

**IN THE SUPREME COURT OF OHIO**

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

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**MEMORANDUM IN SUPPORT OF PLAINTIFF-APPELLEES' MOTION FOR  
RECONSIDERATION BY AMICUS CURIAE THE COUNTY COMMISSIONERS  
ASSOCIATION OF OHIO AND THE OHIO TOWNSHIP ASSOCIATION**

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## MEMORANDUM IN SUPPORT

Pursuant to Supreme Court Practice Rule 18.02(C), *amicus curiae* the County Commissioners Association of Ohio (“CCAO”) and the Ohio Township Association (“OTA”) respectfully submit this memorandum in support of Plaintiff-Appellees’ motion to reconsider this Court’s decision on the merits of this case.

This Court agreed to hear only the first proposition of law, submitted in the appeal by Cleveland Electric Illuminating Company and FirstEnergy: “The statutory permission granted to utilities by R.C. 4931.03 to maintain poles in the unincorporated area of Ohio township satisfies the ‘any necessary permission’ requirement of *Turner*<sup>1</sup> absent legislative action by a governing public authority to revoke or cancel the statutory permission.”

During oral argument and in the briefs, both plaintiffs and *amicus curiae* asserted that *Turner* does not apply because of two simple facts. In *Turner*, this Court held that the utility was not liable for the accident because, prior to the accident, the utility had obtained specific permission for the location of that pole from the Ohio Department of Transportation (“ODOT”). In addition, in *Turner*, the particular road where the accident occurred was never widened and the location of the pole in that case never changed from the time permission was granted by ODOT until the time of the accident.

In this case, the township road located in Bainbridge Township, Ohio was widened well after the poles were originally placed. And both the County Engineer and the Township insisted that all 48 poles be relocated. Cleveland Electric Illuminating Company agreed to move all 48 poles, and said so in writing. So, all bets were off. Any ‘governmental authority’ granted to the utility for the original location of the pole back in 1952 and replaced in 1975 on Savage Road in Bainbridge Township, Geauga County, simply does not apply.

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<sup>1</sup> *Turner v. Ohio Bell Tel. Co.*, 118 Ohio St.3d 215, 2008-Ohio-2010.

The majority opinion of the Court nevertheless fails to recognize these two important distinctions and continues to evaluate this case according to the law of *Turner*. The majority blames the township for re-opening the road. See *Link v. FirstEnergy Corp.*, Slip Opinion No. 2016-Ohio-5083, at ¶6. Further, the Court blames the Township for failure to “initiate any formal proceedings requiring CEI to move the poles.” See *id.* at ¶7. And, instead of evaluating the single proposition of law accepted by this Court, the majority opinion reweighs the facts and remarks that the utility company’s accident reconstructionist believed that Mr. Link more likely fell off his motorcycle before he struck the pole, and that therefore, maybe the pole did not cause Mr. Link’s injuries. *Id.* at ¶11. Worse yet, the majority opinion reweighed the evidence and using the *Turner* analysis (which does not apply) wrongfully concluded that the evidence at trial was not legally sufficient to establish that the pole interfered with the usual and ordinary course of travel. *Id.* at ¶25.

CCAO and OTA asks this Court to reconsider its decision concerning a requirement for a “Resolution” or “affirmative legal action” that a township board of trustees or county engineer must take in order to require the relocation of a utility pole. Under the majority’s decision, a township board of trustees or county engineer must take some sort of “affirmative legal action” to revoke a utility’s permission to place poles along roads, even in circumstances where the road is widened. *Id.* at ¶28. Moreover, then the majority decision clearly states that written letters directing a utility to relocate poles are not sufficient to revoke permission for purposes of R.C. 4931.03. *Id.* at ¶30 (stating that county engineer’s letter requesting relocation of poles did not carry the force of law) and ¶31 (letter from township board chairman requesting relocation does not have the force of law).

However, absent a “Resolution” or “affirmative legal action” from the township board of trustees, ¶28, or “initiating legal proceedings” against the utility, ¶33, there is little in the way of

practical guidance for townships and counties who want to enforce compliance by utilities with road improvement plans.

The CCAO and OTA support the reconsideration of this case because its members need clarity on this important issue. The current decision encourages utilities to “drag their feet” on pole relocation projects, while at the same time leaving townships and counties with enormous financial burdens to relocate the poles at taxpayer expense.

As noted in this Court’s decision, Defendant-Appellants submitted plans to remove poles in October 2008 and a revised plan in March 2009. *Id.* at ¶¶3-4. By June 2009, Defendant-Appellants unilaterally refused to move 8 of 9 poles as set forth in their own plans. *Id.* at ¶4. In short, the utility company presented an acceptable plan, but then chose not to complete it. The good news in this case, as pointed out during oral argument, is that the poles have since been voluntarily moved by the utility company, at their expense, albeit several days after Mr. Link was seriously injured.

By allowing utilities to avoid liability for the placement of their poles when the failure to relocate is due entirely to the utility company’s own inaction, the Court’s decision places an unfair burden on townships and counties. Throughout the state, utility companies have no incentive to relocate poles and can refuse to do so despite the existence of long-established plans. While this Court leaves open the possibility of revoking permission for pole location through “affirmative legal action” or “initiating legal action,” it is unclear what remedies townships and counties have to ensure swift compliance with pole relocation projects.

On a practical level, “initiating legal action” is not always a viable solution to ensure such swift compliance. In the future, utilities could initially agree to move the poles, then, change their mind, and ultimately delay any pole relocation project by forcing townships and counties to become mired in protracted and expensive legal proceedings. Each month that passes without

the relocation of poles results in danger to travelling public, and shifts liability from utility companies to townships and counties.

Accordingly, townships and counties are left with “affirmative legal action.” This term is left undefined by the Court. Under the majority’s decision, directives through correspondence are not sufficient. The majority’s decision is problematic for townships and counties in light of how road improvement projects are completed—through communications between the township, the county engineer, utilities, and various contractors. It is simply not clear what constitutes “affirmative legal action.” Due to this lack of clarity, townships and counties will be forced to litigate this issue in the future. Even where more formal action is taken, townships and counties bear the risk concerning the placement of poles (while non-compliant utilities can do nothing and maintain immunity).

In summary, the CCAO and OTA submits this memorandum in support of Plaintiff-Appellees’ Motion for Reconsideration on the merits of the case because these important issues remain un-answered. The *amicus curiae* urge this Court to reconsider the long-term and financial impact this case will have on county and township road improvement and pole relocation projects throughout the state. Further, the *amicus curiae* ask this Court to provide clarification regarding what “affirmative legal action” is required to revoke permission for purposes of R.C. 4931.03.

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**CERTIFICATE OF SERVICE**

A copy of this *Memorandum in Support of Plaintiff-Appellees' Motion for Reconsideration* by *Amicus Curiae County Commissioners Association of Ohio and Ohio Township Association* has been sent via regular U.S. mail, postage pre-paid on August 5, 2016 to:

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