

In the Supreme Court of Ohio
Case No. 2015-0132

DOUGLAS V. LINK, *et al.*

Plaintiffs-Appellees,

v.

FIRSTENERGY, CORP., *et al.*

Defendants-Appellants

On Appeal from the Eighth District Court of Appeals, Cuyahoga County
Case No. CA-14-101286

**MERIT BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION FOR JUSTICE
IN SUPPORT OF PLAINTIFFS-APPELLEES DOUGLAS V. LINK AND DIANE LINK**

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INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

This *Amicus Curiae* represents the interests of the Ohio Association for Justice ("OAJ"). OAJ is comprised of approximately 1,500 attorneys throughout Ohio utilizing their collective knowledge and experience to preserve the rights of individuals and to promote public confidence in the legal system. In this matter, *Amicus Curiae* seeks to persuade this Court to uphold long-standing federal and state common law subordinating the interests of utility companies to the public good.

‘Under the traditional common-law rule,’ reaffirmed by the U.S. Supreme Court in 1983 and recognized by the Court as far back as 1905, ‘utilities have been required to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities.’ But affected utilities, facing large and unwanted expenditures, have persistently found ways to argue around or against this rule, and courts have sometimes been reluctant to apply it. Stokes, *Moving the Lines: The Common Law of Utility Relocation*, 45 Val. U. L. Rev. 457, 457-458 (2011) (footnote omitted).

Amicus Curiae intervenes in this appeal on behalf of Plaintiffs-Appellees Douglas V. Link and Diane Link. Douglas V. Link suffered serious and permanent injuries on October 8, 2010 while operating his motorcycle on Savage Road in Bainbridge Township. A buck struck him under his left arm and he veered towards the right side of the road, striking a utility pole. Defendant-Appellant The Cleveland Electric Illuminating Company (“CEI”) owned the pole which was located in the right-of-way. Diane Link suffered a loss of consortium.

In 2008 and 2009, Bainbridge Township engaged in widening Savage Road under the supervision of the Geauga County Engineer’s Office. CEI originally moved some of the utility poles along the road as required by the project plans approved by the County Engineer’s Office, but then refused to move eight of the poles. Employees of Defendant-Appellant FirstEnergy Service Company (“FESC”) made recommendations to CEI regarding the road widening project.

Defendants-Appellants did not have a permit for the poles. The County Engineer and Township Trustees repeatedly attempted to have Defendants-Appellants move the poles as originally planned. Despite these attempts and despite the occurrence of a motor vehicle accident involving one of the poles that was not moved, which occurred five months prior to Douglas Link's accident, Defendants-Appellants still refused to move the eight poles. This prior accident also resulted in a lawsuit and appeal to the Eight District. *Bidar v. Cleveland Elec. Illuminating Co.*, 8th Dist. Cuyahoga No. 9740, 2012-Ohio-3686, ¶ 23, appeal not allowed by *Bidar v. Cleveland Elec. Illum. Co.*, 134 Ohio St. 3d 1452, 2013 Ohio 347, 982 N.E.2d 729.

Plaintiffs-Appellees filed suit against CEI and FirstEnergy Corp. FESC was later added as a Defendant. FirstEnergy Corp. was granted a directed verdict because it was a holding company. A jury trial was ultimately held and a jury verdict was returned in favor of Plaintiffs-Appellees on their claims for qualified nuisance and loss of consortium. During the course of the pending case, Defendants-Appellants moved for summary judgment, directed verdict and judgment notwithstanding the verdict, all of which were denied. Both parties appealed to the Eighth District Court of Appeals which affirmed the verdict in favor of Plaintiffs-Appellees.

In its reaching the decision to affirm the jury verdict, the Eighth District Court of Appeals considered the applicability of *Turner v. Ohio Bell Tel. Co.*, 118 Ohio St.3d 215, 2008-Ohio-2010, 887 N.E.2d 1158. After consideration, the Court of Appeals concluded that Defendants-Appellants "did not have the requisite permission to keep the Pole in its original location after completion of the Savage Road widening project." *Link v. FirstEnergy Corp.* 2014-Ohio-5432, 25 N.E. 3d 1095, ¶ 24 (8th Dist.). Without such permission, the holding in *Turner* became inapplicable and the jury verdict against Defendants-Appellants was affirmed.

The decision of the Appellate Court permitted Plaintiffs-Appellees Douglas and Diane Link to recover their damages caused by the qualified nuisance which resulted from the inaction of the Defendants-Appellants. Despite receiving repeated requests to relocate the poles after the road-widening project, Defendants-Appellants ignored the unreasonable risk of harm caused by the poles and failed to comply with necessary conditions required for permission to continue to locate those eight poles in the right-of-way in the same location.

R.C. 4931.03 addresses the construction of telecommunications and, by virtue of R.C. 4933.14, electric lines and facilities on the roads and highways in unincorporated areas of townships. R.C. 4931.03(B)(2) provides that construction under the section is subject to any applicable law, including, but not limited to, any law requiring approval of the legislative authority, county engineer or the transportation director.

