

IN THE SUPREME COURT OF OHIO

Allstate Insurance Company, as subrogee of
Margaret Harris and Anna Kaplan,

Appellant,

v.

Cleveland Electric Illuminating Company,

Appellee.

CASE NO: 07-0452

On Appeal from the Cuyahoga
County Court of Appeals,
Eight Appellate District

Court of Appeals
Case No. CA-06-087781

APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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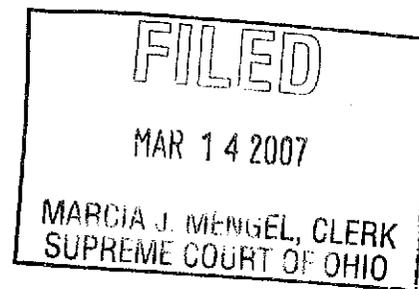


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EXPLANATION OF WHY THIS CASE IS A CASE
OF PUBLIC AND GREAT GENERAL INTEREST

This cause presents a critical issue for the future of a utility customer's right to pursue a pure common law tort claim against that utility: whether a utility company's failure to respond to its customer's emergency service call, resulting in a fire and property damage to the customer's property, is a pure common law tort claim subject to jurisdiction in a court of common pleas, and not before the Public Utilities Commission of Ohio ("PUCO") under R.C. 4905.26.

In this case, the Court of Appeals ruled that a utility company's failure to respond to repeated customer emergency calls warning of a tree limb on a live power which was described as "about to snap" line, resulting in fire and property damage, involves a question of whether the utility company provided adequate utility service, thus falling under the exclusive jurisdiction of PUCO under R.C. 4905.26, as a utility company is expected and required to respond to such calls concerning emergency situations in an adequate and expedient manner.

The decision of the Court of Appeals endangers the delineation of claims over which PUCO has exclusive jurisdiction as codified by the General Assembly in R.C. Chapter 4905. The ruling of the Court of Appeals not only contradicts existing appellate court case law, including its own established precedent, but also undermines legislative intent and ignores the plain meaning of the public utilities statute. The Court of Appeals' decision further opens the door for a public utility to circumvent liability for its negligent acts thus leaving its customers without a venue in which to pursue their tort theory claims.

As this Court stated in *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, where a utility customer claim relates to rates or services of the utility, PUCO has exclusive jurisdiction under R.C. 4905.26. 61 Ohio St. 3d 147, 151-152. However, where the claim is one of contract or pure common-law tort, the claim may be pursued in a court of common pleas. *State ex rel.*

Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas, 97 Ohio St. 3d 69. Further, R.C.

4905.26, in relevant part, defines those claims over which PUCO has authority:

Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. Such notice shall be served not less than fifteen days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

(West. 2007) PUCO has no greater authority than that the legislature grants it. Its powers extend no further than the powers authorized by the General Assembly in the regulatory provisions governing the Public Utilities Commission, R.C. 4905 et seq. Should a customer's complaint against a public utility fall outside of the situations articulated in R.C. 4905.26, PUCO cannot and will not possess jurisdiction.

The implications of the decision of the Court of Appeals will potentially affect every customer receiving service from a public utility in the State of Ohio. The Court of Appeals decision will assuredly be used by public utilities in the future in attempts to deny complaining customer's access to the court of common pleas. Using the Court of Appeals decision as precedent, the public utility is successful in dismissing the customer's claim from the court of common pleas, it can then argue before PUCO that PUCO does not have jurisdiction over the complaint as it does not fall within the areas over which PUCO retains exclusive jurisdiction as granted by the General Assembly. Effectively, utility customers in Ohio will have no venue in

which to pursue these claims against an offending utility. Such a result would truly be unconscionable.

The General Assembly certainly never intended for Ohio utilities to circumvent accountability for their negligent acts. The judgment of the Court of Appeals has great general significance in that it potentially eliminates an Ohio resident's ability to advance a common law tort theory against a utility, distorting the statutory scheme of R.C. Chapter 4905. To promote the purposes and preserve the integrity of R.C. Chapter 4905 and to assure its uniform application, this court must grant jurisdiction to hear this case and review the inconsistent and incorrect decision of the Eighth District Court of Appeals, Cuyahoga County.

