

**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**

**REPLY IN SUPPORT OF MERIT BRIEF OF APPELLANTS THE CLEVELAND
ELECTRIC ILLUMINATING COMPANY AND FIRSTENERGY SERVICE COMPANY**

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*

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
ARGUMENT.....	2
I. CEI Met the Requirements of <i>Turner</i> and its Limitation of Liability Protects CEI.....	2
A. Section 4931.03 granted CEI permission to install the Pole in 1952.....	2
B. No other applicable law existed to limit or revoke the permission granted to CEI to install the Pole.....	3
1. Appellees and their <i>amici</i> rely on statutes and other guidelines that are inapplicable to this case.....	3
2. The relevant governmental authorities did not exercise any legislative authority to force CEI to relocate the Pole or otherwise revoke CEI’s permission to maintain the Pole in its then-present location.....	9
3. CEI’s permission to maintain the Pole was not “automatically revoked” by the commencement of road construction on Savage Road.....	10
C. The Pole did not incommode or otherwise interfere with the usual and ordinary course of travel on Savage Road.....	10
D. Accepting Appellees’ arguments would deprive CEI of due process of law.....	11
II. Specific Points in Reply.....	12
A. Appellees repeatedly misstate the record below.....	12
B. CEI does not argue that it is entitled to “unfettered discretion” or “blanket immunity” under <i>Turner</i>	16
C. The Township’s reopening of Savage Road at the recommendation of the County Engineer fatally undercuts Appellees’ claim that CEI had an obligation to move the Pole.....	17
D. OAJ’s reliance on case law and statutes from other jurisdictions is misplaced.....	17
CONCLUSION.....	18
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases

<i>Jocek v. GTE North, Inc.</i> , 9th Dist. No. 17097, 1995 Ohio App. LEXIS 4343, at *13-14 (Sept. 27, 1995).....	4
<i>Leskovac v. Ohio Dept. of Transp.</i> , 71 Ohio App.3d 22, 593 N.E.2d 9 (Franklin Cty. 1990).....	4
<i>Neiderbrach v. Dayton Power & Light Co.</i> , 94 Ohio App.3d 334, 640 N.E.2d 891 (Montgomery Cty. 1994).....	4
<i>Toledo Edison Co. v. Bd. of Defiance Cty. Commrs.</i> , 2013-Ohio-5374, 4 N.E.3d 458 (3rd Dist.).....	9, 10, 11, 12
<i>Turner v. Ohio Bell Telephone Co.</i> , 118 Ohio St.3d 215, 2008-Ohio-2010, 887 N.E.2d 1158.....	passim

Statutes

Ohio Rev. Code § 4931.03.....	passim
Ohio Rev. Code § 5515.01.....	5
Ohio Rev. Code § 5535.01.....	5
Ohio Rev. Code § 5543.09.....	6
Ohio Rev. Code § 5547.03.....	6, 9, 11
Ohio Rev. Code § 5547.04.....	7, 9
Ohio Rev. Code § 5571.02.....	7
Ohio Rev. Code § 5571.05.....	8
Ohio Rev. Code § 5571.16.....	3
Ohio Rev. Code § 5573.01.....	8

INTRODUCTION

In 1952, CEI had permission by virtue of R.C. § 4931.03 to install the Pole that Mr. Link's motorcycle struck in 2010. This has never been disputed. Nothing during the intervening sixty years affected CEI's right to maintain the Pole where it was lawfully installed.¹ There existed no law, ordinance, or resolution with which CEI had to comply to place the Pole or to maintain it in its current location. This remains true today. The Pole had been maintained without incident for over sixty years on Savage Road, a Township road subject to the lawfully-enacted resolutions of the Bainbridge Township Board of Trustees ("Trustees"). Absent some additional legal permission requirements or evidence that the Pole incommoded the roadway, neither of which is present here, this Court's holding in *Turner v. Ohio Bell Telephone Co.*, 118 Ohio St.3d 215, 2008-Ohio-2010, 887 N.E.2d 1158, precludes CEI liability for the collision by Mr. Link's motorcycle and the Pole.