The Bainbridge Township Board of Trustees passed a resolution that Savage Road should be widened. Once the resolution passed, R.C. 5573.01 became applicable. That section provides, in pertinent part, that when the board of township trustees determines by resolution that any road shall be improved, the resolution shall order the county engineer to make surveys, plans, profiles, cross sections, estimates and specifications as are required for the improvement. The board of trustees may require the county engineer to make alternative plans or the county engineer may submit alternative plans without an order of the board of trustees. In the event alternative plans exist, the county engineer and the board shall agree on which of the final plans shall be adopted. The only plans approved required Defendants-Appellants to move all of its poles along Savage Road, including the pole involved in Douglas Link's accident.

On March 26, 2009, the Geauga County Engineer's Office advised Defendants-Appellants by letter that the revised plans to not move the eight poles did not "address the clear

zone of the roadway. In some cases the poles are in the ditch line and may not have enough cover, in other areas, poles are in front of the ditch and only four to six feet off the edge of the pavement.” *Link*, 2014-Ohio-5432, 25 N.E. 3d 1095, at ¶ 21. The Defendants-Appellants were advised the revised plans created a “liability the township will not allow to exist on a public road,” as well as a ‘liability’ the engineer thought appellants would not want to absorb.” *Id.* Defendants-Appellants then offered to move the poles at the expense of Bainbridge Township after the *Bidar* accident. *Id.* at ¶ 22.

In addition to R.C. 5573.01, R.C. 5543.09(A) provides the county engineer is required to supervise the improvement of roads by township trustees. R.C. 5571.05 also provides that the township trustees shall be subject to the general supervision of the county engineer with respect to the repair and maintenance of roads.

Defendants-Appellants seek to relieve themselves from liability by arguing that the lack of any “legislative action” requiring removal of the poles relieved it of any obligation to relocate the eight poles. Further, Defendants-Appellants rely on testimony that the county could not require the poles to be moved.

The latter argument is baseless. The county could not require the poles to be moved because the road was not a county road, that is, the county engineer could not take any “legislative action” requiring the poles to be moved. The above-referenced statutes grant the County Engineer the power to approve and supervise, but provide no mechanism for enforcement because none is needed. Once the alternative plan to leave the eight remaining poles in their current positions was not approved, Defendants-Appellants lost the protection of R.C. 4931.03(A). By not moving the poles, Defendants-Appellants accepted the risk of liability as the immunity set forth in *Turner* no longer existed. Defendants-Appellants did not have “any

necessary permission” to keep the eight poles in the right-of-way. Thus, Defendants-Appellants cannot rely on the lack of further “legislative action” by the county engineer or the township as a justification for creating an unreasonable risk of harm.

The adoption of Defendants-Appellants’ Proposition of Law would result in the board of trustees in this case (or other governmental entity in other cases) being required to pass a resolution every time a utility company refused to relocate poles. Undoubtedly, this would result in more litigation as the utility company would appeal to the court of common pleas, the appellate court and the Supreme Court of Ohio resulting in increased costs for townships and counties. For example, in a Defiance County case involving Toledo Edison, a subsidiary of FirstEnergy Corp., the following scenario occurred:

The commissioners requested that Toledo Edison relocate its utility poles further away from the edge of the roadway for safety and snow removal, but Toledo Edison refused. (*Id.*). Other companies affected by the roadway improvements, including AEP, Northwest Electric, and Embarq, complied with the commissioners' request to move their utility poles and lines. (Ex. A). Toledo Edison, on the other hand, claimed that its utility poles were ‘not obstructions and * * * [did] not interfere or conflict with the improved highway,’ relying on *Turner v. Ohio Bell Tel. Co.*, 118 Ohio St. 3d 215, 2008-Ohio-2010, 887 N.E.2d 1158. (*Id.*).

Toledo Edison Co. v. Bd. of Defiance County Comm'rs, 2013-Ohio-5374, 4 N.E.3d 458, ¶ 3 (3rd Dist.), appeal not allowed by *Toledo Edison Co. v. Defiance County Bd. of Comm'rs*, 138 Ohio St. 3d 1471, 2014-Ohio-1674, 6 N.E.3d 1206 (2014).

An alternative sought by Defendants-Appellants and inherent in their Proposition of Law is apparent in another case involving Toledo Edison. Toledo Edison moved the poles and then sought reimbursement for the costs from the government entity in a Wood County case:

In 2003, the city of Perrysburg ("Perrysburg") sought to widen the intersection of State Route 25 and Roachton Road to accommodate the construction of a new high school. To complete the project, it was necessary to relocate electrical poles and equipment belonging to the Toledo Edison Company, ("Toledo Edison") that were partially located within Perrysburg's right-of-way of the intersection. Perrysburg submitted a request for relocation of the equipment to Toledo Edison.

Toledo Edison complied with the request and then submitted an invoice to Perrysburg in the amount of \$ 315,698.37, the cost of the relocation. Perrysburg refused to pay for the relocation and on March 18, 2004, Perrysburg filed a complaint for declaratory judgment seeking a declaration as to which party is responsible for the relocation costs.

City of Perrysburg v. Toledo Edison Co., 171 Ohio App. 3d 174, 2007-Ohio-1327, 870 N.E.2d 189, ¶ 2 (6th Dist.).

The long-standing law of the State of Ohio establishes a government is not liable for payment to a utility when a utility is required to relocate its property.

