County Commissioner Association and County Engineer Association of Ohio Winter Conference

The Law on Utility Relocation During a Road Widening Project

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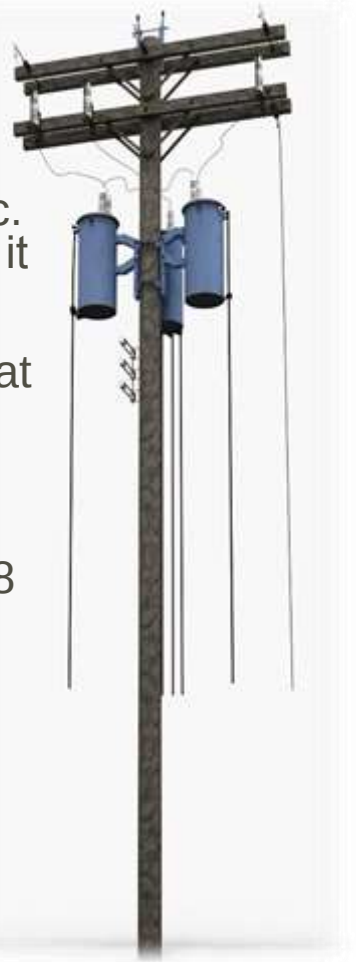
Frank J. Reed, Jr.
Partner
Environmental and Government Services Practice Group

Tuesday, December 6, 2016
9:15 a.m. to 10:00 a.m.
Greater Ohio Convention Center

Facts

- In 2006, Bainbridge Township decided to widen Savage Road, a portion of which is located in the unincorporated part of Bainbridge Township, Geauga County, Ohio.
- October 30, 2008, Cleveland Electric Illuminating Company, Inc. ("CEI") submitted Engineering Plans and utility announced that it would remove all 48 poles.
- March 2, 2009, CEI submitted revised plans and announced that they moved 40 poles, and proposed to allow the remaining 8 poles to stay in place.
- March 26, 2009, [24 days later] Geauga County Engineer, Robert Phillips, wrote a letter to CEI stating that the remaining 8 poles must be moved.
  - On March 2, 2009, we received a revised set of plans that does not address the "clear zone" of the highway. I would think this is a liability First Energy does not want to absorb and I know this is a liability the township will not allow to exist on a public road.
  - As project manager for the township road reconstruction project, I am requesting your review of this project with the hope that you will agree that it is in the best interest of everyone that First Energy completes the October 2008 plan in a timely fashion and provide a safe, clear zone for the roadway.



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Facts

- May 23, 2010. David Bidar was hurt when his car left the road and collided with one of the 8 utility poles which was not moved.
- *Bidar v. Cleveland Electric Illuminating Company* (August 16, 2012), Eighth District Court of Appeals, Case No. 97490, 2012-Ohio-3686.
  - Deer darted into the roadway. Mr. Bidar swerved to avoid hitting the deer, and struck a CEI utility pole. Mr. Bidar sued the utility company for his injuries. The trial court held that the utility company was authorized to place to the pole in this location, pursuant to R.C. 4931.03(A). Mr. Bidar appealed, arguing that the utility company did not ever obtain specific permission from any governmental agency to place the pole. The Court of Appeals reversed, holding that there was a "genuine issue of material fact as to whether the pole placement interfered with the usual and customary course of travel." *Id*. at paragraph 25. As such, the case was remanded to the trial court.
  - There was a Dissent filed by Judge Colleen Conway Cooney that would have ruled for the utility company on the basis that R.C. 4921.02 gave permission for the pole, by statute.

Facts

- September 13, 2010. Cleveland Electric Illuminating Company wrote a letter stating that the company will not move the remaining 8 poles. Lorna Wisham, Director, External Affairs, First Energy.
  - [U]pon further review by our engineering department last year, the Illuminating Company decided not to relocate the remaining eight poles because there was no conflict or interference with the project. Any subsequent relocation of poles would be for "clear zone." The company does not relocate poles for clear zone, except at the customer's expense.
  - I am aware that an automobile recently left the roadway and made contact with one of our poles. The driver was cited for failure to control, but thankfully was not seriously injured. In light of your correspondence, I reviewed your request with our legal department and this does not change our conclusion. We will not relocate the poles for clear zone.