Appellees and their *amici curiae*, The County Commissioners Association of Ohio ("CCAO"), The Ohio Township Association ("OTA"), and Ohio Association for Justice ("OAJ") (together, the "*amici*"), rely on inapplicable provisions of the Revised Code, Ohio Department of Transportation ("ODOT") guidelines, and the Geauga County Highway Use Manual ("Highway Use Manual") that either do not apply to maintenance of poles alongside Township roads or require separate and additional governmental action to revoke prior permission. Indeed, no governmental entity -- including the Trustees, the Geauga County Commissioners, and the Geauga County Engineer -- ever enacted any law, passed any ordinance, or approved any resolution ordering CEI to relocate the Pole. The attempts made by individual members of those entities or the Geauga County Engineer to persuade CEI to relocate the Pole lacked the force of a

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

“law” with which CEI had to comply in accordance with R.C. § 4931.03(B)(2). Moreover, the Geauga County Engineer’s recommendation to the Trustees to reopen Savage Road with the Pole in its then-current location, which the Trustees followed, is compelling evidence that CEI was not under any legal obligation to relocate the Pole. Therefore, CEI did not lose the permission granted by R.C. § 4931.03 to install and maintain the Pole, and under *Turner*, Appellants could not, as a matter of law, be held liable for Mr. Link’s accident.

ARGUMENT

I. CEI Met the Requirements of *Turner* and its Limitation of Liability Protects CEI.

This Court held in *Turner* that, in addition to placing the pole such that it does not “interfere with the usual and ordinary course of travel[,]” a utility cannot be held liable as a matter of law if the utility “obtained ***any necessary permission to install the pole . . .***” ***when the pole was placed.*** (*Turner*, 118 Ohio St.3d 215, ¶ 21 (emphasis added)). Appellees and their *amici* offered nothing in their briefs to change the fact that: (1) CEI obtained “any necessary permission” by complying with all applicable laws in installing and maintaining the Pole; and (2) the Pole did not incommode the roadway. Therefore, *Turner* applies to bar liability.

A. Section 4931.03 granted CEI permission to install the Pole in 1952.

Appellees and their *amici* do not dispute that R.C. § 4931.03(A) itself granted permission to CEI to install the Pole alongside Savage Road in Bainbridge Township, one of Ohio’s many unincorporated townships. Instead, they argue that the permission afforded under that section of the Revised Code was somehow limited or revoked based on certain statutes and other guidelines that do not apply to the facts of this case. However, it is critical to note that there is no dispute that CEI had permission to install the Pole in 1952 in the location where Mr. Link struck it with his motorcycle.

B. No other applicable law existed to limit or revoke the permission granted to CEI to install the Pole.

Pursuant to the Revised Code, “[c]onstruction under [R.C. § 4931.03] is subject to R.C. § 5571.16² 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.” (R.C. § 4931.03(B)(2) (emphasis added)). There existed no “applicable law” which obligated CEI to relocate its pole, and the permission that CEI had to install the Pole in 1952 was not limited or revoked.

1. Appellees and their *amici* rely on statutes and other guidelines that are inapplicable to this case.

Appellees and their *amici* cite to various sections of the Revised Code, the Highway Use Manual, and ODOT regulations as supposed evidence of “laws” with which CEI failed to comply in maintaining the Pole. (*See generally* Appellees’ Merit Brief; OAJ’s *amicus* Brief; CCAO’s and OTA’s *amicus* Brief). As summarized in the following chart, these provisions either do not apply to maintenance of utility poles on Township roads, do not authorize the revocation of permission to place utility poles without further legislative action, or are not “laws” with which CEI was obligated to comply.

² R.C. 5571.16 provides that, when a person seeks to excavate near a township highway, the township board of trustees may pass a resolution to require that person to obtain a permit prior excavation. Nothing in this section of the Revised Code prevents a township from passing a resolution ordering a utility to move its equipment, which the Township Trustees could have done, but never did, with respect to the Pole.