This duty [the paramount duty of the city to care for the streets and keep them open, in repair, and convenient for the general public] would be seriously interfered with if the city could not change the grade of its streets, save upon the condition that it should make compensation to every gas company, and water company, and telephone company, and electric light company, and street railway company, for inconvenience and expense thereby occasioned. All such agencies must be held to take their grants from the city upon the condition, implied where not expressed, that the city reserves the full and unconditional power to make any reasonable change of grade, or other improvement, in its streets.

Gas Light & Coke Co. v. Columbus, 50 Ohio St. 65, 70, 33 N.E. 292 (1893).

In the years 2009 through 2013, over one-half of all fatalities from motor vehicle accidents in Ohio involved vehicles which departed from the roadway. *National Traffic Highway Safety Administration*, FARS 2009-2012 Final and fars 2013, ARF, http://www.nrd.nhtsa.dot.gov/departments/nrd-30/ncsa/STSI/39_OH/2013/39_OH_2013.htm (accessed October 24, 2015). The Federal Government set forth the following requirement for federal-aid highways:

- (1) In determining whether any right-of-way on any Federal-aid highway should be used for accommodating any utility facility, the Secretary shall—
 - (A) first ascertain the effect such use will have on highway and traffic safety, since in no case shall any use be authorized or otherwise permitted, under this or any other provision of law, which would adversely affect safety. . . 23 U.S. Code § 109 (l).

Defendants-Appellants and their Amicus Curiae are asking this Court to hinder governmental entities from acting to protect the health, safety and welfare of Ohio Citizens by

refusing to comply with requests to relocate poles and seeking reimbursement of the costs. Instead of recognizing the need for compliance with local, state and federal standards regarding a “clear-zone” on the side of a roadway, Defendants-Appellants refused to move the remaining poles and, when finally agreeing to move them, only if the expense was borne by Bainbridge Township. Defendants-Appellants’ economic concern for themselves to the detriment of the Citizens of the State of Ohio, Ohio Counties and Ohio Townships is readily apparent in their actions with respect to the poles and their seeking the jurisdiction of this Court to review a case which does not warrant review.

Adverse consequences will result from the reversal of the Eighth District’s decision in this matter. First and foremost, utility companies will be granted blanket immunity for any actions related to the placement of poles when a motor vehicle collides with a pole in unincorporated townships. Utility companies will point to R.C. 4931.03(A) and *Turner* balking at any attempt by local government officials to have the poles relocated. The decision of this Court in *Turner* should not be expanded to allow the blanket immunity Defendants-Appellants seek. *Turner* clearly states “nevertheless, utility companies do not enjoy unfettered discretion in the placement of their poles within the right-of-way.” *Turner*, 118 Ohio St.3d 215, 2008-Ohio-2010, 887 N.E.2d 1158 at ¶ 20. The Appellate Court in *Turner* applied an eight factor test¹ to determine the reasonableness of the pole location. *Id.* at ¶ 15. This Court in *Turner* relied instead on determining whether the utility obtained any necessary permission to install the pole and whether the pole interfered with the usual and ordinary course of travel, noting that the

¹ Those factors include (1) the narrowness and general contours of the road, (2) the presence of sharp curves in the road, (3) the illumination of the pole, (4) any warning signs of the placement of the pole, (5) the presence or absence of reflective markers, (6) the proximity of the pole to the highway, (7) whether the utility company had notice of previous accidents at the location of the pole, and (8) the availability of less dangerous locations. *Turner* at ¶ 15.

public authority will presumably consider many of the factors in the eight factor test when deciding whether to approve the location of the pole. *Id.* at ¶ 20 and ¶ 21.

In the context of unincorporated townships, *Turner* replaces the eight factor test with a streamlined determination of whether the utility received permission for the pole placement. The adoption of this streamlined determination is a recognition that state and local governments act to protect the health, safety and welfare of the public and are in the best position to evaluate the safety of the pole placement. If Defendants-Appellants are allowed to twist *Turner* into a decision providing utility companies with blanket immunity, the underlying premise of *Turner* will be thwarted. In the present case, adopting Defendants-Appellants' position will allow utilities to leave poles in the original positions despite the determination by the governmental authorities that the poles present an unreasonable risk of harm as a result of a change in the original layout of the road. Failure to move the poles when requested would be an abuse of privilege granted to utility companies and would upset the balance between the commercial interest of the utilities and the safety of private citizens developed in *Turner*.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae will defer to the procedural history and the specific facts of this case as set forth in Plaintiffs-Appellees' Merit Brief. *Amicus Curiae* only focuses on the facts and procedural issues related to Defendants-Appellants' Proposition of Law in this brief.

LAW AND ARGUMENT

OAJ'S PROPOSITION OF LAW NO. 1: THE STATUTORY PERMISSION GRANTED TO UTILITIES BY R.C. 4931.03 TO MAINTAIN POLES IN THE UNINCORPORATED AREA OF AN OHIO TOWNSHIP DOES NOT SATISFY THE "ANY NECESSARY PERMISSION" REQUIREMENT OF *TURNER* WHEN THE ROADWAY IS ALTERED AND PERMISSION FOR THE CONTINUED PLACEMENT OF THE POLES IN THE SAME LOCATION IS NOT OBTAINED.