Facts

- October 8, 2010, [25 days later] Mr. Link is hurt.

    1. He was driving home from the Brentwood Tavern, where he was celebrating his birthday party, at approximately 10pm on a Friday night. He had a blood alcohol content of .17%. A deer darted into the road, clipped Mr. Link as he was driving his motorcycle. The impact caused his motorcycle to lose control, and he struck a utility pole. He suffered life threatening injuries to his right leg and pelvis, and was life-flighted by helicopter to Akron Hospital.

- First Energy Service Company ("First Energy") provides (a) external affairs, (b) legal services, (c) economic development, and (d) accounting services to Cleveland Electric Illuminating Company.

Procedural History

1. December 10, 2010, Mr. Link filed his lawsuit in Geauga County Common Pleas Court.
2. May 11, 2011, Defendants filed a motion for summary judgment.
3. October 7, 2011, trial court denies summary judgment
4. January 25, 2013, jury trial begins.
5. February 5, 2013, jury rules for plaintiffs on (a) nuisance and (b) loss of consortium.

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Summary of Damages

1. $237,200, past economic losses
2. $180,983, future economic losses
3. $0 past pain & suffering
4. $234,000, future pain & suffering
5. $653,182 (total)

$620,718.84 (past medical expenses)

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Summary of Damages

Plaintiff had asked for:

1. $ 186,998 in future medical
2. $ 100,000 in lost past income
3. $1,051,700, in future medical
4. $ 318,000 in lost household services

$1,656,698 (Total)

There were 2,200 vehicles pass on Savage Road per day.

The cost to remove the remaining 8 poles was estimated at $20,000.

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Jury Findings (Comparative Negligence Statute)

1. Doug Link, 17% at fault
2. Cleveland Electric, 27% at fault
3. First Energy, 19%, at fault
4. Diane Link, 0%

5. Geauga County, 22% (for re-opening the road prior to movement of all the poles)
6. Bainbridge Township, 15% (same)
7. Brentwood Tavern, 0% (no dramshop liability)

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Facts in Favor of the Utility

1. Geauga County Engineer Robert Phillips testified this pole did not need to be moved.
2. Bainbridge Township did not pass a Resolution ordering the poles be moved
3. Newly elected Geauga County Engineer said, “The project is complete. The issue with the [remaining 8] poles is a Township matter.”
4. Geauga County made a decision to re-open the road, despite the fact that the remaining 8 poles had not yet been moved.
5. The fact is that in the Link case, one utility pole was 3 feet, 9 inches from the edge of the white line.
6. In Turner (which held the utility company is not liable), the pole was 6 feet, 3.6 inches from the edge or road and 8 feet, 2.4 inches from the white line.

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Facts in Favor of the Utility

- But, the Court of Appeal said, “It doesn’t matter.” In Turner, ODOT gave permission for the location of that pole. In Link, after the road was widened, all bets were off. The County Engineer had to evaluate what was safe and order the poles be moved accordingly.
- Cleveland Electric filed an appeal to the Ohio Supreme Court, alleging 4 assignments of error, but only one of which is accepted by the Ohio Supreme Court.

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Public Policy Dictates that County Engineers are in the best position to decide Pole Location

County Engineers are in the best position to decide if a utility pole is too close, after a widening project, not the utility company.

County Engineers must take:

1. Must complete Fundamentals of Engineering (8 hour test)
2. Must serve as Engineering in Training (EIT) for 4 years
3. Must take Principles/Practices of Engineering (8 hour test)
4. Must take 24 hours of courses on Surveying
5. Must complete Fundamentals of Surveying Exam (4 hours)
6. Must complete Principles of Practicing Survey (8 hour test)

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Utility Companies Have Due Process

If County determines the pole is an Obstruction and issues an Order, then Utility company has appeal rights

1. R.C. 307.56
2. R.C. 2506.04
    a. Unconstitutional, illegal, arbitrary, capricious, unreasonable, unsupported by preponderance of substantial, reliable, and probative evidence on the whole record.