Rule/Statute/ Guideline	Location of Argument by Appellees or <i>amici curiae</i>	Reasons Inapplicable to CEI's Maintenance of the Pole
CEI's Internal Design Guidelines	Appellees' Merit Brief at 7-8	• Internal company guidelines, which themselves rely on ODOT regulations, are not legally binding on the company, but instead operate to provide general design benchmarks for CEI. • CEI's internal design guidelines only applied to new road construction, not road improvements such as the work performed on Savage Road. (Tr. at 277-278).
ODOT Regulations	Appellees' Merit Brief at 9, 30-31	• Applicability of ODOT regulations are limited to state highways, not Township roads. (<i>See Leskovac v. Ohio Dept. of Transp.</i>, 71 Ohio App.3d 22, 27, 593 N.E.2d 9 (Franklin Cty. 1990)). • ODOT regulations are not mandatory to a utility. (<i>See Neiderbrach v. Dayton Power & Light Co.</i>, 94 Ohio App.3d 334, 343, 640 N.E.2d 891 (Montgomery Cty. 1994); <i>Jocek v. GTE North, Inc.</i>, 9th Dist. No. 17097, 1995 Ohio App. LEXIS 4343, at *13-14 (Sept. 27, 1995)).

Rule/Statute/ Guideline	Location of Argument by Appellees or <i>amici curiae</i>	Reasons Inapplicable to CEI's Maintenance of the Pole
Geauga County Highway Use Manual	Appellees' Merit Brief at 8-9, 29- 31	• The provisions of the Highway Use Manual were not intended to be retroactive and did not “supersede” prior permissions to install. (Appellees’ Appx. at 21). • The Highway Use Manual is not mandatory, and instead provides “guidelines” for utility pole placement that were intended to be “modified as conditions dictate.” (Appellees’ Appx. at 21). • The Highway Use Manual applies to county roads under Chapter 5547 of the Revised Code (<i>id.</i>), which are distinct from Township roads. (R.C. § 5535.01). In fact, the County Engineer at the time of the road reconstruction project, Robert Phillips, testified that the County could not force CEI to relocate the Pole because Savage Road is not a county road. (Tr. at 553).
R.C. § 5515.01	Appellees' Merit Brief at 30 OAJ's <i>amicus</i> Brief at 12-13	• As OAJ recognizes, this section of the Revised Code grants authority to ODOT to regulate <i>state highways</i>, not Township roads such as Savage Road. (OAJ's <i>amicus</i> Brief at 12).

Rule/Statute/ Guideline	Location of Argument by Appellees or <i>amici curiae</i>	Reasons Inapplicable to CEI's Maintenance of the Pole
R.C. § 5543.09(A)	Appellees' Merit Brief at 19 CCAO/OTA's <i>amicus</i> Brief at 1, 5-7 OAJ's <i>amicus</i> Brief at 4	• This section of the Revised Code authorizes the County Engineer to “supervise the construction, reconstruction, resurfacing and improvement of public roads by boards of township trustees.” (R.C. § 5543.09(A)). The statute does not extend the County Engineer’s supervisory authority to permitting or disallowing the locations of previously-installed utility assets in the right-of-way of roads.
R.C. § 5547.03	CCAO/OTA's <i>amicus</i> Brief at 1, 5-7	• As Appellees acknowledged in their Merit Brief, this section of the Revised Code is limited to county roads, not Township roads such as Savage Road. (Appellees’ Merit Brief at 26). • Moreover, this section provides authority to a board of county commissioners to remove only a pole that is an obstruction to a roadway, which the Pole was not and which authority the Geauga County Commissioners did not seek to exercise here.

Rule/Statute/ Guideline	Location of Argument by Appellees or <i>amici curiae</i>	Reasons Inapplicable to CEI's Maintenance of the Pole
R.C. § 5547.04	CCAO/OTA's <i>amicus</i> Brief at 1, 5-7 OAJ's <i>amicus</i> Brief at 13	As OAJ acknowledged in its <i>amicus</i> Brief, this section of the Revised Code speaks to removal of obstructions by landowners on county highways, not Township roads such as Savage Road. (OAJ's <i>amicus</i> Brief at 13). There is no evidence that CEI ever owned the land on which the Pole was located.
R.C. § 5571.02(C)	Appellees' Merit Brief at 25	This section of the Revised Code merely grants authority to the board of township trustees to appoint a "township highway superintendent" to "have charge of maintenance and repair of roads within the township." (R.C. § 5571.02(C)). The statute does not give a township highway superintendent the authority to permit or disallow the locations of previously-installed utility assets in the right-of-way of roads. Even if such authority existed under the Revised Code, the township highway superintendent appointed to the Savage Road project, Walter Rudyk, testified at trial that he did not instruct CEI to relocate the Pole. (Tr. at 487).