The Eighth District Court of Appeals reviewed the evidence in this case and determined reasonable minds could reach different conclusions as to whether permission for the placement of the poles had been granted by any public authority to Defendants-Appellants. Therefore, Defendants-Appellants were not entitled to judgment as a matter of law at any point during the pendency of the case. The Court of Appeals specifically considered the following evidence in reaching the determination:

- On May 8, 2006, the Bainbridge Township Board of Trustees passed a resolution to improve and widen the entire length of Savage Road in Bainbridge Township. *Link*, 2014-Ohio-5432, 25 N.E. 3d 1095, at ¶ 3.
- In late 2006, the Geauga County Engineer's Office sent the Defendants the preliminary road reconstruction plans for the Savage Road widening project. *Id.*
- On October 30, 2008, the Defendants transmitted the original utility pole relocation plans for Savage Road to the Geauga County Engineer's Office. *Id.*
- Prior to the winter of 2008-2009, CEI relocated certain utility poles; however, it did not relocate approximately eight utility poles along the west side of Savage Road. The original plans called for the relocation of these poles. *Id.* at ¶ 4.
- Savage Road remained closed for the winter of 2008-2009 because the utility pole relocation project was not completed, and the Defendants had made assurances that the relocation project would be finished in the first quarter of 2009 pursuant to the original plans. *Id.*
- The Defendants failed to return to the project, and on March 2, 2009, the Defendants sent the Geauga County Engineer revised plans, which called for the poles that had not been relocated to remain in their current positions. *Id.* at ¶ 5.
- On March 26, 2009, the Geauga County Engineer's Office sent the Defendants a letter concerning CEI's revised plans stating that the township had kept Savage Road closed since the project began to 'protect not only the driving public, but also their and your tort liability.' The letter went on to state that the revised plans did not 'address the clear zone of the roadway. In some cases the poles are in the ditch line and may not have enough cover, in other areas, poles are in front of the ditch and only four to six feet off the edge of the pavement.' According to the county engineer, the revised plans created a

‘liability the township will not allow to exist on a public road,’ as well as a ‘liability’ the engineer thought appellants would not want to absorb. *Id.* at ¶ 21.

- The Defendants were not responsive to the concerns raised in the letter. Less than one year later, the Bidar accident occurred. The township wrote to the Defendants again, informing them of the Bidar accident and stating:

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.

We would like a resolution of this issue with CEI as soon as possible and before there are any further accidents. We look forward to your prompt notification of the schedule for relocating the poles. *Id.* at ¶ 22.

- The township did not receive a response for almost three months. The response stated that the Defendants had decided not to relocate the utility poles except at the township's sole cost and expense. Twenty-five days later, the Link accident occurred. *Id.*

Despite this course of events, Defendants-Appellants seek to relieve themselves from liability:

Proposition of Law No. I: 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.

Defendants-Appellants are asking this Court to rewrite R.C. 4931.03 by imposing an additional requirement that the governmental entity with responsibility for the road take affirmative action to revoke or cancel the statutory permission. Obviously, if the legislature wanted to impose this addition requirement, it could have added the appropriate language to the statute. Having not added any additional language, this Court cannot impose any additional requirements to the statute. (“There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a

situation not provided for.” *State ex rel. Foster v. Evatt*, 144 Ohio St. 65, 56 N.E.2d 265 (1944), paragraph 8 of the syllabus).

As discussed above, once the necessary permission no longer exists, the immunity for negligence afforded by *Turner* also no longer exists.

Further, Defendants-Appellants ignore the import of R.C. 4931.03(B)(2) which provides as follows:

Construction under this section is subject to section 5571.16 of the Revised Code, as applicable and any other applicable law, including, but not limited to, any law requiring approval of the legislative authority, the county engineer, or the director of transportation.

Counsel for Plaintiffs-Appellees provided the lower courts with all the applicable laws and standards for the placement of the poles. In summary, a little over one year prior to the Bainbridge Township’s passing of the resolution to widen Savage Road, the Geauga County Board of Commissions by resolution adopted into law The Geauga County Commissioners Highway Use Manual (“Highway Use Manual”). This Manual provides requirements for the design of the several elements in utility occupancies, but also provided if State, Local and Industry standards are higher those standards shall be used. Any deviations from the approved plans required the approval of the Geauga County Engineer prior to installation. Defendants-Appellants’ deviations were not approved.

The ODOT Procedure for Utility Relocations requires a review against the clear zone requirements of all utility relocation plans. The ODOT Location & Design Utility Manual provides for a clear zone distance of seventeen (17) to twenty-three (23) feet on Savage Road depending on grade. Appellants also failed to comply with the American Association of State Highway and Transportation Officials’ (“AASHTO”) standards.

As previously discussed, R.C. 5573.01 became applicable once Bainbridge Township Trustees passed the resolution to widen the road. That section provides that the county engineer is required to make plans and specifications as are required for the improvement. The board of trustees may require the county engineer to make alternative plans or the county engineer may submit alternative plans without an order of the board of trustees. In the event alternative plans exist, the county engineer and the board shall agree on which of the final plans shall be adopted. The only plans adopted required Defendants-Appellants to move all of its poles along Savage Road, including the pole involved in Douglas Link's accident, yet, Defendants-Appellants want this Court to ignore that fact.