STATEMENT OF THE CASE AND FACTS

Plaintiff-Appellant Allstate Insurance Company insureds, Margaret Harris and Anna Kaplan, resided in a side by side duplex residence located at 1500-1502 East 250th Street, Euclid, Ohio. On July 20, 2003, a tree limb from a tree behind Ms. Harris's garage had fallen onto the electrical wires connecting the utility pole to Ms. Harris's house, the weight of which was causing the electrical service mast to pull away from the house. Upon witnessing the condition of the tree limb, electrical wire and service mast at approximately 11:30 a.m., Ms. Little and Ms. Harris made repeated phone calls to Defendant-Appellee CEI to inform it of the situation. Upon speaking with a CEI representative, they were told that someone would be out "shortly" to fix the problem.

After waiting all afternoon for CEI to arrive with no result, the weight of the tree limb on the wire successfully pulled the service mast away from the house, eventually causing the wire insulation to rub away due to friction, allowing the hot conductor to contact the meter box. This allowed an internal fault conductor to flow through the main electric panel, causing the fire.

As a result of the June 20, 2003 fire, Allstate paid a total of \$149,357.34 to or on behalf of Margaret Harris and \$12,435.13 to or on behalf of Anna Kaplan. Allstate filed suit against CEI in the Cuyahoga Court of Common pleas. CEI filed a Motion to Dismiss and a subsequent Motion for Summary Judgment, arguing that the court of common pleas did not have jurisdiction over Allstate's negligence claim. The court denied both motions. After hearing all the evidence during trial, the jury found CEI 100% negligent and found that negligence to be the proximate cause of the \$161,792.47 in damages sustained by Allstate. The jury awarded Allstate the full \$161,792.47.

CEI appealed to the Cuyahoga County Court of Appeals, alleging among other assignments of error, that jurisdiction was proper before PUCO and not the Cuyahoga Court of Common pleas. The Court of Appeals reversed the judgment of the court of common pleas and found that it did not have jurisdiction over Allstate's negligence claim against CEI as exclusive jurisdiction resided with PUCO because Allstate's negligence claim was manifestly service related.

The Court of Appeals erred in ruling that PUCO maintained exclusive jurisdiction over Allstate's claim of negligence against CEI.

In support of its position, Allstate presents the following argument.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: A utility company's failure to respond to a customer's emergency call, resulting in a fire at that customer's home, is a pure common law tort claim subject to jurisdiction in a court of common pleas, not before the Public Utilities Commission of Ohio under R.C. 4905.26.

Allstate's claim against CEI is a pure common law negligence claim based upon CEI's acts and/or omissions; as such, the trial court clearly possessed subject matter jurisdiction over the instant case. In general, "the existence of a court's own subject matter jurisdiction in a

particular case poses a question of law.” *Burns v. Daily*, 114 Ohio App. 3d 693, 701 (11th Dist. 1996). While it is clear that PUCO has exclusive jurisdiction to hear and determine matters involving service or practices affecting or relating to service, jurisdiction is proper in the Ohio common pleas courts against utility companies where the claims arise in pure common law. *Gayheart v. Dayton Power & Light Co.*, 98 Ohio App. 3d. 220 (2nd Dist. 1994).

In deciding whether an action belongs under PUCO’s exclusive jurisdiction because it is service related or whether it is a pure common law tort claim subject to jurisdiction in a common pleas court, the Cuyahoga Court of Appeals articulated a two-pronged approach: 1) “Is PUCO’s administrative expertise required to resolve the issue in dispute; and 2) Does the act complained of constitute a ‘practice’ normally authorized by the utility?” *Pacific Indemnity Insurance Company v. The Illuminating Company*, 2003 WL 21710787 at *3 (Ohio App. 8th Dist.). If either of these questions is answered in the negative, the claim is outside PUCO’s jurisdiction. *Id.* Unfortunately, when deciding this matter, the Cuyahoga County Court of Appeals failed to follow its own established precedent.

