Supreme Court of Ohio Clerk of Court - Filed November 24, 2015 - Case No. 2015-0132

IN THE SUPREME COURT OF OHIO

DOUGLAS V. LINK, *et al.*	:	**Case No. 2015-0132**
Plaintiff-Appellees,	:	**On Appeal from the Eighth District Court of Appeals Cuyahoga County, Ohio**
v.	:	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, *et al.*,	:	**Court of Appeals Case No. CA-14-101286**
Defendant-Appellants.	:	

MERIT BRIEF OF AMICUS CURIAE THE COUNTY COMMISSIONERS ASSOCIATION OF OHIO AND THE OHIO TOWNSHIP ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEES DOUGLAS V. LINK, ET AL.

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STATEMENT OF AMICUS INTEREST

The County Commissioners Association of Ohio ("CCAO") represents Ohio's 88 counties working together for a common goal of cost efficient, quality governance. CCAO works with Ohio county commissioners, county executives, and council members to help make county government progressive and transparent. Similarly, the Ohio Township Association ("OTA") represents Ohio's 1,308 townships in promoting and preserving township government in Ohio. CCAO and OTA, and the local governments they represent, have an interest in preserving the rights of local governments to approve the placement of utility poles along the public roads and highways in unincorporated areas of townships.

R.C. 5543.09(A) and R.C. 5571.05 vest the authority to supervise road construction projects in county engineers. R.C. 5547.03 and R.C. 5547.04 permit the county engineer to require utility companies to remove obstructions that interfere with road improvements and repairs. The grant of this authority is necessary because county engineers have the education and expertise necessary to make determinations regarding road improvements and repairs. County engineers are in the best position to make these determinations, not utility companies. Accordingly, the Ohio General Assembly has adopted these statutes, which vest authority in the county engineer and not in utilities to determine the placement of poles along roads.

If this Court reverses the Eighth District's decision, county engineers and townships will lose critical oversight authority over the placement of utility poles along roads at the expense of public safety.

STATEMENT OF THE FACTS

The facts of this case are extensively described in the analysis of the Eighth District in *Link v. FirstEnergy Corp.*, 25 N.¶E.3d 1095, 2014-Ohio-5432. Based on its review, CCAO and OTA believe the following facts are most important in this appeal:

1. Defendant-Appellant Cleveland Electric Illuminating Company ("CEI") owned and operated utility poles along Savage Road in Bainbridge Township ("Township"). *Id.* at ¶2.
2. On May 8, 2006, the Township Board of Trustees passed a resolution to widen Savage Road. Later in 2006, the Geauga County Engineer's Office ("GCEO") sent the Defendant-Appellants the preliminary road reconstruction plans. On October 30, 2008, the Defendant-Appellants transmitted their utility pole relocation plans to the GCEO. *Id.* at ¶3.
3. Prior to the winter of 2008-2009, CEI relocated some utility poles, but it did not relocate 8 utility poles along the west side of Savage Road. Under the original plans, all poles were to be relocated. The Defendant-Appellants made assurances that the relocation project would be finished in the first quarter of 2009, in accordance with the original plans. *Id.* at ¶4.
4. The Defendant-Appellants did not ever return to the project to relocate the utility poles. *Id.* at ¶5.
5. On March 2, 2009, the Defendant-Appellants sent the GCEO revised plans calling for the poles to remain in their current position. *Id.* at ¶5.
6. On March 26, 2009, the GCEO issued a letter to the Defendant-Appellants calling for the poles to be moved per the original plan. *Id.* at ¶5.
7. The Defendant-Appellants were unresponsive to the letter. *Id.* at ¶22.
8. On May 23, 2010, an accident occurred on Savage Road involving one of CEI's poles (detailed in *Bidar v. Cleveland Electric Illuminating Co.*, 8th Dist. Cuyahoga No. 97490, 2012-Ohio-3686). *Id.* at ¶22.

9. On June 24, 2010, the Township wrote the Defendant-Appellants seeking to have the poles relocated. The Defendant-Appellants refused. *Id.* at ¶22.