Further, this Court in *Turner* acknowledged that utility companies do not possess “unfettered discretion” in the placement of their poles in the public right-of-way. *Turner*, 118 Ohio St.3d 215, 2008-Ohio-2010, 887 N.E.2d 1158, at ¶ 20. This statement is followed by references to R.C. 4339.03, 5515.01 and 5547.04.

R.C. 4339.03 is applicable to municipalities and, in part, provides: 1) No person shall occupy or use a public way except in accordance with law; 2) In occupying or using a public way, no person shall unreasonably compromise the public health, safety, and welfare; and, 3) No person shall occupy or use a public way without first obtaining any requisite consent of the municipal corporation owning or controlling the public way.

At the time *Turner* was decided, R.C. 5515.01, which is applicable to state highway systems, allowed the director of transportation to grant a permit to use or occupy a portion of the road or highway as long as the use or occupancy does not incommode the traveling public. The statute further states in relevant part:

(A) The occupancy of such roads or highways shall be in the location as prescribed by the director.

(B) Such location shall be changed as prescribed by the director when the director deems such change necessary for the convenience of the traveling public, or in connection with or contemplation of the construction, reconstruction, improvement, relocating, maintenance, or repair of such road or highway. . . .

(G) Permits may be revoked by the director at any time for a noncompliance with the conditions imposed.

R.C. 5547.04 addresses removal of obstructions by landowners on county highways. Under this provision, owners or occupiers of lands situated along the highways are required to remove all obstructions placed by them within the bounds of the highway unless consent is obtained from the board of county commissioners to keep obstructions placed prior to July 16, 1925. The consent may contain conditions and the obstructions cannot interfere with traffic or with the construction or repair of the highways. Prior to the erection of any obstruction within the bounds of any highway, the approval of the Board of County Commissions shall be obtained unless the highway is part of the state highway system. The Board may enforce this section.

Despite the applicable clear zone requirements and despite the recognition in *Turner* of the various Ohio Revised Code sections of the need to require the poles be relocated in the event of a determination they are no longer safely or properly placed, in some instances due to the reconstruction of the road, Defendants-Appellants insist they have an absolute and unconditional right to maintain poles in their current locations.

Courts in other states have rejected this argument proffered by Defendants-Appellants. In 2012, the Supreme Court of New Jersey considered a case very factually and legally similar to the present case. (*Seals v. County of Morris*, 210 N.J. 157, 42 A.3d 157 (2012.)) The plaintiff in *Seals* was injured when he crashed into a utility poled owned by Jersey Central Power & Light (“JCP&L”) and First Energy Corporation. First Energy was the parent corporation of JCP & L and both companies are referred to as JCP & L throughout the decision. *Id.* at 159 and fn 1. The

pole was located a few feet off of the road on private property. *Id.* The road was in a township and maintained by the county. *Id.* Both JCP & L and the county were named as defendants. Plaintiff alleged “JPC & L is liable for negligently placing the pole in a dangerous location where it was foreseeable that a vehicle would veer off the road and that the county is liable for its negligence in not having it removed.” *Id.*

The trial court denied the summary judgment motions filed by JPC & L and the county. *Id.* The appellate court reversed the denial for JPC & L for the following reasons:

The Appellate Division likewise relied on *Contey* but reversed, pronouncing that JCP & L could not be found liable because the County and Township gave implicit approval for the pole's location by their silence. *Seals v. Cnty. of Morris*, 417 N.J.Super. 74, 88, 8 A.3d 796 (App.Div. 2010). The Appellate Division additionally concluded that whether the County was immune from suit had not been sufficiently developed before the trial court and therefore remanded for further proceedings. *Id.* at 94-95, 8 A.3d 796. *Id.* at 160.

The New Jersey Supreme Court reversed and remanded. *Id.* Initially, the Supreme Court noted the placement of telephone poles and electric lines were governed by two different statutes. *Id.* Pursuant to one statute, the county or municipality has the power to dictate the exact placement of telephone poles while under the other statute it does not have this power with respect to electric poles. *Id.* The Supreme Court also noted that neither the township nor the county directed JPC & L where to locate the pole. *Id.* Thus, JPC & L was not entitled to the immunity for negligence afforded the county or township for the placement of the pole and could be held liable for any negligence. *Id.*

The pole struck by the plaintiff had been in place since 1937. *Id.* at 161. It had been replaced a number of times and numerous accidents occurred which involved a vehicle striking the pole. *Id.* The position of JCP & L was similar to the position taken by Defendants-Appellants in the State of Ohio:

According to JCP & L, if the pole posed a safety hazard, JCP & L would have moved the pole at the County's request or the County was free to erect a guardrail to protect motorists. JCP & L's engineer stated that even if Pole #617 had been struck by cars once a year, every year, for ten years, the County—not JCP & L—would be responsible for deciding whether the pole should be moved or a guardrail installed. Absent a particular request by a governmental entity, JCP & L would not move a pole, regardless of the number of accidents.
Id. at 162.