Rule/Statute/ Guideline	Location of Argument by Appellees or <i>amici curiae</i>	Reasons Inapplicable to CEI's Maintenance of the Pole
R.C. § 5571.05	Appellees' Merit Brief at 19, 25 CCAO/OTA's <i>amicus</i> Brief at 1, 5-7 OAJ's <i>amicus</i> Brief at 4	• This section of the Revised Code relates only to “maintenance and repair of roads,” not road reconstruction improvements like the Savage Road project. (R.C. § 5571.05; Appellees' Appx. at 1). • More importantly, this section states that the County Engineer has authority to “supervis[e] and direct[.]” the Township Trustees and the township highway superintendent, not utilities with equipment in the right-of-way. (R.C. § 5571.05).
R.C. § 5573.01	OAJ's <i>amicus</i> Brief at 3, 12	• This section of the Revised Code merely grants authority to a board of township trustees to decide whether to order a county engineer to act to make his or her own plans for a road construction project. (R.C. § 5573.01). The statute does not give the County Engineer authority to permit or disallow the locations of previously-installed utility assets in the right-of-way of roads. The Trustees' resolution approving the Savage Road project similarly does not, and cannot, grant this authority to the Geauga County Engineer. (Appellees' Appx. at 1).

None of the purported legal “requirements” to which Appellees and their *amici* cite required CEI to relocate the Pole; indeed, none of them is relevant to this matter at all. Absent some “applicable law” with which CEI failed to comply, the permission to install the Pole granted by R.C. § 4931.03(A) was not limited or revoked.

2. The relevant governmental authorities did not exercise any legislative authority to force CEI to relocate the Pole or otherwise revoke CEI’s permission to maintain the Pole in its then-present location.

Each party cites *Toledo Edison Co. v. Bd. of Defiance Cty. Commrs.*, 2013-Ohio-5374, 4 N.E.3d 458 (3rd Dist), as support in their respective Briefs, (Appellees’ Merit Brief at 15; OAJ’s *amicus* Brief at 5, 19; CCAO/OTA’s *amicus* Brief at 7), but *Toledo Edison* perfectly demonstrates the legislative action that can be taken in order to force a utility to move a pole. Indeed, in *Toledo Edison*, the Defiance County Commissioners informally requested that the utility move certain poles that it deemed unsafe, but the utility refused. (*Toledo Edison*, at ¶ 3). In response, the Defiance County Commissioners held a formal hearing pursuant to R.C. § 5547.03 and 5547.04 to determine whether it would obligate the utility to relocate the poles in question. (*Id.* at ¶ 4). At that hearing, the utility was given an opportunity to be heard. (*Id.* at ¶ 5). In addition, the Defiance County Engineer testified and offered his input to the Commissioners on whether the poles should be moved. (*Id.*) Ultimately, the Commissioners determined that the poles were obstructions under R.C. § 5547.03, and they enacted a formal resolution ordering the utility to relocate the poles. (*Id.* at ¶ 7).

Appellees and their *amici* point to no such exercise of legislative authority by the Trustees or the Geauga County Board of Commissioners that directed CEI to relocate the Pole. Appellees assert that the Trustees passed a resolution on June 23, 2008 relating to the reconstruction of Savage Road “approving the County Engineer’s road reconstruction plan.” (Appellees’ Merit Brief at 1). Appellees twist the chronology by arguing that the Trustees

approved the relocation of all of CEI's poles pursuant to CEI's first set of plans. (Appellees' Brief at 8, 15-16; Ex. 11). Importantly, the Trustees could not have "approved" CEI's plans through their June 23, 2008 resolution because the plans, which were dated October 14, 2008 (Ex. 11), did not yet exist.

Neither legislative entity took any official action beyond the single Trustees' informal request that was the first step of the process described in *Toledo Edison*. However, mere "requests" to move the Pole do not carry the force of law, and they did not obligate the utility under R.C. § 4931.03(B)(2).

3. CEI's permission to maintain the Pole was not "automatically revoked" by the commencement of road construction on Savage Road.

