

**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**

**RESPONSE OF APPELLANTS THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY AND FIRSTENERGY SERVICE COMPANY TO APPELLEES' MOTION
TO DISMISS APPEAL AS IMPROVIDENTLY ACCEPTED**

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
(216) 622-8200
(216) 241-0816 (facsimile)
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
(440) 248-8811
(440) 248-1599 (facsimile)
jtriscaro@demarcotriscaro.com

*Attorney for Appellees,
Douglas V. Link and Diane Link*

*Attorneys for Appellants,
The Cleveland Electric Illuminating
Company and FirstEnergy Service
Company*

Edward L. Bettendorf (0025924)
45 Erieview Plaza, Suite 1400
Cleveland, Ohio 44114
Eb5312@att.com
(216) 544-7420
(216) 822-0240 (facsimile)

*Attorney for Amicus Curiae,
AT&T*

Frank J. Reed (0055234)
Frost Brown Todd LLC
One Columbus, Suite 2300
10 West Broad Street
Columbus, Ohio 43215
(614) 559-7213
(614) 464-1737 (facsimile)
freed@fbtlaw.com

Alexander L. Ewing (0083934)
Frost Brown Todd LLC
9277 Centre Point Drive, Suite 300
West Chester, Ohio 45069
(513) 870-8200
(513) 970-0999 (facsimile)
aewing@fbtlaw.com

*Attorneys for Amici Curiae,
Ohio Township Association and
County Commissioners Association*

Melissa R. Lipchak (0055957)
7658 Slate Ridge Boulevard
Reynoldsburg, Ohio 43068
(614) 367-9922
(614) 367-9926 (facsimile)
MelissaLipchak@MelissaLaw.net

*Attorney for Amicus Curiae,
Ohio Association of Justice*

INTRODUCTION

In accepting jurisdiction over this appeal, a majority of this Court determined that the issues presented herein are ones of public or great general interest. The arguments contained in the parties' briefing confirms this determination. The decision of the Eighth District Court of Appeals will impact hundreds of thousands, if not millions, of utility poles in each of Ohio's 1,308 townships in addition to the rights of the utilities that placed such poles. Moreover, the Eighth District's decision removes any obligation for Ohio's governmental officials to act with the certainty, formality, and due process that all citizens of Ohio deserve and expect.

LAW AND ARGUMENT

This Court exercised jurisdiction with respect to a question of statutory interpretation: whether legislative action is required to affect the permission granted to utilities under R.C. § 4931.03 to maintain poles in unincorporated townships. As with any other question of statutory interpretation, this is a question of law. (*See Cincinnati Ins. Co. v. DTJ Enters.*, 143 Ohio St.3d 197, 2015-Ohio-843, 36 N.E.3d 122, ¶ 21). Appellees' references to various findings of the jury on different issues at trial have no bearing on the legal question before this Court. This legal question is of public and great general interest because it relates to the uncertainty that results from the Eighth District Court of Appeals' decision and the inability for interested parties in each of Ohio's 1,308 townships to rely on the language of the Ohio Revised Code and this Court's rulings. The impact of the Eighth District's refusal to obey this Court's prior rulings and follow the plain language of the Ohio Revised Code is significant and far-reaching. These interests remain as true today as they did on the day that Appellants filed their Memorandum in Support of Jurisdiction.

This appeal turns on an issue of fundamental importance to Ohio jurisprudence: Can a court, or a jury, disregard the plain language of the Revised Code enacted by the duly elected representatives of the people? This Court should answer that question with a resounding “no” and do now what the trial court should have done: apply the binding precedent of *Turner v. Ohio Bell Telephone Co.*, 118 Ohio St.3d 215, 2008-Ohio-2010, 887 N.E.2d 1158, and enter judgment for Appellants.

The Revised Code is clear. An electric utility may place its equipment in the right of way in the unincorporated territory of an Ohio Township. (R.C. § 4931.03(A)). That statutory permission is subject to enumerated statutes (none of which any party has suggested applies here) and “any other applicable law...requiring approval...of the county engineer...” (R.C. § 4931.03(B)). Appellants Reply in Support of its Merits Brief demonstrates that none of the statutes that Appellees and their *amici* say constitutes such a law is even remotely “applicable” here. They have nothing to do with the *installation* of a utility pole in the unincorporated territory of an Ohio township. These statutes do not allow anyone to deny an electric utility the legislatively granted permission to place its equipment. If this Court allows the application of these, or any other, irrelevant statutes or inapplicable guidelines to write out of the Revised Code the authority clearly granted by the General Assembly, Ohio will no longer be governed by the rule of law, but by the rule of whimsy.