Another argument advanced by Defendants-Appellants in the present case and in *Seals*, which was accepted by the appellate court in *Seals*, was: “if public entities had the power to regulate the location of a utility pole through their lawmaking authority, then those entities ‘in the absence of an ordinance, resolution, regulation, or other governmental action, *implicitly* placed their imprimatur on Pole # 617's location.’ *Id.* at 88, 8 A.3d 796 (emphasis added).” *Id.* at 163. This argument was rejected by the New Jersey Supreme Court.

The Supreme Court reasoned that the placement of a utility pole without any direction of involvement from a public entity does not entitle the utility company to immunity when the pole is placed in an unsafe manner or location. *Id.* at 166. “Indeed, such a suggestion would be contrary to the modern trend in our common law, which imposes on every person and entity the duty of acting reasonably and with due care, under the given circumstances, so as not to endanger or cause harm to others.” *Id.*

Neither the county nor township in *Seals* passed a resolution regarding the placement of the pole. *Id.* at 167-168. The New Jersey Supreme Court specifically noted the township had the authority, by ordinance or resolution, to direct the moving of a utility pole that poses a hazard to the public, but the county did not. *Id.* In the present case, Geauga County did not have the authority to pass an ordinance or resolution because the road was not a county road. Bainbridge Township did not pass a resolution. The New Jersey Supreme Court specifically stated the failure to pass such ordinance did not relieve JPC & L from liability: “However, the failure to do

so is not, as the Appellate Division suggests, an ‘implicit imprimatur’—a seal of approval—that absolves the utility company from its own negligence.” *Id.* at 168-169. JPC & L solely determined the placement of the pole as did Defendants-Appellants in the present case and are liable for their inaction. The jury verdict in the present case must stand.

New Jersey is not the only state recognizing liability on the part of utility companies for creating an unreasonable risk of harm. In a Louisiana case, the plaintiffs were injured when the vehicle they were occupying went off of the road. A vehicle traveling in the opposite direction went left of center. To avoid the vehicle, the plaintiff driver drove onto the shoulder of the road and braked. The brakes locked and the vehicle skidded into the grassy right-of-way and struck a 50 foot pole lying in the grass. *Nicks v. Teche Elec. Co-op. Inc.*, 640 So.2d 723, 724-725 (La.App.1994). The defendant utility company was engaged in replacement of the poles along the road and left the pole on the grass overnight. *Id.* at 725. The Louisiana Court of Appeals addressed the liability of the utility company as follows:

The court's imposition of a duty upon Teche to keep its equipment outside the ‘clear recovery area’ was also not error. Persons and private entities using the area alongside the highway have a duty to not create obstructions or perilous conditions for motorists who inadvertently or by reason of necessity stray from the traveled portion of the highway. The court's use of the ‘clear recovery area’ concept in defining the duty owed reflects that concept's use in AASHTO guidelines adopted by the state and federal governments. Considering the particular circumstances of this case, the imposition of such a duty upon a utility company is not unreasonably burdensome. Finally, we agree with the learned trial judge that the risk of harm encountered by plaintiffs was within the scope of the duty breached by Teche.
Id. at 726.

Another Louisiana Court of Appeals case recognized circumstances may change which would require a utility company to relocate a previously placed pole:

While Bell may have initially had the right to place its utility pole in the right-of-way with the placement being perfectly reasonable, subsequent accidents involving the pole may have placed Bell on notice that the location of its pole

combined with the curve in the street presented an unreasonable risk of harm to motorists. There is a point, which we do not specify, where the utility company may not blindly rely on its right-of-way and fail to act to correct known unreasonable hazards that are presented by its property.

Duplissey v. City of Bastrop, 561 So.2d 796, 798-799 (La.App.1990).

The Supreme Court of Mississippi considered a case involving an accident with a utility pole wherein a statute existed giving a utility company the right to place poles in the public right-of-way. *Mississippi Power & Light Co. v. Lumpkin*, 725 So.2d 721 (Miss.1998). The Mississippi Supreme Court framed the issue as follows: “Here we consider the question whether a utility company may be liable for injuries suffered by a passenger where a negligent driver strikes one of its poles in a public right-of-way, off the traveled portion of a highway.” *Id.* at 722.

The Mississippi statute in question permitted electric companies to place poles along the public highways with certain conditions. Those conditions were: “(1) the NESC [National Electric Safety Code] requirements are met; (2) there is no resulting danger to persons or property; (3) there is no interference with the common use of roads, streets and water; (4) there is no interference with the use of wires by other wire-using companies; and, (5) the construction does not unnecessarily inconvenience any landowner.” *Id.* at 727. After consideration of the statute, the facts of the case and persuasive law from other states², the Supreme Court of Mississippi held:

Today we adopt a standard which requires those who place structures in rights-of-way pursuant to the statute to exercise reasonable care under the circumstances for the safety of those making common use of the right-of-way. It shall not be a bar to liability that contact with the structure occurs only after the driver, through misfortune or ordinary negligence, has left the main traveled portion of the right of way. In determining whether the placement of a pole may be considered

² The Supreme Court of Mississippi noted the following states permitted recovery if the placement of a utility pole created an unreasonable risk of harm: Georgia, Minnesota, Pennsylvania, Michigan, New Hampshire and Louisiana. *Id.* at 728.

unreasonably dangerous such that liability may follow, the trial court should consider such factors as the structure's proximity to the roadway, the configuration of the roadway, whether the utility had notice of previous accidents of sufficient similarity to give reasonable notice of the danger, and whether there are feasible alternative locations for the structure which are less dangerous. *Id.* at 730.