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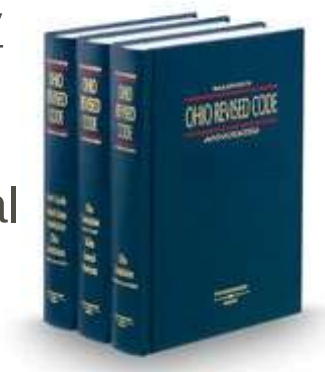
R.C. 307.56 Appeal from decision of board of county commissioners

- A person aggrieved by the decision of the board of county commissioners may appeal to the court of common pleas, as provided by and under the authority of Chapter 2506. of the Revised Code. The court shall advance such appeal when perfected for immediate trial.



- Where a board of county commissioners has adopted administrative regulations pursuant to various enabling sections of the Revised Code, such regulations may provide for an appeal or variance therefrom to a higher administrative authority, or board of appeals or variances, which authority or board is appointed by the board of county commissioners. The decisions of such higher authority or board of appeals or variances shall be considered, a "final order" as described in section 2506.01 of the Revised Code.

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R.C. 5571.14. Township Could Order that an obstruction be declared a public nuisance.

A. A board of township trustees or township highway superintendent may determine that an object bounding any township road and located wholly or in part on the land belonging to the road interferes with snow or ice removal from, the maintenance of, or the proper grading, draining, or dragging of the road, causes the drifting of snow on the road, or in any other manner obstructs or endangers the public travel of the road. The board or superintendent then may declare the object to be a public nuisance and **order the owner**, agent, or occupant of the land on or bordering upon which the object is maintained **to remove it within thirty days**. If that person refuses or neglects to comply with the order, the board or superintendent shall have the object removed. The expense incurred in that removal shall be certified to the county auditor and entered on the tax duplicate against that land, to be collected in the same manner as other taxes.

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R.C. 5571.14. Township Could Order that an obstruction be declared a public nuisance.

(B)(1) The authority granted in this section is in addition to the authority granted in section 5543.14 of the Revised Code to remove vegetation and the authority granted in section 5547.03 of the Revised Code to remove objects or structures constituting obstructions.

(2) The authority granted in this section applies to land belonging to a township road whether owned in fee simple or by easement.

(3) Objects that may be declared to be a public nuisance under this section include a **fence, post, pole, athletic or recreational apparatus, rock, or berm, any vegetation, or any other object** identified by the board or superintendent as interfering with or obstructing the township road under division (A) of this section.

(C) The authority granted in this section does not apply to an object that is lawfully entitled to be maintained on land belonging to a township road pursuant to a franchise or other grant of public authority.

R.C. 4931.03 does not give Utilities Blanket Authority to place a Utility Pole Anywhere

Construction in Unincorporated area of Township

A. A telephone company may do either of the following in the unincorporated area of the township:

1) Construct telecommunications lines or facilities upon and along any of the public roads and highways and across any waters within that area by the erection of the necessary fixtures, including posts, piers, or abutments for sustaining the cords or wires of those lines or facilities. The lines and facilities shall be constructed so as not to incommode the public in the use of the roads or highways, or endanger or injuriously interrupt the navigation of the waters.

2) Construct telecommunications lines and facilities in such a manner as to protect them beneath the surface of any of the public roads and highways and beneath any waters within that area. Those lines and facilities shall be constructed so as not to incommode the public in the use of the roads or highways, or endanger or injuriously interrupt the navigation of the waters.

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R.C. 4931.03 does not give Utilities Blanket Authority to place a Utility Pole Anywhere

(B)(1) This section does not authorize the construction of a bridge across any waters within the state.

(2) 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,

i. any law requiring approval of the legislative authority,

ii. the county engineer, or

iii. the director of transportation.

Ohio law gives County Engineer authority to supervise a Township Road Project

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5543.09 Supervision by county engineer.

A. Except as provided in division (B) of this section, **the county engineer shall supervise** the construction, reconstruction, improvement, maintenance, and repair of the highways, bridges, and culverts under the jurisdiction of the board of county commissioners, and the construction, reconstruction, resurfacing, and improvement of public roads by boards of township trustees under sections 5571.01, 5571.06, 5571.07, 5571.15, 5573.01 to 5573.15, 5575.02 to 5575.09, and 5577.01 of the Revised Code. When the engineer has charge of the highways, bridges, and culverts within the engineer's county, and under the control of the state, the engineer shall also supervise their construction, reconstruction, improvement, and repair.