OAJ argues in its *amicus* Brief that CEI's permission to install the Pole pursuant to R.C. § 4931.03 somehow evaporated solely because the improvement project was initiated on Savage Road. (OAJ's *amicus* Brief at 18). Not only is OAJ's position entirely without any legal support, but its argument that the commencement of a construction project automatically removes any existing permission to maintain a pole makes no sense. Under OAJ's argument, a road construction project that resulted in a pole being *farther* from the roadway would also dissolve permission for the pole to remain in place. This would be the case even though the pole's prior location to the road was permissible. Ultimately, in this scenario, it would force both the utility and the relevant legislative bodies to undertake a review of a pole that had effectively already been moved further from the road.

C. The Pole did not incommode or otherwise interfere with the usual and ordinary course of travel on Savage Road.

The Eighth District Court of Appeals did not hold below, and Appellees and their *amici* do not argue here, that the Pole incommoded or otherwise interfered with the roadway. As such,

in addition to permission, the second part of the *Turner* test is also met, and CEI is entitled to protection from liability. (*Turner*, 118 Ohio St.3d 215, ¶ 21).

Appellees, CCAO, and OTA argue that pursuant to *Toledo Edison*, CEI could be forced to remove a pole that is found to be an “obstruction” pursuant to R.C. § 5547.03. (Appellees’ Merit Brief at 27; CCAO/OTA *amicus* Brief at 6-7). Critically, this determination was never made by the Geauga County Board of Commissioners as it had been in *Toledo Edison*, which occurred in the context of a public hearing and legally enacted resolution. (*Toledo Edison*, 2013-Ohio-5374 at ¶ 7). Nor should such a determination have been made, given that the Pole was several feet farther from the roadway than was the pole in *Turner*.

D. Accepting Appellees’ arguments would deprive CEI of due process of law.

If the arguments of Appellees and their *amici* were accepted, utilities would presumably be required to relocate equipment based on nothing more than an oral expression of concern or discomfort from a government employee, leaving utilities without a legal mechanism to protect their property rights in the face of pseudo-legislative action. In *Toledo Edison*, the Defiance County Board of Commissioners’ held a public hearing, allowing all interested parties and the public to be heard before concluding that poles were an obstruction pursuant to R.C. § 5547.03. Following the hearing, the Board passed a resolution ordering the utility to move the poles. This course of events followed the legislative process and offered the utility an opportunity to participate in the public hearing, present evidence of why its poles were not an obstruction, and challenge the resolution in court. But none of those opportunities arose or were needed by CEI here because the Trustees, Geauga County Board of Commissioners, and Geauga County Engineer did not take legal action to require CEI to move the Pole.

Appellees and OAJ express concern in their Briefs that requiring the Township Trustees to pass a resolution would ultimately lead to more litigation as it did in *Toledo Edison*, and that townships should not be required to take legislative action to force utilities to relocate poles. (Appellees’ Merit Brief at 15; OAJ’s *amicus* Brief at 5). However, the process in *Toledo Edison* worked as it should, it is the law, and it afforded the utility due process. It is a fact of life in a Constitutional society that when persons are given rights under the law, and those rights are infringed by the government, lawsuits may result. To deprive a party of due process simply because the process might be challenged by the aggrieved party is counter to our system of rights and jurisprudence. Moreover, requiring the use of the proper legislative process may also decrease the possibility of litigation because it will encourage certainty in its results.

II. Specific Points In Reply.

A. Appellees repeatedly misstate the record below.

In addition to being incorrect on the law, Appellees’ Merit Brief is filled with material misstatements of the evidence admitted (or not admitted):

Appellees’ Misstatements	Location of Misstatement by Appellees or <i>amici curiae</i>	Evidence in the Record Contradicting Appellees’ Misstatements
Appellees allege that CEI would have had to pay a “nominal amount” to move the eight poles that did not conflict with the road.	Appellees’ Merit Brief at 3	Appellees cite to no record evidence to support this statement.