10. On October 8, 2010, Douglas Link was injured by colliding into one of CEI's poles. *Id.* at ¶6.

ARGUMENT

Proposition of Law No. 1: A utility company does not have permission to determine the placement of utility poles by virtue of R.C. 4931.03(A)(1).

A. The Plain Language of R.C. 4931.03 Does Not Grant Defendant-Appellants Permission to Determine the Placement of Utility Poles.

In its brief on the merits, Defendant-Appellants argues that R.C. 4931.03 grants "permission" to it as a utility company[1] to place its utility poles at any place along roads and highways within the unincorporated areas of Ohio townships so long as they do not "incommode" (inconvenience) users of the road. Defendant-Appellant's Brief at p. 9. The Defendant-Appellants believe that this statutory authority constitutes "permission" under the test set forth in *Turner v. Ohio Bell Telephone Co.,* 118 Ohio St.3d 215, 2008-Ohio-2010, 887 N.E.2d 1158. However, nothing could be further from the truth. Defendant-Appellant's argument ignores the plain language of R.C. 4931.03, as well as the holding and rationales in *Turner.*

First, Defendant-Appellants' interpretation of R.C. 4931.03 accentuates 4931.03(A)(1) and ignores the plain language of 4931.03(B)(2) when these provisions must be read together. The statutory language reads as follows:

> (A) A telephone company may do either of the following in the unincorporated area of the township:

[1] The term "telephone company" is used under R.C. 4931.03. However, R.C. 4933.14(A) states that R.C. 4931.03 also applies to electric companies. For purposes of this brief, the Amicus Curiae uses the term "utility company" to mean either telephone or electric companies.

(1) **Construct** telecommunications lines or facilities upon and along any of the public roads and highways and across any waters within that area by the erection of the 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, or endanger or injuriously interrupt the navigation of the waters.

(2) **Construct** telecommunications lines and facilities in such a manner as to protect them beneath the surface of any of the public roads and highways and beneath any waters within that area. Those lines and facilities shall be constructed so as not to incommode the public in the use of the roads or highways, or endanger or injuriously interrupt the navigation of the waters.

(B)

[. . .]

(2) Construction under this section is subject to section 5571.16[2] of the Revised Code, as applicable, **and any other applicable law**, including, but not limited to, **any law requiring approval** of the legislative authority, **the county engineer**, or the director of transportation.

R.C. 4931.03(emphasis added).

Accordingly, a utility company is permitted to "construct" utility poles along roads in unincorporated territories of townships subject to statutes such as R.C. 5543.09(A), R.C. 5571.05, 5547.03 and R.C. 5547.04, which necessarily subjects the location of poles along roadways to county engineer approval.

In *Bidar v. Cleveland Electric Illuminating Co.*, 8th Dist. Cuyahoga No. 97490, 2012-Ohio-3686, the Eighth District Court of Appeals rejected Defendant-Appellant's interpretation of R.C. 4931.03(A), finding that a public utility's "use" of a public right of way is not the same as full authority to determine the placement of its lines and facilities. *Id.* at ¶11. While R.C. 4931.03(A) authorizes the use of public right of ways, it does not provide an unfettered right to determine placement. *Id.*

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[2] This section refers to obtaining a permit before installing a driveway culvert or making an excavation in a township road or right of way.

The Defendant-Appellants are asking this Court to modify the statute to provide additional authority that the Ohio General Assembly did not include within the statutory language. This Court has repeatedly refused to rewrite the Ohio Revised Code, noting that if the Ohio General Assembly had intended a different meaning than the clear and unambiguous statutory language it drafted, it could have easily done so when adopting the statute. *See generally Zumwalde v. Madeira & Indian Hill Joint Fire District*, 128 Ohio St.3d 492, 496, 2011-Ohio-1603, 946 N.E.2d 748 at ¶24; *State ex rel. Choices for South-Western City Schools v. Anthony*, 108 Ohio St.3d 1, 10, 2005-Ohio-5362, 840 N.E.2d 582 at ¶53; *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St.3d 394, 397, 2007-Ohio-2203, 865 N.E.2d 1275 at ¶9.

