ORIGINAL

IN THE SUPREME COURT OF OHIO

DOUGLAS V. LINK *et al.*,	)	CASE NO. 2015-0132
	)	
Plaintiff/Appellees,	)	ON APPEAL FROM THE CUYAHOGA COUNTY COURT OF APPEALS, EIGHTH APPELLATE DISTRICT
	)	
vs.	)	
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, *et al.*,	)	COURT OF APPEALS CASE NO. CA-05-087541
	)	
Defendant/Appellants.	)	

BRIEF OF *AMICUS CURIAE* OF THE OHIO BELL TELEPHONE COMPANY, dba AT&T OHIO ("AT&T"), IN SUPPORT OF DEFENDANT/APPELLANTS, URGING REVERSAL

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STATEMENT OF INTEREST OF *AMICUS CURIAE* AT&T

STATEMENT OF INTEREST OF *AMICUS CURIAE* AT&T

Pursuant to the provisions of Ohio Supreme Court Practice Rule 16.06, The Ohio Bell Telephone Company, dba AT&T Ohio ("AT&T"), hereby respectfully submits the within *amicus curiae* Brief in support of appellants The Cleveland Electric Illuminating Company and its affiliated support service entity, FirstEnergy Services Company's (collectively, "CEI") appeal herein. AT&T, an Ohio public utility having its principal place of business at Cuyahoga County, Ohio, and operating under the regulatory oversight of the Public Utilities Commission of Ohio ("PUCO"), provisions telecommunications services throughout much of Ohio. AT&T owns and/or shares in the use of hundreds of thousands of utility poles and associated facilities within its territorial jurisdiction (including many tens of thousands of such poles and facilities in numerous unincorporated areas of Ohio townships) .

AT&T shares CEI's concerns about the Eighth District's December 11, 2014, opinion (the "Eighth District's opinion") regarding this Court's interpretation of R.C. 4931.03(A)(1) in *Turner v. Ohio Bell Telephone Co.* (2008), 118 Ohio St.3d 215, 887 N.E.2d 1158. The Eighth District's opinion creates needless uncertainty, especially including the uncertainty of utilities' having to contend with the unauthorized and even arbitrary "standards" of government officials whose knowledge of and expertise in provisioning utility services may be nonexistent, for most if not all public utilities—all of which utilities rely on the longstanding public policy of R.C. 4931.03(A)(1) and this Court's rule in *Turner.* Accordingly, AT&T respectfully urges this Court's reversal of the judgment below.

SUMMARY OF THE CASE AND FACTS

AT&T has not thoroughly studied the docket and record of proceedings in this action—as to which AT&T is prepared to defer to the principal parties hereto to recite all the

important particulars. However, as AT&T understands (based primarily, but not exclusively, on the story outlined in the Eight District's opinion[1]), the following facts are relevant to this appeal:

1. On October 8, 2010, plaintiff/appellee Douglas V. Link, while intoxicated at a level more than double the legal limit, was operating his motorcycle on Savage Road in Bainbridge Township, Geauga County, Ohio, when he encountered a deer crossing the road; whereupon,

2. Mr. Link lost control of his motorcycle, left the roadway, and crashed into a CEI utility pole well off the improved portion of the road.

3. As result of the crash, Mr. Link sustained serious and permanent injury to his right leg and pelvis—as to which injury he sued CEI for negligence in the placement of the pole (and his wife, Diane Link, derivatively sued CEI for loss of consortium).

4. In 2006, prior to Mr. Link's accident, the Bainbridge Township Board of Trustees (the "Trustees") passed a resolution to improve and widen the entire length of Savage Road. In connection with this public improvement, the Geauga County Engineer (the "Engineer") sent CEI the preliminary drawings for the Savage Road widening project—in response to which CEI prepared a pole relocation plan for the project, which relocation plan CEI submitted to the Engineer, albeit not for approval but for information purposes.

5. CEI's original pole relocation plan called for moving certain utility poles, including the one that Mr. Link later crashed into. Sometime before the winter of 2008-2009, CEI moved all but eight of the poles along Savage Road. However, in March of 2009, CEI decided that it did not need to move these eight poles. CEI submitted a revised pole relocation plan to the Engineer advising him that it was going to leave them in their original location. The pole that Mr. Link crashed into was among these eight poles.

6. In response to CEI's revised pole relocation plan, the Engineer sent CEI a letter concerning CEI's decision not to relocate the eight original poles.[2] For its part, CEI decided not to move these poles.

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[1] AT&T is also relying here on the facts recited in CEI's 1/26/15 Memorandum in Support of Jurisdiction.

[2] According to the Eighth District's opinion, the Engineer, as "Project Manager" of the Savage Road widening project, merely requested CEI to review "this project with the hope you will agree that it is in the best interest of everyone that [CEI] completes the [original] plan in a timely fashion . . . ." There is no further evidence that the Engineer (or the Township Board of Trustees) took any further action, either by way of legislation or even demand that CEI move its poles.