In this case, it is clear that PUCO’s administrative expertise is not required to resolve Allstate’s negligence claim, and nor does CEI’s failure to act constitute a practice normally authorized by the utility. Despite CEI’s assertion that because Allstate’s Complaint relates to electrical service provided by CEI, PUCO’s administrative expertise is required, Allstate is alleging a pure common law tort that will require a determination of legal rights and liabilities, an area over which PUCO has no power. *See Milligan v. Ohio Bell Tel. Co.*, 56 Ohio St. 2d 191 (1978). Because every negligence claim brought against a public utility will be one involving some aspect of services, CEI’s reading of the jurisdictional scope of R.C. 4905.26 is overly

broad. *Gayheart*, 98 Ohio App. 3d at 229. CEI's self-serving interpretation of the statute was obviously not the enacting legislature's intention.

In analogous cases, courts have found subject matter jurisdiction proper in the court of common pleas. *Mid-American Fire & Casualty Co. v. Gray*, 1993 WL 211651 (Ohio App. 2nd Dist.) (power company's failure to timely respond to the insured's request for assistance did not constitute a practice related to services as contemplated by the statute); *Gayheart*, 98 Ohio App. 3d 220 (the court found a power surge to be an isolated act of negligence not reasonably contemplated by the legislature in enacting R.C. 4905.26); *Harris v. Ohio Edison Co.*, 1995 WL 494584 (Ohio App. 7th Dist.) (allegations that the power company negligently, recklessly, and intentionally failed to investigate and correct a dangerous and potentially deadly breach in its system that caused a power surge, despite repeated and urgent requests to do so elevated the homeowners' claim beyond a mere service call)

Like the situations in *Mid-American* and *Gayheart*, there is no evidence that CEI's failure to respond to Ms. Harris's request for assistance was a practice related to services as contemplated by R.C. 4905.26; rather, it was an isolated act of negligence. *See Mid-American*, 1993 WL 211651 at *3; *Gayheart*, 98 Ohio App.3d at 229. Incidentally, jurisdiction was proper in the court of common pleas in *Mid-America* even though the *Mid-American* plaintiff's only claim against the power company was based on the latter's failure to respond, irrespective of any intervening cause. *See Mid-American*, 1993 WL 211651.

Further, like the power company in *Harris*, in the instant case CEI was given actual and repeated notice of a dangerous condition for which it was directly responsible to the public. CEI was notified on three occasions that live electrical wires were pulled away from Ms. Harris's home, pulling the service mast from the structure as well. CEI's failure to respond moved beyond the mere inadequate performance of a services and constituted a negligent omission to

act where a reasonable person in the position of defendant would have acted for the safety of the plaintiffs. *Harris*, 1995 WL 494584 at *1.

Public utilities have a duty to their customers and the public at large to exercise due care in the operation of their businesses. In the instant case, Ms. Harris was not complaining about a simple overcharge or reporting a power outage; she was alerting CEI to a real danger that CEI then promised to fix. Instead, CEI misclassified her service call and failed to dispatch an employee to her home, despite having adequate personnel to do so. By assuming a duty to act and then failing to act, CEI proximately caused the injury to Ms. Harris. While not responsible for the tree limb originally falling onto the wire, CEI negligently failed to remedy this danger or even respond to the emergency. Therefore, subject matter jurisdiction was proper before the trial court, despite CEI's protestations.

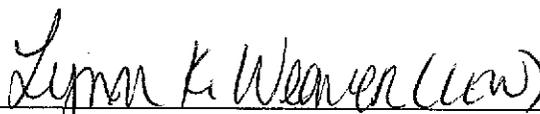
The ruling of the Cuyahoga County Court of Appeals ignores the clear meaning of R.C. 4905.26 and improperly broadens the matters over which PUCO retains exclusive jurisdiction. Such a judicial expansion of a clear and carefully drafted statutory exclusion violates the rules of statutory construction established and applied by this court. See *State ex rel. Keller v. Forney*, 108 Ohio St. 463 (1923).

