Supreme Court of Ohio Clerk of Court - Filed August 05, 2016 - Case No. 2015-0132

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 FOR RECONSIDERATION

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Now come Appellees, Douglas V. Link and Diane Link, by and through counsel, pursuant to Rule 18.02 of the Rules of Practice of the Supreme Court of Ohio, and respectfully request that the Court reconsider its Opinion issued July 26, 2016, in the above-referenced case, and adopt the position of the dissenting opinion that *Turner* does not apply since permission for the subject utility pole had been rescinded once the road was widened. The reasons for this request are more fully set forth in the Memorandum in Support set forth below.

MEMORANDUM IN SUPPORT

Reconsideration before this Court is appropriate if it is confined strictly to the grounds urged for reconsideration, is not a re-argument of the case, and is filed with respect to one of the criteria listed in S.Ct.Prac.R. 18.02(B), including, as in this case, a decision on the merits. S.Ct.Prac.R. 18.02(B)(4). The Court may invoke its reconsideration procedures in order to "correct decisions which, upon reflection, are deemed to have been made in error." *Buckeye Community Hope Found v. Cuyahoga Falls* (1998), 82 Ohio St.3d 539, 541, quoting *State ex rel. Huebner v. W. Jefferson Village Council* (1995), 75 Ohio St.3d 381, 383. See, also, *State ex rel. Mirlisena v. Hamilton Cty. Bd. of Elections* (1993), 67 Ohio St.3d 597 (reasoning contained in a previous dissenting opinion adopted by a majority of this court pursuant to a motion for reconsideration); *State ex rel. Eaton Corp. v. Lancaster* (1989), 44 Ohio St.3d 106 (views contained in a previous concurring opinion adopted by a majority of this court pursuant to a motion for "rehearing"). The Court is urged to invoke its reconsideration procedures in this case for the same reason and to vacate the Opinion and adopt the position of the dissenting opinion.

ISSUES REGARDING ANAYLYSIS

The Court limited its review in this case to whether the trial court erred in denying Appellants' motion for JNOV. Opinion at ¶22. JNOV is only proper if upon viewing the evidence in a light most favorable to the nonmoving party and presuming any doubt to favor the nonmoving party, reasonable minds could come to but one conclusion, that being in favor of the

moving party. Civ.R. 50(B); *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.* (2002), 95 Ohio St.3d 512, ¶3. Such a decision does not determine factual issues, but only questions of law, even though it is necessary to review and consider the evidence in deciding the motion. *Goodyear* at ¶4. "Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon [JNOV]." *Osler v. Lorain* (1986), 28 Ohio St.3d 345, 347 quoting *Posin v. A.B.C. Motor Court Hotel* (1976), 45 Ohio St.2d 271, 275.

As noted in Justice O'Neill's dissent, the majority reevaluated the evidence contrary to the correct legal standard of review. Dissent at ¶50. Construing the evidence in a light most favorable to the Links, permission for the subjection utility pole was clearly rescinded once the width of the road was widened. The Township never even had an opportunity to deem the utility pole an obstruction prior to the Link accident because CEI made continued assurances that it would relocate the subject pole, and failed to expressly communicate its decision to keep 8 poles in place. As late as June 24, 2010, it was clearly evident that the Township was unaware of CEI's decision. The Township's letter stated, "We were informed that CEI would complete the relocation of the remaining eight poles in 2010," and "We look forward to your prompt notification of the schedule for relocating the poles." CEI's response letter providing that it no longer relocates poles for clear zone was not received by the Township until September 13, 2010 – only 25 days prior to the Link accident.

Consequently, the Township never even had an adequate opportunity to pass a resolution declaring the poles obstructions before the Link accident. As noted in the dissent, the township trustees serve part-time and do not always know what to do without direction from the county prosecutor or county engineer. Dissent at ¶52. It is simply not practicable to expect the Township trustees to consult with the county prosecutor, consult with the county engineer, draft a resolution, have an open meeting regarding the resolution, and pass the resolution – all within 25 days. Such a requirement dispells notions of fundamental fairness and justice for the Links.

Moreover, once the road was widened, both the Township and the County made clear that the existing poles must be moved. In its letter, the Township stated, "It is apparent that safety dictates the relocation of these poles to an adequate distance from the roadway and in line with the other poles on Savage Road." The Township's minutes from June 14, 2010, provide that the trustees were in agreement to draft a letter to CEI requesting that the poles be moved as soon as possible. Dissent at ¶48. The letter was circulated and approved by each trustee prior to transmittal on June 24, 2010. Consequently, a unanimous act was taken by the Township, and furthermore, the utility previously agreed to move all 45 poles. There is no requirement that the Township pass a resolution under Ohio law for pole relocation.

Revised Code Sections 5571.01 and 5571.02, which the majority opinion fails to recognize, provides townships the authority to reconstruct, repair, control and maintain any public road "***or part thereof under its jurisdiction***." Revised Code 5581.01(B) further provides that the "board of township trustees may construct, improve, maintain, or repair the berm of any road under its jurisdiction." Therefore, township control is not limited to the improved or paved surface of the roadway. Townships have the ability to control all objects within the right-of-way, including utility poles, without passing a formal resolution. Such control of the right-of-ways was expressly reflected in the resolutions the Township passed for the improvement of Savage Road. Thus, a separate resolution concerning relocation of utility poles is simply not required under Ohio law.