B. For any particular project, with the approval of the county engineer, the board of township trustees of a township that has adopted a limited home rule government under Chapter 504. of the Revised Code may hire an independent professional engineer to assist the county engineer with the supervision of the construction, reconstruction, resurfacing, and improvement of public roads by the board under sections 5571.01, 5571.06, 5571.07, 5571.15, 5573.01 to 5573.15, 5575.02 to 5575.09, and 5577.01 of the Revised Code.

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5571.05 Supervision of maintenance and repair of township roads

- In the maintenance and repair of roads, the board of township trustees and **any township highway superintendent** appointed by it, **shall be subject to the general supervision and direction of the county engineer**. Such board of township trustees shall follow the direction of the engineer as to methods to be followed in making repairs.

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5547.03 Removal of structures constituting obstructions or interference.

- All persons, partnerships, and corporations using or occupying any part of a highway, bridge, or culvert with telegraph or telephone lines, steam, electrical, or industrial railways, oil, gas, water, or other pipes, mains, conduits, or any object or structure, other than by virtue of a franchise legally granted [easement], **shall remove from the bounds of such highway**, bridge, or culvert, their poles and wires connected therewith, or any and all tracks, switches, spurs, or oil, gas, or water pipes, mains, conduits, or other objects or structures **when**, **in the opinion of the board of county commissioners**, **they constitute obstructions in any highway**, other than the state highway system; or the bridges or culverts thereon, or interfere or may interfere with the proposed improvement of such highways, bridges, or culverts or the use thereof by the traveling public. By obtaining the consent and approval of the board, such persons, partnerships, and corporations may relocate their properties within the bounds of such highways, bridges, or culverts in such manner as the board prescribes. The giving of such consent and approval by the board does not grant any franchise rights.
- Persons, partnerships, or corporations occupying any part of a highway, bridge, or culvert, under and by virtue of a franchise legally granted, **shall relocate their properties** within the bounds of such highway, bridges, or culverts **when in the opinion of the county engineer, they constitute obstructions** or interfere with the construction, improvement, maintenance, or repair of such highways, bridges, or culverts, or the use thereof by the traveling public.

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5547.03 Removal of structures constituting obstructions or interference.

- If, in the opinion of the engineer, such persons, partnerships, or companies [corporations] have obstructed any such highway, bridges, or culverts, or if any of their properties are, in his opinion, so located that they do or may interfere with the proposed improvement, maintenance, or repair the board shall notify such person, partnership, or corporation directing the removal or relocation of the obstruction or property, and, **if they do not within five days proceed to so remove or relocate and complete the removal or relocation within a reasonable time, the board may do so by employing the necessary labor**. The expense incurred shall be paid in the first instance out of any moneys available for highway purposes, and not encumbered for any other purpose, and the amount shall be certified to the proper officials to be placed on the tax duplicate against the property of such person, partnership, or corporation, to be collected as other taxes and in one payment, and the proper fund shall be reimbursed out of the money so collected, or the account thereof may be collected from such person, partnership, or corporation by civil action by the state on the relation of the board.

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5547.04 Removal of obstructions by landowners - consent and approval - signs and advertising.

- The owner or occupant of lands situated along the highways shall remove all obstructions within the bounds of the highways, which have been placed there by them or their agents, or with their consent.

- By first obtaining the consent and approval of the board of county commissioners, obstructions erected prior to July 16, 1925 in highways other than roads and highways on the state highway system or bridges or culverts thereon, may be permitted to remain, upon such conditions as the officials may impose, provided such obstructions do not interfere with traffic or with the construction or repair of such highways.

- No person, partnership, or corporation shall erect, within the bounds of any highway or on the bridges or culverts thereon, any obstruction **without first obtaining the approval of the board** in case of highways other than roads and highways on the state highway system and the bridges and culverts thereon

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5547.04 Removal of obstructions by landowners - consent and approval - signs and advertising.

- All advertising or other signs and posters erected, displayed, or maintained on, along, or near any public highway, and in such a location as to obstruct, at curves or intersecting roads, the view of drivers using such highway, are obstructions, but this section has no application to crossing signs erected in compliance with section 4955.33 of the Revised Code, at the crossings of highways and railroads.
- The board shall enforce this section and, in so doing, may avail itself of section 5547.03 of the Revised Code.