CONCLUSION

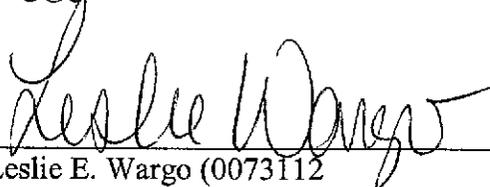
For the reasons discussed above, this case involves a matter of public and great general interest. Plaintiff-Appellant Allstate Insurance Company respectfully requests this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully Submitted,

Lynn K. Weaver, Counsel of Record



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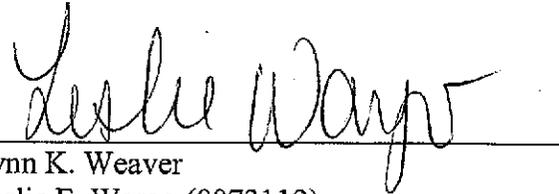


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Certificate of Service

I certify that a copy of the Appellant's Memorandum in Support of Jurisdiction was sent by regular U.S. mail on the 13th day of March, 2007, to Thomas I. Michals, Esq., Deneen Lamonica, Esq., and Anthony F. Stringer, Esq., Counsel for Appellee, at Calfee, Halter & Griswold, LLP, 1400 McDonald Investment Center, 800 Superior Avenue, Cleveland, Ohio 44114-2688.

A handwritten signature in cursive script, appearing to read "Lynn K. Weaver", is written over a horizontal line.

Lynn K. Weaver
Leslie E. Wargo (0073112)

APPENDIX

1. Journal Entry and Opinion of the Court of Appeals, Eighth Appellate District (January 29, 2007)

JAN 29 2007

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87781

ALLSTATE INSURANCE COMPANY

PLAINTIFF-APPELLEE

vs.

**CLEVELAND ELECTRIC ILLUMINATING
COMPANY**

DEFENDANT-APPELLANT



**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-554692

BEFORE: Calabrese, P.J., Kilbane, J., and Blackmon, J.

RELEASED: January 18, 2007

JOURNALIZED: JAN 29 2007

VOLO 628 PD0767

ANTHONY O. CALABRESE, JR., P.J.:

Defendant-appellant, Cleveland Electric Illuminating Company ("CEI"), appeals the decision of the trial court. Having reviewed the arguments of the parties and the pertinent law, we reverse and remand to the lower court.

I.

According to the case, this subrogation action was filed by plaintiff-appellee, Allstate Insurance Company ("Allstate"), as subrogee of Margaret Harris and Anna Kaplan, against CEI on February 14, 2005, alleging negligence for a fire that damaged the duplex residences of Harris and Kaplan on July 20, 2003. Both Harris and Kaplan submitted a claim for damages under their respective homeowner's insurance policies. Allstate paid Harris \$149,357.34 and paid Kaplan \$12,435.13 for damages.

On July 20, 2005, CEI filed a motion to dismiss, asserting that the Public Utilities Commission of Ohio (PUCO) possessed exclusive subject matter jurisdiction over Allstate's negligence claim. Allstate filed its memorandum in opposition to CEI's motion to dismiss on August 5, 2005. The trial court denied CEI's motion on August 10, 2005, ruling that it did have subject matter jurisdiction over Allstate's claim. After engaging in written and oral discovery, CEI filed its motion for summary judgment, alleging in part that it owed no duty to affirmatively act in the protection of the Harris and Kaplan properties, and

that there is not evidence as to the standard of care or breach thereof to establish it as a proximate cause of the fire.

Allstate filed its response and memorandum in opposition to CEI's motion for summary judgment on December 15, 2005. The trial court denied CEI's motion on December 16, 2005. On December 28, 2005, CEI filed a motion for reconsideration of the trial court's denial of its motions to dismiss and for summary judgment, which the trial court denied on December 30, 2005.

A final pretrial conference was held on January 4, 2006, and the parties were ordered to file any motions in limine by January 9, 2006. The trial court issued a ruling on the motions in limine on January 12, 2006, including granting Allstate's motion in limine to exclude CEI from presenting evidence that it was not liable because the customer's tree limb fell on the wire, pulling the service mast away from the house. Jury trial began on January 17, 2006.

On January 19, 2006, Allstate rested its case in chief and CEI moved for a directed verdict, which the trial court denied. CEI presented its case, concluding on January 20, 2006. After closing arguments, the case was submitted to the jury who returned a verdict on January 20, 2006, finding CEI 100 percent negligent and awarding Allstate the full \$161,792.47 in damages. This appeal ensued.

