

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

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

v.

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

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

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**MEMORANDUM OF APPELLANTS THE CLEVELAND ELECTRIC ILLUMINATING  
COMPANY AND FIRSTENERGY SERVICE COMPANY IN OPPOSITION TO  
PLAINTIFFS-APPELLEES' MOTION FOR RECONSIDERATION**

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## INTRODUCTION

This Court accepted the instant appeal to decide whether “[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* [*v. Ohio Bell Telephone Co.*, 118 Ohio St.3d 215, 2008-Ohio-2010, 887 N.E.2d 1158] absent legislative action by a governing public authority to revoke or cancel the statutory permission.” *Link v. FirstEnergy Corp.*, 143 Ohio St.3d 1440, 2015-Ohio-3427, 36 N.E.3d 188. In its July 26, 2016 Opinion in this matter, reversing the Court of Appeals’ decision against CEI and FESC,<sup>1</sup> the Court determined it did. Applying *Turner*, the Court held that no provision of Ohio law requires a public utility to obtain permission from a township or county engineer to a leave utility pole in its existing location following a road-widening project. See *Link v. FirstEnergy Corp.*, \_\_\_ Ohio St.3d \_\_\_, 2016-Ohio-5083 (the “Opinion”), ¶ 25.

Plaintiffs-Appellees ask the Court to reconsider its decision, but they provide no basis to justify doing so. Plaintiffs-Appellees either re-hash arguments that this Court already directly considered and rejected, or they attempt to raise points that they did not previously brief but are still without merit. The Court’s decision was correct, and Plaintiffs-Appellees’ Motion for Reconsideration should be denied.

## ARGUMENT

Under Supreme Court Practice Rule 18.02, this Court uses its reconsideration authority to “correct decisions which, upon reflection, are deemed to have been made in error.” *Dublin City Sch. Bd. of Educ. v. Franklin County Bd. of Revision*, 139 Ohio St. 3d 212, 214 (2014) (quoting *State ex rel. Huebner v. W. Jefferson Village Council*, 75 Ohio St.3d 381, 383, 662 N.E.2d 339

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<sup>1</sup> All capitalized terms used herein without definition shall have the meanings ascribed to such terms in Appellants’ Merit Brief.

(1995)). This Court has also made it clear, however, that it will not “grant reconsideration when a movant seeks merely to reargue the case at hand.” *Id.* (citing S.Ct.Prac.R. 18.02(B)). Plaintiffs-Appellees do just that. They reargue their prior assertions and attempt to create new issues that are not really new or do not demonstrate the Court was in error. As set forth in more detail below, there is no basis for a reconsideration of the Court’s decision, and Plaintiffs-Appellees’ Motion should be denied.

**A. Plaintiffs-Appellees Improperly Use Their Motion to Reargue Several Assertions.**

Plaintiffs-Appellees conceded in oral argument and do not (and cannot) argue that CEI never had permission to install the Pole in the first place. As a result, they once again argue that CEI lost its permission for the Pole because of the widening of Savage Road. Plaintiffs-Appellees again point to the township resolution authorizing the road widening project, and the County Commissioners’ adoption of the Geauga County Commissioners’ Highway Use Manual, as substitutes for a legislative action directed at the Pole. *See* Motion at 3-4. In addition to these points being mere reargument (*see, e.g.*, Appellee Merit Brief at 8-9, 16), as the Court correctly held, “While the Geauga County Commissioners Highway Use Manual requires utilities to obtain a permit for underground installations and pipelines, it does not require a permit for utility-pole installation or relocation.” Opinion at ¶30; *see also id.* at ¶ 37 (citing *Steele v. Ohio Dept of Transp.*, 162 Ohio App.3d 30, 2005-Ohio-3276, 832 N.E.2d 764, ¶ 10 (10th Dist.), which held that ODOT clear-zone guidelines did not impose duty to remove object “unless it interfere[s] with safe travel on the regularly traveled portion” of roadway). Both of these arguments were considered and correctly rejected by the Court.

Plaintiffs-Appellees also reassert that the issuance of letters from the township or the county engineer suffice in lieu of a resolution or legal action (*see* Motion at 2, Appellees' Merit Brief at 16-17). Once again this was considered and rejected. The Court held that "a letter expressing disapproval does not carry the force of law requiring CEI (or any utility) to move its utility poles. Indeed, the county engineer acknowledged that he did not have authority to order the relocation of utility poles." Opinion at ¶ 30; *see also id.* at ¶31 ("While the [township] board's chairman sent a letter . . . requesting relocation of the eight disputed poles, a letter, without more, does not have the force of law.").