7. Shortly thereafter, and notwithstanding the Engineer's disposition, the Engineer (and the Trustees) re-opened Savage Road.

8. About a year later, but before Mr. Link's accident, another driver encountered a deer while traveling on Savage Road such that the other driver swerved to avoid hitting the deer and, instead, hit one of CEI's other eight utility poles that CEI elected not to relocate. When this other driver sued CEI for negligence to recover personal injury damages, as to which action the trial court granted CEI summary judgment, the Eighth District reversed the trial court's judgment on the ground that the rule in *Turner* did not apply because the Engineer had not "approved" CEI's decision to keep the original eight poles in their existing location. *See Bidar v. Cleveland Elec. Illum. Co.,* 8th Dist. Cuyahoga No. 97490, 2012-Ohio-3686, 2012 Ohio App. LEXIS 3257 (Aug. 16, 2012), *disc. app. not allowed* 134 Ohio St.3d 1452, 982 N.E.2d 729 (2013).[3]

9. CEI is now appealing the Eighth District's opinion affirming, on the strength of *Bidar,* the trial court's denying CEI's motions for summary judgment, directed verdict, and JNOV, and the jury verdict and judgment against CEI for Mr. and Mrs. Link's claims.

SUMMARY OF THE ARGUMENT

In enacting R.C. 4931.03(A)(1), the General Assembly of Ohio memorialized a long-standing public policy of enabling public utilities[4] to provision utility services without unduly burdening either the utilities or unincorporated areas of Ohio townships (namely, in this case, Bainbridge Township, Geauga County, OH) with needless expenditures of time and effort. Indeed, the statute gives utilities broad discretion in such pole placement decisions.

As the plain language of the statute provides, utilities have statutory

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[3] In *Bidar, t*he Eighth District held, in effect, that because the Savage Road widening project was subject to the "supervision" of the Engineer under R.C. 5543.09(A) and 5571.05, the Engineer had authority over CEI's pole placement decisions. The Eighth District deemed the Engineer's "disapproval" as sufficient to take *Bidar* out of the rule in *Turner*. *See id.* at [*P25]. *Bidar* then served as the Eight District's sole precedent in the case at bar.

[4] R.C. 4931.03(A)(1) is expressly addressed to "telephone company[ies']" provisioning utility services "in the unincorporated area of a township." However, R.C. 4933.14 conveys the same statutory authority to suppliers of electric light and power, including CEI here.

authority to install utility facilities within road rights-of-way provided such facilities do "not incommode the public in the use of the roads or highways . . . ." In *Turner v. Ohio Bell Telephone Co.* (2008), 118 Ohio St.3d 215, 887 N.E.2d 1158, this Court interpreted R.C. 4931.03(A)(1) with respect to a utility pole located within road right-of-way (but well off the improved portion of the road) as to which pole the widow of a passenger killed when a car in which plaintiff's decedent was riding crashed into the pole after running off the road at a high rate of speed in fog, the widow

sued Ohio Bell for negligence in locating the pole.

Reversing the Eight District Court of Appeals' decision that, notwithstanding R.C. 4931.03(A)(1)'s statutory authority to utilities' installing poles in road rights-of-way, a utility is subject to jury determination as to the propriety of the installation, this Court held that,

> [w]hen 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.***

See Turner at 115, 887 N.E.2d at 1159 (Syllabus)(emphasis added).

Now, once again, as in *Bidar,* this Court faces another Eighth District Court of Appeals' decision essentially ignoring R.C. 4931.03(A)(1) and the rule in *Turner.* The court below held that appellee Douglas Link's drunk driving-triggered loss of control after encountering a deer crossing the road, resulting in his motorcycle's leaving the improved portion of the road and crashing into a CEI pole located well off the roadway—is subject to jury determination as to the propriety of the pole's placement. There is no substantial difference between the facts presented in this appeal and the facts obtaining in *Turner.*

Indeed, the only difference seems to be that in *Turner* the utility (AT&T)

obtained, as it was required to do in that case, a "permit" from the Ohio Department of Transportation, which, pursuant to R.C. 5515.01, controlled the state route highway that was the subject of that case; whereas here, inasmuch as CEI pole's placement was on unincorporated township land not subject to any legislative enactment or control—that is, none was ever passed by the governing body (the Trustees)—the "permission" was and remains purely statutory: Namely, R.C. 4931.03(A)(1)'s blanket authorization.

This Court now should re-affirm and apply *Turner* to the case at bar—thereby reversing the Eighth District's erroneous opinion.