Notwithstanding the foregoing, a Resolution was passed by the Geauga County Commissioners related to the poles in question, which CEI blatantly disregarded. The Geauga County Commissioners' Highway Use Manual (the "Highway Use Manual") was adopted into law by a resolution passed by the Geauga County Board of Commissioners on April 28, 2005. CEI breached numerous mandatory provisions of the Highway Use Manual. The majority contends that the Highway Use Manual is discretionary in nature; however, the subject

provisions as applied to this case are mandatory. See Opinion at ¶14. The word 'shall' within the Highway Use Manual establishes a mandatory duty upon CEI, while the word 'should' requires usage of discretion and engineering judgment. See *Dunlap v. W.L. Logan Trucking Co.*, 2005-Ohio-2386 (10th Dist. 2005). CEI breached the following mandatory provisions of the Highway Use Manual:

- Any deviations from the approved plan ***must*** be approved by the Geauga County Engineer prior to installation – The engineer never approved CEI's revised plan. (Tr. at 545).
- The design of the utility facilities ***shall*** conform to guidelines contained herein, but where Local and Industry standards are higher than specified herein, Local or Industry standards ***shall*** prevail – According to ODOT, AASHTO and CEI standards, at the very least, the poles on Savage Road were required to be 17 feet from the edge of the pavement.

Consequently, CEI breached a resolution passed by the Geauga County Commissioners, and should not be shielded from liability in this matter pursuant to *Turner*.

Lastly, the majority opinion encourages CEI and other utilities to ignore directives, requests and demands from county engineers and townships to relocate poles, to the detriment of Ohio citizens. The likely outcome of this precedent is that CEI will never relocate another utility pole again during a township roadway improvement, absent a proceeding according to R.C. 5571.14, or unless the pole would be within the new paved road. This will no doubt result in numerous utility poles being in dangerous close proximity to township roadways. Such lack of any clear zone will likely lead to numerous injuries and deaths. The purpose of the clear zone is for the safe recovery of vehicles that have left the paved roadway, no matter what the reason. As demonstrated by this case, there are circumstances when a vehicle leaves the roadway that are not the fault of the operator (*e.g.* being struck by a deer, swerving to miss an animal, other

vehicles travelling left of center, icy conditions, objects on the road, etc.). This decision places millions of peoples lives at risk through no fault of their own.

Utilities will have no incentive to relocate poles for the health, safety and welfare of citizens. As CEI and FirstEnergy did in this case, a Fortune 500 company with billions of dollars of assets, the company will simply refuse to relocate 8 utility poles and later claim that it did not have adequate funds in the budget for the project. Tellingly, CEI's counsel alluded at oral argument that CEI read *Turner* and thereafter took the position that it no longer needed to move the remaining poles along Savage Road. Now, CEI and other utilities will rely upon *Link* for a position whereby they do not have to relocate poles under any circumstance. And if any municipality, township or county should have the audacity to file a Resolution declaring poles obstructions, CEI will fight such a determination up to this Court as CEI's affiliate did in *Toledo Edison Co. v. Bd. of Defiance Cty. Commrs.*, 2013-Ohio-5374 (3rd Dist. 2013), *review denied*, *Toledo Edison Co. v. Bd. of Defiance Cty. Commrs.*, 138 Ohio St.3d 1471, 2014-Ohio-1674 (Ohio 2014), costing various townships and counties significant tax payer dollars.

Such a conclusion results in a significant windfall to CEI and is also against established United States Supreme Court precedent. The law is well established that a statutory, permissive right of use of public highways by public utilities is ***subordinate to the rights of the public***; that the original location of utility poles in a public highway does not create an irrevocable right to have such poles and facilities remain forever in the same place; and that a utility company can be required to relocate its lines at its own expense when such relocation is demanded by public necessity and for public safety and welfare. See *Erie Railroad Co. v. Board of Public Utility Commissioners* (1921), 254 U.S. 394; *Western Union Telegraph Co. v. City of Richmond* (1912), 224 U.S. 160; *New Orleans Gas Light Co. v. Drainage Commission of New Orleans* (1905), 197 U.S. 453, 460-462; *People ex rel. New York Electric Lines Co. v. Squire* (1892), 145 U.S. 175, 187-191; *Ganz v. Ohio Postal Telegraph Cable Co.*, 140 F. 692, 694-696 (6th Cir. 1905);

Tennessee v. United States, 256 F.2d 244, 258 (6th Cir. 1958); *Duquesne Light Co. v. City of Pittsburgh* (1916), 251 Pa. 557, 565-567.

CONCLUSION

If left to stand, this Court's decision will place millions of Ohio citizens at risk in the years to come on over 41,000 miles of roadway. Utilizing the proper standard for review for a JNOV by viewing the evidence in a light most favorable to the Links, presuming any doubt in their favor, and not weighing the evidence nor the credibility of the witnesses, results in a decision in line with the dissent. Moreover, the majority opinion is in contravention of established United States Supreme Court precedent inasmuch as the permissive right of use of public highways by utilities is subordinate to the rights of the public. For the foregoing reasons, Appellees Douglas and Diane Link respectfully request that the Court vacate the Opinion, adopt the position of the dissenting opinion and affirm the judgment of the court of appeals so that they may be compensated for Mr. Link's catastrophic injury caused by CEI and FirstEnergy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2016, a copy of this *Motion for Reconsideration* was served via U.S. mail, postage prepaid, to the following persons:

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