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ODOT Authority

1. ODOT Location and Design Utility Manual
2. American Association of State Highway and Transportation Official Standards
3. (“AASHTO”)
4. Clear Zone

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Utility Company's Argument against ODOT Authority (Red herring)

1. ODOT requirements do not apply apply to Township Road. Lekovac v. ODOT (1990)
2. ODOT reqs do not apply to a public utility. Neiderbach v. Dayton Power & Light (1994); Jocek v. GTE (1995)
3. Highway Use Manual does not apply
4. R.C. 5515.01 regulates a state highway, not a Township Road
5. Bainbridge Township Superintendent Walter Rudyak testified he did not Order the Utility to move the poles

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Damning Evidence Against the Utility

1. Ralph Delligatti admits that if CEI does not move the poles, they may be subject to fines for delay, and may be obligated to reimburse the county if the county decides to move the poles. (email 12/18/08)
2. Delligati admits (email 1/19/09) “recognized clear zones are dependent upon roadway geometry, design speed, average daily traffic, and that the purpose was to increase safety, to prevent injury from errant drive, eliminate roadside hazards, and that if a utility facility can be relocated to meet the clear zone guidelines, from the government’s perspective, that is what is expected.
3. Arthur Stitte, (email 2/5/09), “I was instructed to review the job and provide a new estimate [which does not require moving all 48 poles] for management.”
4. Michael Walezak (email 4/16/09) admits “the project was divided into two calendar years for budgetary reasons.” (ignores safety)

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Damning Evidence Against the Utility

5. Lorna Wisham (email 4/39/09), admits decision was “primarily driven by capital budget constraints; we aren’t replacing the number of poles once committed by Jason Steel at the beginning of this project because of budget issues.”

6. Ralph Delligatti (email 6/3/09), “2008 design plan followed AASHTO, but by February, 2009, decision was arrived at as a capital deferred action as directed by Regional Management, and after much discussion with internal and external counsel on enforceability of AASHTO clear zone guidelines.”

7. Email (5/27/2010) from Walter Rudyak, Bainbridge Highway Superintendent to Mia Moore (CEI), “relocate these poles as soon as possible” since Mr. Bidar was hurt May 23, 2010.

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Turner v. Ohio Bell Telephone Company

- (May 7, 2008), Ohio Supreme Court. 118 Ohio St.3d 215. 2008-Ohio-2010. (5-2). Majority: Lanzinger, Moyer, Lundberg-Stratton, O'Connor, Cupp. Dissent: Pfeiffer, O'Donnell.
- Utility companies do not enjoy unfettered discretion in the placement of their utility poles within the right-of-way of road, for they are required to obtain approval from the owner of the right-of-way.
- Utility pole what was three feet nine inches from the edge line of road did not incommode the public's use of the highway, and thus companies were not liable
- When a vehicle collides with a utility pole located off the improved portion of the roadway but within the right-of-way, a public utility is not liable if the utility has obtained any necessary permission to install the pole and the pole does not interfere with the usual and ordinary course of travel.

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Turner v. Ohio Bell Telephone Company

- Facts: September 10, 2003, Bryan Hittle and his passenger, Robert Turner, were on their way to work, driving south on State Route 188 in Pleasant Township. It was foggy and dark. Due to poor visibility, the driver was following the taillights of the truck immediately in front of him. Hittle drove the car off the road, striking a utility pole. Turner was killed by the impact.
- The pole was in a grassy area. Two feet, five inches from the berm. Three feet, nine inches from the white edge line of the road. The speed limit was 45 mph. It was estimated that the vehicle was travelling between 55 and 59 mph. Hittle was convicted of vehicular manslaughter.
- Turner's estate filed a civil lawsuit against Ohio Bell Telephone Company alleging that the utility company was negligent in placing, maintaining and continuing to utilize the pole in such close proximity to the travelled portion of S.R. 188. The trial court denied liability.
- The Eighth District Court of Appeals reversed and ruled that a jury should decide if the utility company was negligent or provided a nuisance. The Court of Appeals held, "liability may be imposed where the placement of a pole in close proximity to the edge of the roadway constitutes a foreseeable and unreasonable risk of harm to users of the roadway."

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Turner v. Ohio Bell Telephone Company

- The court of Appeals developed 8 factors for determining the reasonable ness of pole location:
  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.

- The case was certified to the Ohio Supreme Court based upon a conflict with another Court of Appeals on the same issue.