B. R.C. 4931.03 Must Be Interpreted in Light of Other Relevant Statutes.

The Defendant-Appellant's proposed interpretation of R.C. 4931.03 fails to interpret the statute in the context of other relevant statutory provisions. As noted above, R.C. 4931.03(B)(2) states that utility companies' right to construct utility poles are subject to "**<u>any other applicable law</u>**, including, but not limited to, **<u>any law requiring approval</u>** of the legislative authority, [or] **<u>the county engineer</u>**[.]" The Eighth District correctly noted in the present case that other laws already restrict the Defendant-Appellants' right to determine the placement of utility poles—namely, R.C. 5543.09(A) and R.C. 5571.05.

Under R.C. 5543.09(A), the county engineer is vested with the authority to supervise construction, reconstruction, improvement, maintenance, and repair of all roads that are under the jurisdiction of boards of county commissioners and that are undertaken by township boards of trustees. Similarly, R.C. 5571.05 provides that the maintenance and repair of roads is subject to the general supervision and direction of the county engineer. In short, these statutes are "other

applicable laws" that require the approval of the county engineer prior in the case of the construction, improvement, and repair of township roads.

The Defendant-Appellants argue that R.C. 4931.03(B)(2) requires some sort of legislative action, such as an ordinance or resolution, adopted by a governmental entity in order to impose a permission requirement beyond R.C. 4931.03(A). According to the Defendant-Appellants, notice of disapproval by the county engineer is insufficient. This argument must fail for two reasons.

First, there already is a law requiring approval by the county engineer. R.C. 5543.09(A) and R.C. 5571.05 specifically provide that the county engineer is charged with supervising construction and improvement projects on township roads. Indeed, this Court, in another context, has held that the word "supervise" has the same meaning as superintend, which is "to oversee with the **power of direction**." *State ex rel. Board of Education of Whitehall City School District v. Board of Education of Columbus City School District*, 172 Ohio St. 533, 534, 179 N.E.2d 347 (1961) (interpreting R.C. 3311.06).

In light of this meaning of "supervise," the Ohio Revised Code grants the county engineer the right to approve placement of utility poles under its supervisory authority over township road improvement projects. Given that the placement of the utility pole in this case was not approved by the County Engineer (as demonstrated by his March 26 letter and the Township's June 24 letter), the Defendant-Appellants did not have authority under R.C. 4931.03(A) for the placement of its poles, including the one struck by Mr. Link.

The grant of authority to the county engineer to make determinations regarding road construction and improvement projects is supported elsewhere in the Code. In R.C. 5547.03, the county engineer has the authority to order utility companies to remove any items that, in the opinion of the county engineer, constitutes an "obstruction." In addition, under R.C. 5547.04, a

utility company may be required to remove obstructions at its expense. The Third District Court of Appeals recently confirmed the authority granted to county engineers in *Toledo Edison Company v. Board of County Commissioners*, 2013-Ohio-5374, 4 N.E.3d 458.[3] These statutes further demonstrate the intent of the Ohio General Assembly to vest authority with respect to road construction and improvement projects (and determinations regarding obstructions thereon) to the county engineer.

Second, nothing in R.C. 4931.03(B)(2) requires an ordinance or resolution approved by a legislative body for the county engineer to deny permission to the Defendant-Appellants with respect to placement of utility poles. The statute refers to "any other applicable law...requiring approval...of the county engineer." As stated above, the Ohio General Assembly already took formal legislative action to enact R.C. 5543.09(A) and R.C. 5571.05.

In summary, R.C. 4931.03(B)(2) expressly provides that any authority provided to Defendant-Appellants under R.C. 4931.03(A) is subject to any law requiring approval by the county engineer. R.C. 5543.09(A) and R.C. 5571.05 require that township road construction and improvement projects be supervised by the county engineer. The power to supervise includes the power to give direction and approval. The county engineer did not approve the placement of the utility pole in question in this case. In *Turner*, this Court held that utility companies do not enjoy unfettered discretion in the placement of their poles, for they are required to obtain approval from the owner of the right of way. R.C. 4939.03, 5515.01, and 5547.04. *See Turner*, 118 Ohio St.3d at ¶ 20. The evidence in the *Turner* case was that the owner of the utility pole erected the pole pursuant to a permit issued by the Ohio Department of Transportation. *See Id. at* ¶ 26.