Plaintiffs-Appellees also reargue but provide no new support (or any, for that matter) that the Opinion will result in utility poles being too close to township roadways (*see* Motion at 4, Appellees' Merit Brief at 14-15). Their opinion notwithstanding, the legal requirement is that the placement of the Pole cannot incommode the usual and ordinary travel on the road. In rejecting the argument of Plaintiffs-Appellees in the Opinion, the Court said, "[t]he Links did not provide any evidence that a motorist driving on the improved portion of Savage Road would have come in contact with the pole." Opinion at ¶ 39. Nor did the county engineer require that all objects along the road be in the "clear zone" that Plaintiffs-Appellees advocate as a legal requirement. Rather, "CEI's original plan left four poles in the clear zone, and the county engineer did not object to that plan." Opinion at 6. Thus, the Court concluded that the Pole at issue was placed with permission and the protection provided to utilities by *Turner* applied.

Finally, Plaintiffs-Appellees also restate their arguments that CEI believes its initial permission to install the Pole was somehow irrevocable (Motion at 5; Appellees' Merit Brief at 15), and that the "public necessity and welfare" demanded relocation of the Pole (Motion at 5; Appellees' Merit Brief at 22-23). As to the first, this is incorrect, and CEI has never taken this

position. CEI acknowledged that the statutory scheme grants certain powers to county engineers and township boards as affecting pole relocation. Specifically, if the pole interferes with construction or maintenance it can be deemed an obstruction. Ohio Rev. Code § 5571.14. If it does not, the township can either pay the utility to move the pole, or it can determine that the road may be opened with the pole in place. Here, the Court already noted that “the board decided to reopen Savage Road after consulting with the county prosecutor and county engineer.” Opinion at ¶ 33. As to the second, the Court correctly concluded that “[t]he board evaluated the risk to public safety and decided as the owner of the right-of-way that the existing placement of CEI’s utility poles would not incommode the public use of Savage Road.” Opinion at ¶ 33.

**B. Plaintiffs-Appellees’ Attempts to Suggest New Arguments Also Fail to Support Reconsideration of the Court’s Opinion.**

Even Plaintiffs-Appellees’ attempts to advance arguments that were not briefed fail to present the Court with a reason to reconsider its decision (Motion at 2). For example, Plaintiffs-Appellees argue that this Court “reevaluated the evidence contrary to the correct legal standard of review.” The Court did no such thing. Rather, the Court held that, “[e]ven when construing the evidence most strongly in the Links’ favor, as we must, and assuming that Link struck the utility pole while still on his motorcycle, there was no evidence that the pole’s placement created an unsafe condition for normal travel.” Opinion at ¶ 35.

Plaintiffs-Appellees also argue that the procedures outlined by the Court, which would have preserved due process, would not have helped the township because those procedures, if challenged, would not have been resolved before the Link accident occurred. This argument ignores that, in addition to the county engineer deeming the Pole an obstruction and having it moved, or initiating a legal action, the township had options to address pole concerns more immediately. The township can pay the utility to move the pole, or it can install a guardrail to

prevent a motorist from being able to go so far off the road that he might come near the pole or any other obstruction. However, the county engineer and the township board did none of these things here. Instead, after consulting with the county prosecutor and the county engineer, the township decided to open the road, having determined that it was safe to do so.

Finally, Plaintiffs-Appellees also argue that the Court's decision will encourage utilities to "ignore directives, requests and demands from county engineers and townships," opting instead to fight every resolution by a governmental subdivision that a pole must be relocated. Motion at 4-5. First, the fact that CEI moved the majority of the poles along Savage Road without a resolution demonstrates that this is not a threat. Where the poles were in conflict, CEI did not wait for a resolution or a legal action to move the poles; it did so voluntarily at its own expense. *See* Opinion at ¶ 4. The township had the right under Revised Code § 5571.14 to order relocation of the Pole after CEI determined that it and certain other poles presented no conflict with the road widening. *See* Opinion at ¶ 32. Had the township acted on its right, then the issue of the Pole's location could have been resolved while protecting CEI's right to due process of law. Plaintiffs-Appellees would prefer this Court to deprive CEI of due process and subject it to the incontestable whim of any government employee involved in a road project with the capacity of writing a letter. This is not, and has never been, the law. Plaintiffs-Appellees offer nothing new to support a reconsideration of the Court's decision. The Motion for Reconsideration should be denied.

## CONCLUSION

*Turner* bars any liability to Appellees because CEI complied with all applicable laws in placing and maintaining the Pole, and Plaintiffs-Appellees provide the Court with no reason to

change its decision to that effect. Accordingly, Appellants request that this Court deny Plaintiffs-Appellees' Motion for Reconsideration.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

A copy of the foregoing *Memorandum of Appellants The Cleveland Electric Illuminating Company and FirstEnergy Service Company in Opposition to Plaintiffs-Appellants' Motion for Reconsideration* was served via first class United States Mail, postage prepaid, on this 11th day of August 2016, upon the following:

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