Moreover, in keeping with the litany of misstatements in Appellees’ Response to Appellants’ Merit Brief, Appellees once again twist the substance of Appellants’ appeal by suggesting that this appeal only involves issues regarding the “sufficiency of evidence” and that Appellants are “asking this Court to revisit the jury’s finding that it was not immunized by *Turner*.” (Motion to Dismiss at 1-2). Neither of these statements is true. Appellants’

Proposition of Law No. 1,¹ which a majority of this Court accepted for jurisdiction, makes clear that the focus of this appeal is an analysis of the plain language of R.C. § 4931.03 as it relates to this Court’s prior decision in *Turner*. This Proposition of Law does not require any consideration of evidence presented at trial except to rebut Appellees’ inaccurate claims that, unlike in *Toledo Edison Co. v. Bd. of Defiance Cty. Commrs.*, 2013-Ohio-5374, 4 N.E.3d 458 (3rd Dist.), some public authority passed a law limiting the statutory permission granted to CEI to install the utility pole at issue (the “Pole”).

The appeal is not about, as Appellees claim, a question of whether CEI had the necessary permission to maintain the Pole in the location in which it was installed sixty years prior, but instead whether the “any necessary permission” element of the *Turner* test is satisfied by the plain language of R.C. § 4931.03 absent any law or ordinance that a public authority passed to limit the statutory permission. This analysis is purely legal and therefore it is appropriate and necessary for this Court to consider the impact on Ohio’s many utilities and 1,308 townships of the Eighth District’s misapplication of long-standing Ohio law. If the Eighth District’s ruling is permitted to stand, it will turn Ohio law on its head and impose an extraordinary burden and expense on all local governmental authorities and utilities in Ohio. They will need to determine which poles that are located within a township still have permission to remain in place in light of the Eighth District’s modified standard allowing not only formally enacted laws and ordinances, but informal suggestions or requests, to revoke existing statutory permission. Such a result cannot stand, and it is critical for the Court to review the issues presented in this appeal and clear up the confusion created by the Eighth District Court of Appeals’ decision below.

¹ Proposition of Law No. 1 reads: “The 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.”

CONCLUSION

The Proposition of Law presented in this appeal requires this Court's review and analysis in order to resolve matters that are of public and great general interest, which the Court has already recognized by accepting jurisdiction over this appeal. This Court should deny Appellees' Motion to Dismiss Appeal as Improvidently Accepted and allow the appeal to proceed to conclusion after consideration of Appellants' arguments on appeal.

Respectfully submitted,

/s/ Thomas I. Michals _____

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
(216) 622-8200
(216) 241-0816 (facsimile)
tmichals@calfee.com
jeklund@calfee.com
wcoughlin@calfee.com
ezell@calfee.com

*Attorneys for Appellants,
The Cleveland Electric Illuminating Company
and FirstEnergy Service Company*

CERTIFICATE OF SERVICE

A copy of the foregoing, *Response of Appellants The Cleveland Electric Illuminating Company and FirstEnergy Service Company to Appellees' Motion to Dismiss Appeal as Improvidently Accepted*, was served via first class United States Mail, postage prepaid, on this 22nd day of December 2015, upon the following:

Joseph J. Triscaro, Esq.
DeMarco & Triscaro, Ltd.
30505 Bainbridge Road, Suite 110
Solon, Ohio 44139

Attorney for Appellees, Douglas V. Link and Diane Link

Edward L. Bettendorf, Esq.
45 Erieview Plaza, Suite 1400
Cleveland, Ohio 44114

Attorney for Amicus Curiae, AT&T

Melissa R. Lipchak, Esq.
7658 Slate Ridge Boulevard
Reynoldsburg, Ohio 43068

Attorney for Amicus Curiae, Ohio Association of Justice

Frank J. Reed, Esq.
Frost Brown Todd LLC
One Columbus, Suite 2300
10 West Broad Street
Columbus, Ohio 43215

Alexander L. Ewing, Esq.
Frost Brown Todd LLC
9277 Centre Point Drive, Suite 300
West Chester, Ohio 45069

*Attorneys for Amicus Curiae, Ohio Township Association and
County Commissioners Association*

/s/ Thomas I. Michals
One of the Attorneys for Appellants