Appellees' Misstatements	Location of Misstatement by Appellees or <i>amici curiae</i>	Evidence in the Record Contradicting Appellees' Misstatements
Appellees state without any citation to the record below that the Geauga County Engineer's Office "approved" the plans that CEI developed in October 2008.	Appellees' Merit Brief at 2, 16 OAJ's <i>amicus</i> Brief at 3	Robert Phillips, the Geauga County Engineer in 2008, testified at trial that he did not communicate any approval to CEI at the time. (Tr. at 538). Moreover, Mr. Phillips considered the October 2008 plans that CEI submitted to the Geauga County Engineer's Office to be "preliminary." (Tr. at 552-53).
Appellees argue that CEI's decision not to relocate the remaining eight poles was "due to its failure to appropriately budget for it," and that the decision was "strictly a financial decision."	Appellees' Merit Brief at 2-3, 7	Joseph Cattell, the current Geauga County Engineer, testified at trial that he was told by CEI's representatives that the decision was also made because the poles "were not in conflict with the construction." (Tr. at 512). Art Stitt, a representative of CEI who drafted the original and revised plans, confirmed that the revised plans left eight poles in place because they were not in conflict with the road, not because of any financial reason. (Tr. at 283).

Appellees' Misstatements	Location of Misstatement by Appellees or <i>amici curiae</i>	Evidence in the Record Contradicting Appellees' Misstatements
The Bainbridge Township highway superintendent "demanded" that CEI move its eight poles.	Appellees' Merit Brief at 4, 20, 25	At trial, the Township highway superintendent, Walter Rudyk, testified only that he told CEI that the township had "concerns" over the location of the poles, not that he or the Township was instructing or even asking the company to relocate the poles. (Tr. at 487).
Appellees' quote a document introduced into evidence at trial as Exhibit 10 for the proposition that CEI agreed to relocate the Pole prior to submitting its plans to the Geauga County Engineer.	Appellees' Merit Brief at 16	Exhibit 10 reflects CEI's acknowledgement in September 2008, before it submitted any plans relating to relocation of poles on Savage Road, that it had some equipment in conflict that it was required to move. (Ex. 10). In fact, the evidence introduced at trial made clear that CEI did relocate those poles that it was required to move because they were in conflict and that CEI decided not to relocate the poles that were not in conflict. (Tr. at 282-83).

Appellees' Misstatements	Location of Misstatement by Appellees or <i>amici curiae</i>	Evidence in the Record Contradicting Appellees' Misstatements
Appellees claim that a letter sent by a single member of the Board of Trustees without any sort of legislative action is the same as a formal resolution of the Trustees.	Appellees' Merit Brief at 4	This statement has no legal support, defies common sense, and should not be afforded any weight.
Appellees misrepresent that CEI's eventual decision to relocate the Pole was the direct result of an investigation conducted by the Geauga County Prosecutor's office. Even more outlandish, they further allege that CEI committed assault and felonious assault.	Appellees' Merit Brief at 13, 31	Not only are these allegations entirely unsupported by any evidence in the record (in fact, CEI's decision to move the Pole came long after the conclusion of the trial, so the relocation of the Pole was not in the record at all), but they are categorically false. Appellees' counsel's utterance of these allegations, which he himself acknowledges are "upon information and belief," (Appellees' Merit Brief at 13), is not only unprofessional but also without place in any court filing, let alone in an appeal to the Ohio Supreme Court.

Appellees' Misstatements	Location of Misstatement by Appellees or <i>amici curiae</i>	Evidence in the Record Contradicting Appellees' Misstatements
Appellees cite to a letter dated June 24, 2010 that was introduced as Exhibit 4 at the trial which references a separate accident on Savage Road involving a different pole.	Appellees' Merit Brief at 4-5	The Trial Court held that a reference in this letter to another accident on Savage Road involving a different pole than the one at issue in this case had to be redacted, and a redacted version of the letter was introduced into evidence. However, despite the fact that the full text of the letter was not presented to the jury during the trial, Appellees decided to reprint the letter in their Merit Brief, unredacted.

B. CEI does not argue that it is entitled to “unfettered discretion” or “blanket immunity” under *Turner*.

Appellees and their *amici* mischaracterize CEI's position as an assertion that it is entitled to “unfettered discretion” or “*carte blanche* authority” in the maintenance of its poles, “blanket immunity” for that pole placement under *Turner*, and the ability to “place and maintain utility poles anywhere it pleases” pursuant to R.C. § 4931.03. (Appellees' Merit Brief at 14-15, 24, 28; OAJ's *amicus* Brief at 7, 12; CCAO/OTA's *amicus* Brief at 4).