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[3] The Ohio Supreme Court declined jurisdiction. 2014-Ohio-1674 (April 23, 2014).

Accordingly, the Defendant-Appellants did not have permission as required under the *Turner* case.

C. Public Policy Weighs against the Defendant-Appellants' Proposition of Law.

Public policy does not support the Defendant-Appellant's proposition of law. If R.C. 4931.03 is interpreted as granting permission to utility companies for purposes of the *Turner* analysis, an undue liability burden will be placed on local governments. Utility companies like the Defendant-Appellants would use such a ruling to place all risk of loss caused by their own refusal to move utility poles that are causing undue danger to drivers on roads whereas R.C. 5547.03 grants authority to the county engineer to order utility companies to remove any items that, in the opinion of the county engineer, constitutes an "obstruction."

The Defendant-Appellants seek to evade responsibility for their unauthorized placement of utility poles, even though (1) they ignored the road construction plans set forth by the county engineer; (2) they failed to relocate poles despite the fact that the construction plans called for relocation; (3) they made assurances that the poles would be relocated, but never did so; (4) they took no action despite the fact that the county engineer confirmed via letter that the Defendant-Appellants were required to move the poles; and (5) they stalled in responding to another request by the township to relocate the poles after the accident in *Bidar* occurred.

The county engineer and the township took multiple steps to require the Defendant-Appellants to relocate their poles. Nevertheless, the Defendant-Appellants refused to relocate the poles until after the accident in the current case. A decision that reverses the Eighth District would only encourage utilities to engage in similar delay tactics. The risk of tort liability under *Turner* is the only incentive to compel compliance with the township and county engineer's directives, which is why statutory authority is vested in the county engineer to protect the public safety, rather than utilities who protect their bottom line.

Finally, the policy considerations raised by the Defendant-Appellants have little merit. The Defendant-Appellants essentially argue that utilities will be burdened by arbitrary decisions of public officials (such as county engineers). First, the Ohio General Assembly has seen fit to vest this authority in county engineers. Second, their argument ignores the process of construction and improvement. Plans are developed and approved by county engineers. These engineers work closely with townships and with utilities to ensure that all parties understand their obligations. Indeed, in this case, the Defendant-Appellants had ample notice of their obligations to relocate the poles. However, the Defendant-Appellants engaged in delay tactics in order to avoid meeting their obligations under the County Engineer's plan. The potential impact of upholding the Eighth District's decision is overstated by the Defendant-Appellants. Indeed, the Defendant-Appellants cite to zero cases in which the county engineer's supervisory authority was applied in an arbitrary or capricious manner, or in a way that did not provide for public safety.

The Defendant-Appellants are appealing against a legislative regime that has been the status quo for decades. In view of the statutory scheme in place on these matters, it was clearly the intent of the Ohio General Assembly to provide supervisory authority to the county engineer. Moreover, as held by the Third District in the *Toledo Edison* case, the law permits the county engineer to require utilities to remove obstructive poles at their cost. The Defendant-Appellants are asking this Court to uproot well-settled statutory law that is firmly grounded in sound public policy, namely protecting public safety.

CONCLUSION

The Eighth District's decision reflects the clear intention of the Ohio General Assembly with respect to R.C. 4931.03. Had the Ohio General Assembly intended to grant greater authority to utilities, it would have done so. The Defendant-Appellants are asking this Court to rewrite the Ohio Revised Code and to reward their delay tactics. This case has substantial impact on the authority of county engineers to review and direct construction and improvement projects on township roads. The Court should give meaning to the words adopted by the Ohio General Assembly and uphold the discretion of county engineers.

Therefore, the County Commissioners Association of Ohio respectfully requests that the Eighth District's decision be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing *Brief of Amicus Curiae the County Commissioners Association of Ohio* has been sent via regular U.S. mail, postage pre-paid this 24th day of November, 2015 to:

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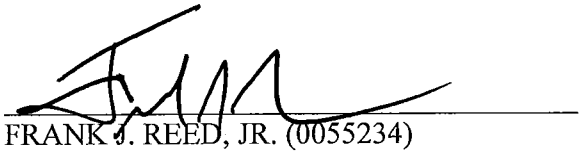

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