According to the facts, on July 20, 2003, Allstate insureds Margaret Harris and Anna Kaplan sustained property damage at their side-by-side duplex residences located at 1500-1502 East 250th Street in Euclid. Sometime between 10:30 a.m. and 11:00 a.m., Harris and her daughter, Lisa Little, walked into the backyard garden and noticed that a large tree limb had fallen from Harris' tree onto the utility wires. The apparent width of the limb caused the electrical service mast to pull away from the house. Little immediately called CEI and spoke to customer service representative Pamela Warford, advising her that a tree limb had fallen on the service wire and that it was ready to snap. Warford categorized the call as a low priority.

After several hours passed with no response, Harris again called CEI to make certain that it had the proper address. She remained in the automated system when reporting the accident and was never connected to a customer service representative.

At approximately 5:00 p.m., Harris noticed that the problem still had not been repaired. Since the lights on her home were still operative, Harris made another call to CEI. Ten minutes after her call, Harris heard a noise and saw wires sparking on the ground. Realizing that the sparks had set the house on fire, she called 9-1-1. The fire department subsequently arrived and extinguished the blaze.

II.

First assignment of error: "The trial court erred in failing to dismiss the action for lack of subject matter jurisdiction."

Second assignment of error: "The trial court erred in failing to grant summary judgment in favor of CEI."

Third assignment of error: "The trial court erred in failing to grant a directed verdict in favor of CEI."

Fourth assignment of error: "The trial court erred in prohibiting counsel for CEI from arguing that CEI owed no duty to Allstate's insured to prevent the fire caused by her tree and her equipment."

Fifth assignment of error: "The trial court failed to correctly instruct the jury on the lack of duty owed by CEI to Allstate's insureds."

Sixth assignment of error: "The trial court erred in precluding CEI's expert, Ralph Dolence, from offering opinion testimony concerning CEI's handling of the trouble calls at issue."

Seventh assignment of error: "The trial court erred in admitting damages summary sheets into evidence without any foundation or supporting testimony and preventing CEI's counsel from demonstrating that the documents were not prepared in the ordinary course and not properly authenticated."

Eighth assignment of error: "The trial court erred in failing to admit Allstate's insured's insurance application into evidence on the basis that there was testimony on that document."

III.

Appellant argues in its first assignment of error that the lower court erred in failing to dismiss the action for lack of subject matter jurisdiction.

PUCO has jurisdiction to adjudicate utility customer complaints related to rates or services of the utility. The Supreme Court of Ohio has determined that when a claim is related to service, as defined by R.C. 4905.26, the Commission has exclusive jurisdiction. Section 4905.26 is the statute authorizing and explaining the procedure for filing service complaints. *Miles Mgmt. Corp. v. FirstEnergy Corp.*, Cuyahoga App. No. 84197, 2005-Ohio-1496.

There are, however, exceptions to PUCO'S exclusive jurisdiction over utility complaints. Contract and pure common-law tort claims may be brought in a court of common pleas, rather than submitted to PUCO. *State ex rel. Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas*, 97 Ohio St.3d 69, 2002-Ohio-5312, 776 N.E.2d 92.

Nonetheless, "claims [that] are manifestly service-related complaints *** are within the exclusive jurisdiction of the commission." *State ex rel. Columbia Gas of Ohio, Inc. v. Henson*, 102 Ohio St.3d 349, 2004-Ohio-3208, at p. 20, 810

N.E.2d 953, citing *Milligan v. Ohio Bell Tel. Co.* (1978), 56 Ohio St.2d 191, 383 N.E.2d 575, ("a court of common pleas is without jurisdiction to hear a claim alleging that a utility has violated R.C. 4905.22¹ by *** wrongfully terminating service, since such matter [is] within the exclusive jurisdiction of the Public Utilities Commission"), paragraph two of the syllabus. Quality of service complaints are under PUCO's jurisdiction. *Id.*, citing *Tongren v. D & L Gas Marketing, Ltd.*, 149 Ohio App.3d 508, 2002-Ohio-5006, 778 N.E.2d 76, p. 20; *Ippolito v. First Energy Corporation*, Cuyahoga App. No. 84267, 2004-Ohio-5876.