Despite the growing recognition of the danger posed to the traveling public by poles in the clear zone of the right-of-way, Defendants-Appellants and other utility companies have sought in various cases to shed themselves of the duty not to create an unreasonable risk of harm or to have a government entity pay for removing the unreasonable risk of harm. These positions are not supported by statutes, case law or public policy.

Turner recognizes immunity for negligence if any necessary permission exists for the placement of the utility pole. *Turner* also recognizes utility companies do not have unfettered discretion with respect to the placement of the poles. Defendants-Appellants may have had permission to place the poles on Savage Road pursuant to R.C. 4931.03; however, that permission was no longer valid when the widening of Savage Road occurred and the plans not to relocate the poles were not approved. At that point in time, Defendants-Appellants accepted the consequences of creating an unreasonable risk of harm and are liable to Plaintiffs-Appellees for the damages suffered as a result of that unreasonable risk of harm.

OAJ'S PROPOSITION OF LAW NO. 2: USE OF A PUBLIC RIGHT-OF-WAY BY UTILITY COMPANIES IS SUBORDINATE TO THE POLICE POWER OF THE GOVERNMENTAL ENTITY WHICH OWNS THE RIGHT-OF-WAY. UTILITY COMPANIES MUST COMPLY WITH THE REQUESTS OF THE OWNER OF THE RIGHT-OF-WAY AND ARE RESPONSIBLE FOR PAYING THE COSTS OF THE COMPLIANCE.

Defendants-Appellants and their Amicus are surreptitiously attempting to shift the cost of relocating poles in the right-of-way to the governmental entity responsible for the right-of-way. Hypothetically, Bainbridge Township Trustees could have passed a resolution requiring

Defendants-Appellants to relocate the eight poles. Defendants-Appellants could have refused relying on *Turner* and claimed the poles were not obstructions and did not interfere with the highway. (See *Toledo Edison Co. v. Bd. of Defiance County Comm'rs*, 2013-Ohio-5374, 4 N.E.3d 458, at ¶ 3) The Defendants-Appellants would appeal the resolution to the Court of Common Pleas and higher courts if they were not successful. Another scenario that could occur is that Defendants-Appellants would move the poles then seek to be reimbursed from Bainbridge Township. (See *City of Perrysburg v. Toledo Edison Co.*, 171 Ohio App. 3d 174, 2007-Ohio-1327, 870 N.E.2d 189, at ¶ 2.)

Unfortunately, it appears the decision in *Turner* is viewed by Defendants-Appellants as an opportunity to achieve cost-savings by increasing the potential costs to the governmental entity requiring relocation through increased litigation costs. In *Bidar*, the Eighth District considered a letter from First Energy Corporation³:

And another internal First Energy memo recognized that there is a difference between the right to use and the location of the use, stating:

By tradition and practice highway and utility facilities frequently coexist within a common, public right-of-way. Consent for utility use of public right-of-way is presumed in the Ohio Revised Code, however neither a compensable interest in the land nor franchise rights are conferred to utilities through their use of the public way. Ohio Revised Code also provides the means for the agencies having jurisdiction over a roadway to have utility facilities constituting obstructions or interference removed and the cost of removal assessed to the facility owner.* * *

I believe there to be no disagreement over Company responsibility for utility relocations necessitated by improvements made to the public way for public benefit. * * *

³ This case was in a different procedural posture than the present case. First Energy Corporation was still a party to the lawsuit when the final appealable order was entered.

[I]f utility facilities can be relocated to meet the clear-zone guidelines as one safety improvement in conjunction with other roadway improvements[,] that is the expectation.
Bidar, 2012-Ohio-3686, ¶ 23.

Defendants-Appellants were aware of their obligations with respect to the right-of-way.

Amicus Curiae AT&T also seeks to alter long-standing law. AT&T is affiliated with AT&T Corp. which was a plaintiff in a case in the Northern District of Ohio wherein the City of Toledo was named as a defendant. (*See AT&T Corp. v. City of Toledo*, 351 F. Supp.2d 744 (2005)). In 2001, the City of Toledo granted AT&T Corp. a permanent easement to maintain a telecommunications cable within a strip of city-owned property. *Id.* at 746. Toledo notified AT&T it wanted to make alterations on easement to relocate a street, create a street and place waterlines and drainage. *Id.* AT&T was required to relocate its cable to a lower depth and incurred significant expense. AT&T filed a lawsuit against the city alleging breach of easement, entitlement to compensation under the state and federal takings clauses and entitlement to relocation assistance or compensation under various statutes and ordinances. *Id.* The City of Toledo filed a 12(b)(6) Motion to Dismiss for failure to state a claim upon which relief can be granted. *Id.* at 746-747.

