

**IN THE SUPREME COURT OF OHIO
CASE NO. 2015-0132**

**DOUGLAS V. LINK, et al.,
*Appellees,***

v.

**THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al.,
*Appellants,***

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

**APPELLEES DOUGLAS V. LINK AND DIANE LINK'S
MOTION TO DISMISS APPEAL AS IMPROVIDENTLY ACCEPTED**

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INTRODUCTION

By a 4-3 vote, this Court accepted CEI's discretionary appeal on its first proposition of law on August 26, 2015. However, even after accepting an appeal, the Court may later find there is no substantial constitutional question or question of public or great general interest, and dismiss the appeal as improvidently accepted.

Now that CEI has filed its merit and reply briefs, it is clear that it has not raised any issue warranting this Court's review. CEI has not presented this Court with a constitutional issue or any conflict among the lower Ohio courts. Nor has it raised a question of great general interest. To the contrary, CEI's appeal involves issues regarding the sufficiency of evidence, *e.g.*, whether the facts of this matter demonstrate that CEI had all necessary permissions to maintain a single utility pole. This Court ordinarily does not grant jurisdiction to determine such issues. *See State v. Urbin*, 100 Ohio St.3d 1207, 1210 (Ohio 2003) (Moyer, C.J., concurring) (appeal improvidently accepted because "resolution of the case is dependent upon factual determinations and the sufficiency of the evidence."); *see also Chemical Bank of N.Y. v. Neman*, 52 Ohio St.3d 204, 207 (Ohio 1990) ("[The Supreme Court] is not required to determine the weight of evidence in civil matters, and ordinarily will not do so."). 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 dismiss this appeal as improvidently accepted. *See State v. Sutton*, 132 Ohio St.3d 1529, 2012-Ohio-4381 (Ohio 2012); *CSAHA/UHHS-Canton, Inc. v. Aultman Health Found.*, 134 Ohio St.3d 1481, 2013-Ohio-902 (Ohio 2013); *State v. Smith*, 137 Ohio St.3d 1470, 2014-Ohio-176 (Ohio 2014) (granting dismissal on appellee's motions); S.Ct.Prac.R. 7.10.

STATEMENT OF THE CASE AND FACTS

The determination of this case is based upon whether CEI had the necessary permissions and approvals to maintain a single utility pole that was struck by a motor vehicle. After a two-

week long trial, a Cuyahoga County jury determined that CEI and FirstEnergy Service Company were responsible for maintaining a qualified nuisance despite being instructed 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 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 v. Ohio Bell Tel. Co.*, 118 Ohio St.3d 215, 220, 2008-Ohio-2010 (Ohio 2008). The Eighth District Court of Appeals affirmed the jury verdict. *Link v. FirstEnergy Corp.*, 2014-Ohio-5432 (8th Dist. 2014).

ARGUMENT

CEI's First Proposition of Law Concerning Permission for the Pole's Placement is Essentially a Challenge to the Sufficiency of the Evidence That Does Not Warrant This Court's Review.

CEI's First Proposition of Law asserts that "[t]he statutory permission granted to utilities by R.C. 4931.03 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." Despite CEI's clever diction, CEI is essentially asking this Court to revisit the jury's finding that it was not immunized by *Turner*.

CEI devotes time within its merit and reply brief making "weight of the evidence" arguments and requesting that this Court make factual determinations concerning the necessary permissions required to maintain the subject pole. For example, CEI alleges that while the County Engineer and Township wanted the pole relocated, they did not require it. (CEI Br. at 2). Moreover, CEI attempts to make argument that the reopening of Savage Road belies the assertion that CEI was obligated to move the pole. (CEI Reply Br. at 17).

The analysis by this Court in this case relates to whether CEI had all necessary permissions and approvals to maintain a single utility pole after a road widening and reconstruction project. Such analysis is essentially a sufficiency of the evidence question based

upon factual determinations not appropriate for this Court's review. 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. *See, e.g., Reighard v. Cleveland Elec. Illuminating*, 110 Ohio St.3d 1441, 2006-Ohio-3862 (Ohio 2006); *Estate of Mikulski v. Cleveland Elec. Illum. Co.*, 132 Ohio St.3d 1424, 2012-Ohio-2729 (Ohio 2012).

Turning to the facts of this case, the Court would have to make a determination, in light of all of the evidence, whether CEI had the requisite permissions and approvals for a single pole's location. The factual evidence related to such inquiry is extensive, and includes (1) The County Engineer's letter; (2) The Township's letter; (3) CEI's multiple acknowledgements that it was required to relocate the pole and that maintaining a clear zone is obligatory; (4) CEI's pole relocation plans calling for the relocation of the subject pole (5) The resolutions for convenience and necessity passed by the Township; (6) CEI's internal standards; (7) The Geauga County Highway Use Manual; (8) Relevant ODOT and AASHTO standards; (9) Communications between the Township's road superintendent and CEI representatives; (10) The location of the pole in relation to the roadway; and (11) The nature of the roadway. These are issues better left for determination by county engineers and townships, who are in the best position to do so. In this case, the Township and County Engineer clearly disapproved and rejected any permission for the pole that Mr. Link struck.

The fact intensive question of whether CEI has presented sufficient evidence to demonstrate that it had all necessary permissions and approvals for the maintenance of a single utility pole in the context of a road reconstruction and widening project is not an issue worthy of this Court's jurisdiction. The jury had the opportunity to review all of this evidence and made a determination that *Turner* did not insulate CEI from liability. This case merely involves the

application of the *Turner* standard to the particular facts presented concerning the Savage Road project. At the end of the day, this case presents no issue of public or great general interest. It is limited to the application of the *Turner* test for immunity to a private dispute between these litigants.

CONCLUSION

This Court should dismiss CEI's appeal as improvidently accepted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 2015, a copy of this *Motion to Dismiss* was served via U.S. mail, postage prepaid, to the following persons:

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