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Turner v. Ohio Bell Telephone Company

- The Ohio Supreme Court said:
  1. Public Utilities have enjoyed at least a qualified right to place utility poles within the right-of-way of public roads since 1847.
  2. Before erecting poles or other fixtures on a public right-of-way, a utility company is generally required to obtain the approval of a public entity that owns the right-of-way. R.C. 4939.03 (Municipalities), 5547.04 (Counties), 5515.01 (ODOT).
  3. Paragraph 26. The evidence in this case indicates that the utility pole was erected pursuant to a permit issued by the Ohio Department of Transportation. Therefore, we conclude that the utility pole did not incommode or interfere with the public's use of the highway, and therefore appellants are not liable as a matter of law. See Footnote 1. ODOT issued a permit for this pole in 1977.

Turner v. Ohio Bell Telephone Company

- Dissent: (Justice O'Donnell, joined by Justice Pfeiffer)
- The majority holds that a utility company's placement of a telephone pole, cannot be a basis for liability if the utility obtained any necessary permission to place the pole in the particular location. * * * * In my view, this is an overbroad reading of our precedent and an infringement on the province of the jury. If the location of the pole was a "foreseeable and unreasonable risk," then the jury should have been allowed to consider that fact, despite the fact that ODOT had once given permission for location of the pole.

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Swaisgood v. Puder (6th District Court of Appeals, January 26, 2007).

- Facts: April 20, 2002, a tractor-trailer made a wide turn onto S.R. 250, then accidentally hit a highway sign and a utility pole owned by Verizon Wireless telephone company. Another truck immediately behind the tractor-trailer stopped, the driver exists his his truck to investigate the accident, was struck by live electrical wires, and died 18 days later.

- Mr. Swaisgood estate sues the utility company. The trial court held that the utility company is not liable because of R.C. 4931.03. The Court of Appeals reversed, holding that because an expert witness said it was "reasonably foreseeable" that the pole, being that close to the intersection might be struck by a tractor-trailer making a wide turn and cause live electrical wires to come into contact with motorists, that the plaintiff should be allowed to present their case to a jury. (Judges Skow, Handwork, Singer).

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Toledo Edison v. Defiance County (December 9, 2013). Third District Court of Appeals. 2013-Ohio-5374.

- Toledo Edison (a division of First Energy) refused to move 22 poles along Bend Road, which had been widened in 2005, and an additional 10 poles along Bend Road north of a bridge.
- AEP, NW Electric, and Embarq all agreed to move their poles.
- December 15, 2011, Defiance County Commissioners issued an Order of removal.
- Toledo Edison filed an Appeal and request for Hearing.
- January 23, 2012, Defiance County Commissioner held a hearing. The County Engineer testified.
- Toledo Edison relied solely upon the Turner case, which says that so long as the pole does not incommode the traveling public, the utility cannot be held liable, in tort, if a person is injured when their vehicle leaves the road and strikes the utility pole.
- But, the County Commissioner rule that they have a duty as County Commissioners to ensure roads are free from obstructions, and once the road was widened, they defer to the County Engineer to determine what is safe.
- The Court of Appeals affirms (3-0), (Judges Preston, Shaw, Williamowski).

ToledoEdison
A FirstEnergy Company

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Lessons Learned from these Cases

1. If a road needs to be widened or reconstructed in any way, the County Commissioners, the Township Board of Trustees, the Municipality [or ODOT] MUST ask the County Engineer to determine what utility poles need to be relocated and to determine the new location of each and every pole, using safety as a primary concern.
2. The County, Township, or Municipality [or ODOT] MUST take steps to issue a Written Order that any and all Obstructions be moved by a date certain. Be sure to include the utility's Appeal Rights, pursuant to 2506 and 307.56.
3. If the Utility Company files an appeal, make sure the lawyer for the government presents evidence, in the form of sworn testimony and properly authenticated documents, which demonstrate the public safety reasons for requiring the utility poles be moved. Tape record the hearing or provide for a court reporter to transcribe the proceedings.

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Lessons Learned from these Cases

4. If the Utility company fails move the obstruction and does not file an Appeal, government should move the pole, and charge the cost to the Utility and certify the amount to the County Auditor and County Recorder for the amount to be placed on the Real Estate Tax duplicate, and filed as a tax lien against the real property of such person.
5. All Letters should be very direct and unambiguous. If in doubt, legal counsel should review all draft letters.
6. The government should insist that all obstructions be relocated prior to re-opening any public road.

