lies ‘so thoroughly within the province of the [trier of fact] that a reviewing court is not at liberty to disturb the [trier of fact’s] assessment’ absent an affirmative finding of passion and prejudice or a finding that the award is manifestly excessive or inadequate.” *Link*, 2014-Ohio-5432, ¶ 64 (quoting *Decapua v. Rychlik*, 8th Dist. Cuyahoga No. 91189, 2009-Ohio-2029, ¶ 22, and *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 655, 635 N.E.2d 331 (1994)). A reviewing court should not find that a verdict is inadequate unless the inadequacy of the verdict is “so gross as to shock the sense of justice and fairness, or the amount of the verdict cannot be reconciled with the undisputed evidence in the case, or it is apparent that the jury failed to include all the items of damages comprising a plaintiff’s claim.” *See id.* (quoting *Decapua*). That principle is especially important where, as here, the jury was presented with both compensable and non-compensable potential causes of pain or suffering. Plaintiffs’ own cited case law makes the point.

In their brief, Plaintiffs rely on *Garaux v. Ott*, 9th Dist. Stark No. 2009 CA 00183, 2010-Ohio-2044, in which the Fifth District held “that the trial court abused its discretion in failing to grant a new trial on the issue of damages where there was ***unrefuted evidence that the contractor suffered pain and suffering as result of burns on his hands . . .***” *Perry v. Carter*, 5th Dist. Richland No. 10CA117, 2011-Ohio-4214, ¶ 18 (emphasis added, citing *Garaux*). The Fifth District, however, distinguished *Garaux* the following year in *Perry*, in a holding that bears directly on the underlying case: “[T]his Court has also found that ***where the evidence is contradicted concerning the cause of the plaintiff’s complaints of pain***, a \$0 damage award for pain and suffering does not require a new trial even when the jury awarded damages for other things, such as medical expenses and/or lost wages. *Id.* at ¶ 19 (citing cases; emphasis added). The Fifth District further held:

Based on the evidence presented, the jury could have concluded that appellant failed to prove by a preponderance of the evidence that the pain she experienced in her neck was caused by the 2005 accident and not by the 2003 accident or from any of a variety of normal life activities which place her at greater risk for neck and/or back problems due to the degenerative disc disease and the abnormal lack of curvature in her neck which predated even the 2003 accident. The jury also could have found that her neck pain was caused by a combination of events and she failed to prove what portion was caused by the 2005 accident by a preponderance of the evidence. The court did not abuse its discretion in overruling the motion for new trial on this basis.

*Id.* at ¶ 21.

So too here – the jury may have found that Mr. Link managed, notwithstanding his severe intoxication, to remain on his motorcycle at the time it hit the Pole. However, the evidence also demonstrated that Mr. Link was hit by a deer, that his motorcycle was knocked sideways, and that he drove his right leg (the one for which Plaintiffs now claim “loss of use”) into the pavement while traveling at a high rate of speed in an attempt to right his motorcycle. The last two injuries in the sequence were not ones for which Plaintiffs could have obtained any compensation from Cross-Appellees, and the jury could have concluded that it was these injuries, rather than any collision with the Pole, that caused Mr. Link’s “loss of use” or his past pain and suffering. The Court should not disturb the jury’s findings on these issues, so there is no reason to accept jurisdiction over the cross-appeal.

### III. CONCLUSION

Plaintiffs had several opportunities – (1) when submitting the jury interrogatories, (2) after hearing the jury’s verdict, (3) during post-trial briefing, and (4) on appeal – to ask for a ruling that a jury finding of “loss of use of a limb, permanent and substantial physical deformity, or loss of a bodily organ system” created an entitlement to an award for past pain and suffering damages against CEI. They never did, and in any event, such a rule would not be proper. They also cannot present the absence of such a rule as plain error because to take advantage of the

plain error doctrine, the law must be and Plaintiffs argued that it was settled in their favor. They advance no new proposition of law of great public interest that needs a pronouncement by this Court. Accordingly, for these and the foregoing reasons, Cross-Appellees respectfully request that the Court decline to exercise jurisdiction over Plaintiffs' cross-appeal.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

A copy of the foregoing, *Response of Appellants/Cross-Appellees, The Cleveland Electric Illuminating Company and FirstEnergy Service Company, to the Memorandum in Support of Jurisdiction for Cross-Appeal*, was served via first class United States Mail, postage prepaid, on this 16th day of March 2015, upon the following:

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