In fact, these statements are incorrect, and Appellants have never taken these positions at any time in this case. Appellants acknowledge that the permission granted by R.C. § 4931.03 to utilities to install poles alongside roads in unincorporated townships is subject to: (1) the

requirement to install poles such that they do not incommode the public in its use of the road (R.C. § 4931.03(A)(1)); and (2) “any applicable *law*” otherwise requiring the utility to seek approval from a governmental entity. (R.C. § 4931.03(B)(2) (emphasis added). In other words, CEI does not argue that its authority or discretion to place poles in unincorporated townships is unlimited, but only that it is entitled to immunity from liability here under *Turner* because the Pole did not incommode the road, and no other law required CEI to move it.

C. The Township’s reopening of Savage Road at the recommendation of the County Engineer fatally undercuts Appellees’ claim that CEI had an obligation to move the Pole.

In June 2009, after Savage Road had been closed for several months due to the improvement project, the Trustees concluded that the work was complete and reopened the road to the public. (Tr. at 422, 559-560). The decision was not made by the Geauga County Board of Commissioners or CEI (Tr. at 477, 560), but by the Trustees only after it received a recommendation from the Geauga County Engineer to reopen the road. (Tr. at 580). The decision to reopen Savage Road was made after CEI informed the Trustees that it was not required to move the Pole. (Tr. at 555). At that time, the Geauga County Engineer notified a representative from CEI that the “contractor is finished [with the project] and the Township will be paying final invoice[.]” (Tr. at 554). Thus, the Trustees’ decision to reopen Savage Road without taking legislative action requiring that the Pole be moved belies Appellees’ claims that CEI was obligated to move the Pole.

D. OAJ’s reliance on case law and statutes from other jurisdictions is misplaced.

OAJ’s *amicus* Brief attempts to draw comparisons to the statutes and case law from other states in order to persuade the Court that *Turner* does not offer Appellants immunity under the facts of this case. (OAJ’s *amicus* Brief at 13-18). However, none of these statutes or case law is on point because of this Court’s language in *Turner* and the statutory permission granted by R.C.

§ 4931.03. Because the outcome of this appeal depends on the unique language of the Revised Code and *Turner*, OAJ's extraneous citations are inapposite.

CONCLUSION

This Court's holding in *Turner* establishes that Appellants are entitled to protection from liability to Appellees because CEI complied with all applicable laws in placing and maintaining the Pole and the Pole did not interfere with the lawful travel on Savage Road. Therefore, as it did in *Turner*, this Court should reverse the Eighth District Court of Appeals' decision, hold instead that the permission granted in R.C. § 4931.03 satisfied the *Turner* test such that Appellants are not liable to the Links as a matter of law, and enter final judgment for Appellants.

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, *Reply in Support of Merit Brief of Appellants The Cleveland Electric Illuminating Company and FirstEnergy Service Company*, was served via first class United States Mail, postage prepaid, on this 14th day of December 2015, upon the following:

Joseph J. Triscaro, Esq.
DeMarco & Triscaro, Ltd.
30505 Bainbridge Road, Suite 110
Solon, Ohio 44139

Attorney for Appellees, Douglas V. Link and Diane Link

Edward L. Bettendorf, Esq.
45 Erieview Plaza, Suite 1400
Cleveland, Ohio 44114

Attorney for Amicus Curiae, AT&T

Melissa R. Lipchak, Esq.
7658 Slate Ridge Boulevard
Reynoldsburg, Ohio 43068

Attorney for Amicus Curiae, Ohio Association of Justice

Frank J. Reed, Esq.
Frost Brown Todd LLC
One Columbus, Suite 2300
10 West Broad Street
Columbus, Ohio 43215

Alexander L. Ewing, Esq.
Frost Brown Todd LLC
9277 Centre Point Drive, Suite 300
West Chester, Ohio 45069

*Attorneys for Amicus Curiae, Ohio Township Association and
County Commissioners Association*

/s/ Thomas I. Michals

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