7. If there is an appeal, make sure the County Engineer, the County Commissioners, the Township Board of Trustees, ODOT, and the County Prosecutor all understand their role, and what Ohio law requires.

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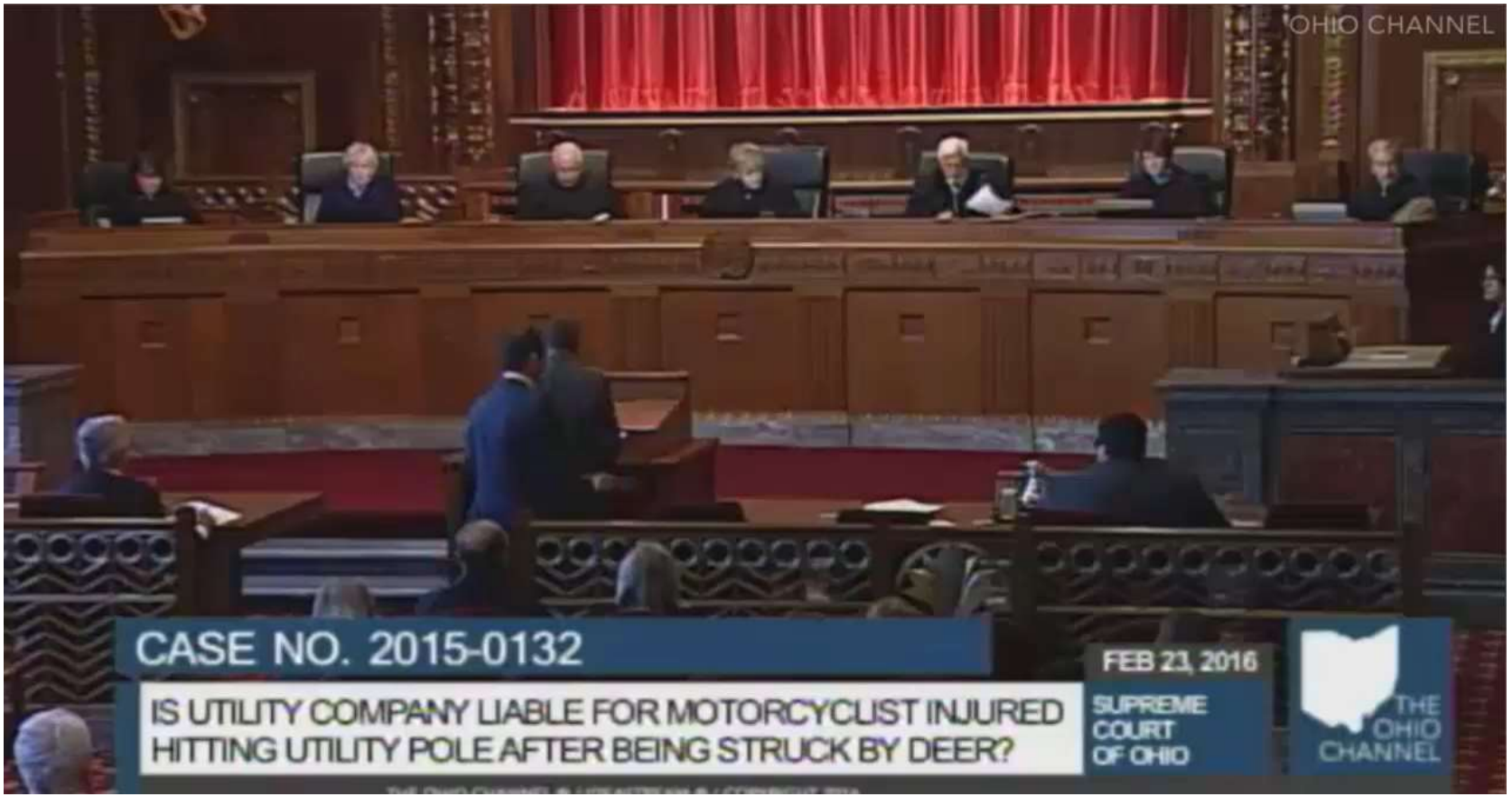

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Questions

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