The District Court dismissed the breach of easement claim setting forth the applicable law as follows:

AT&T's breach of easement claim fails because the easement granted to AT&T by Toledo is implicitly subject to Toledo's continuing duty and right under the police power to engage in the types of construction activities at issue for the preservation of the public health and safety, requiring Plaintiff to relocate its telecommunications cable at its own expense. See *New Orleans Gas Light Co. v. Drainage Comm'n of New Orleans*, 197 U.S. 453, 460-62, 25 S. Ct. 471, 473-74, 49 L. Ed. 831, 834-35 (1905); *Ganz v. Ohio Postal Tel. Cable Co.*, 140 F. 692, 694-96 (6th Cir. 1905); *Gas Light & Coke Co. v. Columbus*, 50 Ohio St. 65, 33 N.E. 292, 293-94 (Ohio 1893).
Id. at 747.

The District Court proceeded to analyze the long-standing law establishing that "the police power, in so far as its exercise is essential to the health of the community, it has been held cannot be contracted away.' *New Orleans*, 197 U.S. at 460, 25 S. Ct. at 473, 49 L. Ed. at 835.'" *Id.* The Court noted the Sixth Circuit held the Board of County Commissioners did not have power "to determine for all time just how a highway shall be used. The use may be changed as the new conditions demand.'" (quoting *Ganz v. Ohio Postal Tel. Cable Co.*, 140 F. 692, 694-96 (6th Cir. 1905).) *Id.* Further, the District Court cited *Gas Light & Coke Co.* for the proposition "the city reserves the full and unconditional power to make any reasonable change of grade, or other improvement, in its streets.'" *Id.* The takings argument was also rejected by the District Court which again relied upon the inviolability of the police power to establish regulations reasonably necessary for the safety and welfare of its people which could not be bargained or given away. *Id.* at 748. The argument requesting financial assistance was also rejected. (*Id.* at 749.)

As this long line of cases demonstrates, two principles had emerged by the end of the twentieth century with respect to utilities' use of the public right-of-way. *Stokes*, 45 Val. U. L. Rev. at 463. First, the right was subordinate to the governmental entity's right to order the utility to relocate its facilities. *Id.* at 463-464. Second, the utility had to pay the costs of relocation. *Id.* at 464.

To hold otherwise would 'embarrass or clog' public control of the roads and hamper the government's ability to respond to future public needs by making change too costly. And this result was a fair one, because by using the public right-of-way the utility company saved the time and money it would otherwise have spent acquiring easements for its lines. The utility company took the risk of locating its lines in the streets; therefore, it must also bear the cost of moving them when the government required it. *Id.* at 464 (footnote omitted).

Requiring a government to pay for the cost of relocation is unworkable for a number of reasons: 1) Street improvements would become too expensive; 2) Response to changed conditions is required of governments; and, 3) Courts would prohibit any attempt by a government to define the use of the right-of-way for all time. *Id.* at 478.

Defendants-Appellants benefited from the use of the right-of-way in Bainbridge Township for over a half of a century at no cost to them for the use. Established precedent and public policy dictate that Defendants-Appellants relocate the poles at their own cost when requested by the township and county. Instead of acknowledging the substantial benefit conferred and the reciprocal obligations, Defendants-Appellants and other utility companies persist in attempting to shift their financial burden to the government, and ultimately the taxpayers.

R.C. 4931.03 does not evidence an intent to abrogate the common law rule requiring utility companies to be responsive to requests from the owner of the right-of-way and responsible for payment for compliance with the requests. ("Statutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment, and in giving construction to a statute the legislature will not be presumed or held, to have intended a repeal of the settled rules of the common law unless the language employed by it clearly expresses or imports such intention." *State ex rel. Morris v. Sullivan*, 81 Ohio St. 79, 90 N.E. 146 (1909), paragraph three of the syllabus.) Defendants-Appellants were neither responsive nor did they want to be responsible. Defendants-Appellants believe they have unfettered discretion to do whatever they decide without consequences. In the present case, the consequences were the loss of immunity for negligence and the payment for the damages caused by their maintenance of a qualified nuisance.

CONCLUSION

Defendants-Appellants CEI and FESC ask this Court to grant them immunity despite the fact they created an unreasonable risk of harm and Plaintiffs-Appellees Douglas and Diane Link suffered injuries as a direct and proximate result of the breach of duty. The basis for Defendants-Appellants request rests upon the contention that their immunity remained unless some resolution was passed by the Bainbridge Township Trustees. This contention is not supported by R.C. 4931.03 nor is it supported by *Turner*.

R.C. 4931.03(B)(2) provides construction is subject to “any applicable law, including, but not limited to. . . .” The provision does not state that a pole may remain in place until a Township Board of Trustees passes a resolution requiring the removal of the pole.

Defendants-Appellants argument that the Eighth District Court of Appeals created uncertainty is not valid. The facts in this case clearly demonstrate a reconstruction of the road; notification of the necessity of moving the poles; moving some of the poles; being advised that the eight poles still needed to be moved; an accident involving one of the poles; and, another request the poles be moved. The decision of the court below does not require utility companies to traverse 41,000 miles of roadways looking under rocks for permission slips signed by township trustees; rather, the decision requires utility companies to be responsive and responsible.

For the foregoing reasons, *Amicus Curiae* Ohio Association for Justice respectfully requests this Court affirm the decision of the Eight District Court of Appeals.

Respectfully submitted,


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was sent by ordinary U.S. Mail, postage prepaid, on the 25th day of November, 2015 to the following Counsel of Record:

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