LAW AND ARGUMENT

Proposition of Law: *The statutory permission granted to utilities by R.C. 4930.03[(A)(1)]*
to maintain poles in the unincorporated area of an Ohio township satisfies the "any necessary permission" requirement of Turner absent legislative action by a governing public authority to revoke or cancel the statutory permission.

In *Turner,* this Court acted to correct the Eighth District's novel opinion that, despite R.C. 4931.03(A)(1)'s express grant of authority to a public utility's placement of facilities in public road rights-of-way, a utility is somehow subject to jury determination as to the propriety of installing a pole off the improved portion of the road. The Eighth District had deviated from both the General Assembly's longstanding public policy (as contained in R.C. 4931.03(A)(1)) and this Court's well-reasoned position on the subject. Tracing the origins of the public policy of allowing a utility to install poles in road rights-of-way to 1847, this Court exhaustively recounted the statutory and judicial history of the policy. *See Turner* at 217-220, 887 N.E.2d at 1160-1163.

AT&T's pole placement was at issue in *Turner.* But the same issue obtains here: Whether a utility that has the statutory authority to install a pole in road right-of-

way (but off the improved portion thereof) is subject to jury determination as to the propriety thereof. This Court held that a utility is ***not*** and ***ought not to be*** subject to such determination. This Court said:

> When a vehicle collides with a utility pole 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.

See Turner at Syllabus. Accordingly, this Court reversed the Eighth District's holding and dismissed AT&T from any liability whatsoever.

Now this Court faces another Eighth District decision on substantially the same issue. In the court below, the Eighth District once again tried to distinguish *Turner* by saying that CEI did not have the Engineer's "permission" to leave the pole that Mr. Link crashed into in its original location; and that, therefore, this case is distinguishable from *Turner.*

But the Engineer had ***no authority*** over CEI's pole placement decisions. Yes, he was the Project Manager for the Savage Road widening project. And while the project included accommodations for utility poles (including the eight poles that CEI decided to leave in their original location—which, again, remained well off the improved portion of the road), the Engineer did not have any actual authority over CEI's placement decisions. Neither the Engineer nor the Trustees had authority to "approve" (or deny) CEI's better judgment. R.C. 4931.03(A)(1) alone gave CEI both permission and "approval."

R.C. 4931.03(A)(1) provides in pertinent part as follows:

> A. A [utility] may do . . . the following in the unincorporated area of the township:
>
> (1) Construct . . . lines or facilities upon and along any of the public roads and highways . . . within that area by the erection of necessary fixtures, including posts, piers, or abutments for sustaining the cords or wires of those lines or facilities. The lines and facilities shall be constructed so as not to incommode the public in the use of the roads or highways . . . .

This statute expressly gives CEI (and all PUCO-regulated utilities) the right to install poles off the improved portions of roads and highways in any unincorporated area of a township—including, as here, along Savage Road in Bainbridge Township, Geauga County, Ohio. Unless and until Mr. and Mrs. Link can show (which, based on all the evidence in the record, they ***cannot*** show) that the Trustees either or both acted by and through some legislative act to establish some sort of permit process for utility pole placement, or otherwise authorized the Engineer to undertake the same—then, as a matter of law, as this Court held in *Turner,* Mr. and Mrs. Link cannot and ought not to be able to hold CEI liable for their injury and loss.

Else the entire utility industry, the very provisioning of public utility services (not just CEI's electric service) shall be subject to the arbitrary "standards" and whims of executive and/or ministerial officials. No matter how well or ill prepared or qualified they are, no matter how sincere or firm in their ideas and beliefs, such officials should not be allowed to "rule" on the propriety of a public utility's provisioning of services. Absent any legislative action by the local governmental authority (in this case, the Trustees), this is a matter of public utility regulation properly lodged, also as a matter of public policy, in the public utility's own sound judgment—and more broadly in the PUCO. The Ohio General Assembly has, in its wisdom, acted to give CEI permission to install (and to keep in place) its poles along Savage Road. Absent any local legislation authorizing a public official such as the Engineer to "approve" CEI's pole placement—the statute ***is*** the "necessary permission" that *Turner* contemplates.

That the Engineer eventually opened Savage Road without requiring CEI to relocate their eight original poles—forcefully undermines the Eighth District's opinion that the Engineer "disapproved" CEI's pole placement decisions. Indeed, even the Engineer's

communications with CEI regarding the poles that are the subject of this action did not assert any real authority over CEI's pole placement. According to the Eight District's opinion at ¶ 21, the most that the Engineer ever did or said was in the form of a "request[ ]" that CEI "review . . . this project with the hope you will agree that it is in the best interest of everyone" that CEI implement its original plan to move all the Savage Road poles. The Engineer obviously recognized that his "authority" here was—***non-existent.***

