

**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 MEMORANDUM OF
AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES' MOTION FOR
RECONSIDERATION**

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**

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**

MELISSA R. LIPCHAK (0055957)
(COUNSEL OF RECORD)
7568 Slate Ridge Boulevard
Reynoldsburg, Ohio 43068
Phone: (614) 367-9922
Fax: (614) 367-9926
MelissaLipchak@MelissaLaw.Net

**ATTORNEY FOR AMICUS CURIAE, OHIO
ASSOCIATION FOR JUSTICE**

FRANK J. REED, JR. (0055234)
(COUNSEL OF RECORD)
Frost Brown Todd LLC
One Columbus, Suite 2300
10 West Broad Street
Columbus, Ohio 43215
Phone: (614) 559-7213
Fax: (614) 464-1737
freed@fbtlaw.com

ALEXANDER L. EWING (0083934)
Frost Brown Todd LLC
9277 Centre Pointe Drive, Suite 300
West Chester, Ohio 45069
Phone: (513) 870-8200
Fax: (513) 870-0999
aewing@fbtlaw.com

**COUNSEL FOR AMICUS CURIAE
COUNTY COMMISSIONERS
ASSOCIATION OF OHIO AND THE
OHIO TOWNSHIP ASSOCIATION**

EDWARD L. BETTENDORF (0025924)
(COUNSEL OF RECORD)
45 Erieview Plaza, Suite 1400
Cleveland, Ohio 44114
Phone: (216) 544-7420
Fax: (216) 822-0240
eb5312@att.com

**ATTORNEY FOR AMICUS CURIAE, THE
OHIO BELL TELEPHONE COMPANY**

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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, in reversing the Court of Appeals’ decision against CEI and FESC,¹ 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.

Amici curiae, The County Commissioners Association of Ohio and The Ohio Township Association (together, the “*Amici*”), ask the Court to reconsider its decision, but they provide no basis to justify doing so. *Amici* 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

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

State ex rel. Huebner v. W. Jefferson Village Council, 75 Ohio St.3d 381, 383, 662 N.E.2d 339 (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)). *Amici* reargue their prior assertions and attempt to create new issues that are not really new or do not demonstrate the Court was in error. Here, 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. *Amici* Improperly Use Plaintiffs-Appellees’ Motion to Reargue Several Assertions.

Amici concede that they are rearguing certain points to the Court. *See Amici’s* Mem. at 1 (“During oral argument and in the briefs, both plaintiffs and *amicus curiae* asserted that *Turner* does not apply”). Nevertheless, *Amici* again assert in their Memorandum that the mere sending of letters by the county engineer or the township meant that “all bets were off” and new permission was required to leave the Pole in place. *See id.*; *see also Amici’s* Merit Brief at 6. *Amici* then fault the Court for continuing to follow precedent by applying the *Turner* factors to this case. *Id.* at 2. However, as this Court correctly held, the letters did not constitute a “law requiring approval” under the statute such that CEI’s original permission to install the Pole was affected in any way. *See* Opinion at ¶ 30 (“a letter expressing disapproval does not carry the force of law requiring CEI to move its utility poles. Indeed, the county engineer acknowledged that he did not have authority to order the relocation of utility poles.”); *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.”).

Amici also argue again that the Court’s decision will somehow prompt CEI and other utilities to delay pole relocation through litigation or force local governments to move the poles at their own expense. *Amici’s* Mem. at 3; *see also Amici’s* Merit Brief at 8-9. *Amici’s* assertion

that they will not be able to obtain “swift compliance” from utilities was addressed by the Court as well. “R.C. 5571.14 authorizes a board of township trustees or township highway superintendent to declare as a public nuisance an object bounding a township road that ‘obstructs or endangers the public travel’ and to order its removal within 30 days.” Opinion at ¶ 32 (citing R.C. 5571.14(A)). “Upon refusal to comply, the board or superintendent can order the object’s removal and certify the expense to the county auditor to be collected in the same manner as a *tax*.” *Id.* (emphasis in original). Each of *Amici*’s arguments was considered and properly rejected by the Court. What the Court did not allow, however, is for a township to infringe on CEI’s property rights without due process of law.

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

Even *Amici*’s attempts to advance arguments that were not briefed fail to present the Court with a reason to reconsider its decision. For example, *Amici* argue that the Court “reweighed the facts” because the Opinion makes reference to the testimony of CEI’s accident reconstruction expert. *Amici*’s Mem. at 2. 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.

Amici also assert that the Court’s decision, and its holding that mere letters are insufficient to revoke the permission granted to CEI by statute, offers “little in the way of practical guidance for townships and counties who want to enforce compliance by utilities with road improvement plans.” *Amici*’s Mem. at 2-3. However, the Court identified several ways in which a county or township could seek relocation of a utility pole. In addition to the procedure under Ohio Revised Code § 5571.14(A) discussed above, the Court noted that the Township

could have passed a resolution ordering the relocation of the Pole or initiated legal proceedings – *i.e.*, a lawsuit – seeking an order requiring the relocation of the Pole. *See* Opinion at ¶ 25. Any of these options would have given CEI the opportunity to be heard in court if the township’s actions were not justified, preserving due process.

Finally, *Amici* ask the Court to reconsider the “long-term and financial impact” of its decision. The Court already did. *See* Opinion at 32 (R.C. 5571.14 permits township to assess cost of pole relocation as a tax). *Amici*’s worries that road projects will be interfered with are baseless, as in this case, where CEI voluntarily, and at its own expense, moved every pole that was in conflict with the road widening project. *See* Opinion at 4. Moreover, “the board decided to reopen Savage Road after consulting with the county prosecutor and county engineer.” Opinion at ¶ 33. *Amici*’s complaints about an allegedly hazardous condition being permitted to exist on Savage Road were contradicted by the township’s opening of the road. None of *Amici*’s arguments has any merit; accordingly, the Motion for Reconsideration should be denied.

CONCLUSION

Turner bars any liability to Plaintiffs-Appellees because CEI complied with all applicable laws in placing and maintaining the Pole, and *Amici* 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 and let its original decision stand.

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 Memorandum of Amici Curiae in Support of 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:

Joseph J. Triscaro
DEMARCO & TRISCARO, LTD.
30505 Bainbridge Road, Suite 110
Solon, Ohio 44139

**ATTORNEY FOR APPELLEES,
DOUGLAS V. LINK AND DIANE
LINK**

EDWARD L. BETTENDORF
45 Erieview Plaza, Suite 1400
Cleveland, Ohio 44114

**ATTORNEY FOR AMICUS CURIAE,
THE OHIO BELL TELEPHONE
COMPANY**

MELISSA R. LIPCHAK
7568 Slate Ridge Boulevard
Reynoldsburg, Ohio 43068

**ATTORNEY FOR AMICUS CURIAE, OHIO
ASSOCIATION FOR JUSTICE**

ALEXANDER L. EWING
Frost Brown Todd LLC
9277 Centre Pointe Drive, Suite 300
West Chester, Ohio 45069

FRANK J. REED, JR.
Frost Brown Todd LLC
One Columbus, Suite 2300
10 West Broad Street

**COUNSEL FOR AMICUS CURIAE COUNTY
COMMISSIONERS ASSOCIATION OF OHIO
AND THE OHIO TOWNSHIP ASSOCIATION**

/s/ Thomas I. Michals

One of the Attorneys for Appellants,
The Cleveland Electric Illuminating Company
and FirstEnergy Service Company