In the case at bar, we must determine whether plaintiff's claims are common-law tort claims or whether they primarily relate to service. We review the substance of the claims rather than plaintiff's assertions that they are tort claims. See *Milligan v. Ohio Bell Telephone Co.* (1978), 56 Ohio St.2d 191, 383 N.E.2d 575.

Following the Ohio Supreme Court and other state appellate courts, this court has repeatedly held that tort claims alleging disruption in service or the adequacy of utility service fall under the exclusive jurisdiction of PUCO. *Pac. Indem. Ins. Co. v. Illuminating Co.*, Cuyahoga App. No. 82074, 2003-Ohio-3954; *Lawko v. Ameritech Corp.* (Dec. 7, 2000), Cuyahoga App. No. 78103, (negligence

¹R.C. 4905.22 states that "every public utility shall furnish necessary and adequate service ***."

claim alleging inadequate telephone service and failure to remedy the telephone service "are clearly service-oriented" and, therefore, "the exclusive jurisdiction for disposition of such claims lies with the PUCO"); *Assad v. Cleveland Elec. Illuminating Co.* (May 19, 1994), Cuyahoga App. No. 65532; *Ohio Graphco v. Ohio Bell Tel. Co.* (May 12, 1994), Cuyahoga App. No. 65466; *Pacific Chemical Products Co. v. Teletronics Services, Inc.* (1985), 29 Ohio App.3d 45, 29 Ohio B. 47, 502 N.E.2d 669; *State Farm Fire & Cas. Co. v. Cleveland Elec. Illuminating Co.*, Lake App. No. 2003-L-032, 2004-Ohio-3506, (plaintiff's negligent inspection claim was primarily related to service); *Suleiman v. Ohio Edison Co.*, 146 Ohio App.3d 41, 2001-Ohio-3414, 764 N.E.2d 1098, (negligence claim for defendant's replacement of an electrical meter relates to service and is within the exclusive jurisdiction of PUCO); *Cochran v. Ameritech Corp.* (July 26, 2000), Summit App. No. 19832, (tort and civil rights claims related to telephone company's discontinuation of plaintiff's service and, therefore, fell under PUCO); *Heiner v. Cleveland Elec. Illuminating Co.* (Aug. 9, 1996), Geauga App. No. 95-G-1948, (power surge was service related); *Farra v. Dayton* (1989), 62 Ohio App.3d 487, 576 N.E.2d 807, (claim brought as negligence concerning removal of electric and gas meters is service related).

The case at bar involves a tort claim concerning the adequacy of utility service to Harris' and Kaplan's duplex. Specifically, it is expected and required

that CEI respond to customer service inquires concerning emergency situations in an adequate and expedient manner. Clearly, CEI failed to provide adequate utility service in this case. If CEI's customer service department would have responded adequately to repeated customer warnings, the resulting fire in this case could have been avoided all together. Accordingly, we find that Ohio law, as well as the evidence in the record, mandates that this case falls under the exclusive jurisdiction of the PUCO.

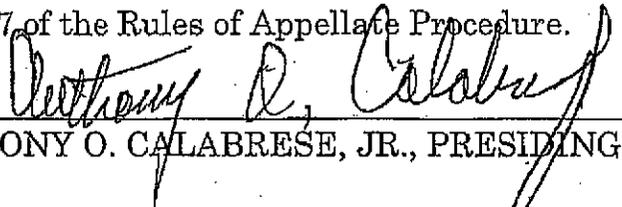
Appellant's first assignment of error is sustained.

Based on the disposition of appellant's first assignment of error, we find appellant's remaining assignments of error to be moot. This case is to be remanded to the lower court with instructions to dismiss for lack of subject matter jurisdiction. Proper venue for this case is with the PUCO.

It is ordered that appellant recover from appellee costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.


ANTHONY O. CALABRESE, JR., PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., CONCURS;
MARY ELLEEN KILBANE, J., DISSENTS WITH SEPARATE OPINION

MARY EILEEN KILBANE, J., DISSENTING:

I respectfully dissent from the majority's opinion and would find that PUCO did not have exclusive jurisdiction over this claim.