By turning the Engineer's "hope" into a legal mandate requiring adherence despite the absence of true legislative authority, the Eighth District's opinion throws the provisioning of utility services into needless limbo. There was and is no reason or logic, and hence no legal basis, for a public official's unwarranted interference in CEI's (or any other utility's) provisioning practices. To be sure, AT&T is not saying that the Trustees could never exercise authority—including, *e.g.,* legislatively authorizing the Engineer to develop and implement a permitting procedure, over CEI's pole placement. However, in this case, the Trustees did ***not*** enact any legislation addressing this subject. Accordingly, the only legitimate authority, what this Court in *Turner* calls "necessary permission," for CEI's pole placement—was and is the Ohio General Assembly's public policy provisions obtaining in R.C. 4931.03(A)(1), which decidedly (and unambiguously) authorized CEI to install (or rather, in this case, to leave) the subject poles on Savage Road in their original locations. That should be the end of the inquiry.[5]

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[5] To suggest, as the Eighth District opinion at ¶ 22 does, that CEI was "not responsive to the concerns raised in the [Engineer's] letter"—is both extravagant and untrue. It is extravagant because it assumes that CEI was somehow legally obligated to respond. It is untrue because the Eighth District's opinion cites to no evidence that CEI did not, in fact, carefully consider the Engineer's "request." Further, CEI ***did respond*** to the Engineer's request. *See id.* The Eighth District simply did not appreciate CEI's response; but that hardly justifies the Eighth District's excluding CEI from the benefits of (and rights engendered in) the rule in *Turner.*

There is yet a further reason why the Eighth District's opinion should be reversed. Namely, under the rule in *Turner,* a utility placing poles off the improved portion of the road is entitled to assume that anyone traveling on the road will do so lawfully. In *Turner* this Court couched this in terms of "the usual and ordinary course of travel." In this case, Mr. Link's drunk driving—including a blood alcohol reportedly ***more than twice the legal limit***—rendered Mr. Link manifestly unprivileged even to be on the road. The question immediately arises, did Mr. Link "lose control" of his motorcycle and run into the pole because he encountered a deer or because he was drunk and unable to operate his motorcycle in a safe manner (including avoiding the deer)? The Eighth District's opinion does not say. Notwithstanding the answer to that question, and this is the crux of CEI's appeal, it is beyond dispute that Mr. Link had no right even to be operating a motor vehicle on Savage Road while drunk. Neither CEI nor any other public utility ought to be held to "anticipate" that intoxicated drivers will, for a host of reasons (even including encountering a deer crossing the road), lose control of their vehicles while driving drunk.[6] Accordingly, the Eighth District's opinion should not stand.

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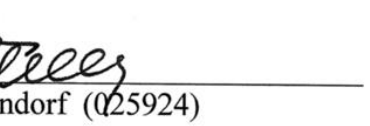
[6] Doubtless this is why this Court in *Turner* cited with approval at 221, 887 N.E.2d at 1163-64, the Second District Court of Appeals' holding in *Ramby v. Ping* (Apr. 13, 1994), 2d Dist. No. 93-CA-52, 1994 Ohio App. LEXIS 1539, 1994 WL 124829, to the effect that there is no "precedent . . . for imposing a duty on public or private landowners to remove an off-road hazard that renders only off-road travel unsafe, unless the off-road travel is shown to be an aspect of the usual and ordinary course of travel on the roadway." No such evidence appears of record in the case at bar. (Incidentally, this too should preclude the Eighth District's holding regarding punitive damages against CEI.) This is also why this Court in *Turner* held that a speeding driver who leaves the improved portion of a highway in foggy conditions—a condition far more common (and therefore arguably more "foreseeable") than drunk driving occurrences—cannot recover damages, either.

CONCLUSION

The Eighth District's opinion below ignores this Court's clear exposition of the law under R.C. 4931.03(A)(1) in *Turner*. In failing to adhere to *Turner,* the Eighth District has created needless uncertainty in the entire utility industry—and indeed beyond. If affirmed here, the Eighth District's opinion will unauthorizedly empower any number of public officials, including but not limited to county engineers (but also mayors, safety, health, and/or service directors, *et al.*), to exercise arbitrary authority over all manner of utility provisioning. It may well empower such individuals to dictate the placement, not only of public utility facilities, but other roadside objects such as fire hydrants, mailboxes, fences, landscape objects and features, and the like—all without valid or otherwise sound criteria. The Ohio Legislature has long considered the balance between public safety and order and the needs of both private and semi-private enterprise. In the utility industry, R.C. 4931.03(A)(1) strikes a proper balance among these competing interests. The Eighth District's opinion vitiates this balance. It introduces needless uncertainty and even confusion. This Court should now restore this proper balance by re-affirming *Turner*. AT&T respectfully urges the Court to reverse the judgment below.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Brief was served on all parties of record as listed in the caption hereof, by regular United States mail, postage prepaid, this 27th day of October, 2015.