In deciding whether an action is service-related and belongs under PUCO's exclusive jurisdiction, some courts approach the issue by posing two questions: Is PUCO's administrative expertise required to resolve the issue in dispute? Does the act complained of constitute a "practice" normally authorized by the utility? If the answer to either question is in the negative, courts routinely find that those claims fall outside PUCO's exclusive jurisdiction. *Pacific Indemn. Ins. Co. v. The Illuminating Co., et al.*, Cuyahoga App. No. 82074, 2003-Ohio-3954.

In some circumstances, however, courts "retain limited subject-matter jurisdiction over pure common-law tort and certain contract actions involving utilities regulated by the commission." *Id.* In *State ex rel. Cleveland Elec. Illuminating Co.*, 97 Ohio St.3d 69,75, 2002-Ohio-5312, respondent asserted that its contract with the relator/utility was void because of indefiniteness and lack of consideration. The Ohio Supreme Court determined that respondent's contract claims against relator/utility did *not* fall within the exclusive jurisdiction of PUCO.

Further, in the instant case, there is nothing in the record to evidence that PUCO's administrative expertise was required to resolve Allstate's claim. There

is also no indication that CEI's failure to promptly act constitutes an act "normally authorized" by the utility. See *Pacific Indemn. Ins. Co.*, supra.

Finally, PUCO does not have exclusive jurisdiction over every claim brought against a public utility. As the majority recognizes, contract and pure common-law tort claims against a public utility *may* be brought in a common pleas court. *State ex rel. Ohio Power Co. v. Harnishfeger* (1980), 64 Ohio St.2d 9; *Milligan v. Ohio Bell Tel. Co.* (1978), 56 Ohio St.2d 191; *Steffen v. Gen. Tel. Co.* (1978), 60 Ohio App.2d 144.

In *Pacific Indemn. Ins. Co. v. Illuminating Co.*, supra, this court cited to *State ex rel. Ohio Edison Co. v. Parrott* (1995), 73 Ohio St.3d 705, 708, in outlining several tort and contract cases in which various courts determined PUCO did not have exclusive jurisdiction. The Supreme Court found that:

"Other courts retain limited subject matter jurisdiction over tort and some contract claims involving utilities regulated by the commission. See, e.g., *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, supra, 61 Ohio St.3d at 154, (pure common-law tort claims may be brought in common pleas court); *Kohli v. Pub. Utilities. Comm.* (1985), 18 Ohio St.3d 12 (failure to warn landowners of dangers regarding voltage actionable in common pleas court); *Milligan v. Ohio Bell Tel. Co.* (1978), 56 Ohio St.2d 191, paragraph three of the syllabus (invasion of privacy actionable in common pleas court); *Marketing Research Serv., Inc. v. Pub. Utilities Comm.* (1987), 34 Ohio St.3d 52, (commission has no jurisdiction to resolve breach of contract dispute concerning provision of interstate telecommunications service). But, see, *Gallo Displays, Inc. v. Cleveland Pub. Power* (1992), 84 Ohio App.3d 688 (common-

law nuisance claim against utility not actionable in common pleas court)."

As the court in *Gayheart v. Dayton Power & Light Co* (1994), 98 Ohio App.3d 220, 229 found, "[i]n essence, every negligence claim brought against a public utility will be one involving some aspect of 'service.'" Therefore, the mere fact that a case involves some aspect of service, does not automatically place it within PUCO's exclusive jurisdiction.

I would find that the circumstances in the instant case were not ones that would reasonably have been contemplated by the legislature in enacting R.C. 4905.26 as being within PUCO's exclusive jurisdiction. Moreover, there is no evidence to suggest that CEI's failure to respond to Ms. Harris' call was a "practice related to service" as contemplated by the statute. Instead, it can be interpreted as an isolated act of negligence. For these reasons, this is a case that is appropriate for resolution by a jury, and jurisdiction was properly before Common Pleas Court.

I would therefore find that jurisdiction was properly before the Common Pleas Court and overrule CEI's first assignment of error.