

CASE NO. 2007-0452  
IN THE SUPREME COURT OF OHIO

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ALLSTATE INSURANCE COMPANY,  
*Plaintiff-Appellant,*

v.

CLEVELAND ELECTRIC ILLUMINATING COMPANY,  
*Defendant-Appellee.*

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ON APPEAL FROM THE CUYAHOGA COUNTY COURT OF APPEALS  
EIGHTH APPELLATE DISTRICT  
CASE NO. CA-06-087781

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APPELLEE THE CLEVELAND ELECTRIC ILLUMINATING COMPANY'S  
MEMORANDUM IN RESPONSE TO APPELLANT'S MEMORANDUM IN SUPPORT  
OF JURISDICTION

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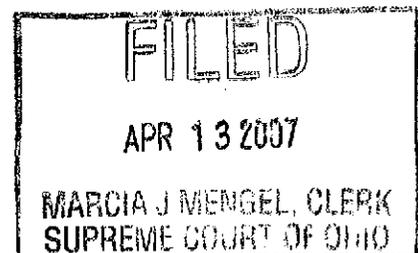
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**CERTIFICATE OF SERVICE**

**I. EXPLANATION WHY THIS CASE DOES NOT INVOLVE AN ISSUE OF PUBLIC AND GREAT GENERAL INTEREST**

This case does not involve an issue of public and great general interest. It is nothing more than a subrogation action arising from fire damage to a dwelling located in South Euclid, Ohio. As a result of the fire damage, Appellant, Allstate Insurance Company (“Allstate”), paid \$161,792.47 pursuant to two homeowner’s policies it sold to two separate insureds. After inspecting the property, including trees thereon, Allstate chose to accept the risk and insure both homes in exchange for the payment of premiums. Fire loss was a risk expressly covered under Allstate’s policies. Subsequent to Allstate’s payment to its insureds under its policies, and notwithstanding its contractual obligations to cover the loss, Allstate filed a negligence action against Appellee, The Cleveland Electric Illuminating Company (“CEI”), seeking reimbursement for the \$161,792.47 that it paid to its two insureds.

All of the experts (including those retained by Allstate) agreed that CEI did nothing to cause the fire. Rather, the fire was caused when a large limb on a tree owned by one of Allstate’s insured’s ultimately compromised the insured’s electrical equipment. There was no criticism of CEI’s equipment and no evidence that CEI breached any duty of care. Rather, Allstate alleged only that CEI failed to prevent the fire — a fire not caused by anything CEI did or failed to do. Allstate specifically alleged that CEI should indemnify it for a fire caused by the tree and equipment owned by one of its insureds because CEI did not immediately respond to certain calls made by one of the insureds approximately six hours prior to the fire. Because the manner and time by which utilities prioritize and respond to customer service calls is a service-related issue, the Eighth District Court of Appeals correctly concluded that the PUCO had exclusive jurisdiction over the dispute, consistent with Ohio Revised Code § 4905.26.

Moreover, this Court in other recent decisions already has addressed the PUCO issues raised by Allstate in its Memorandum in Support of Jurisdiction. See Kazmaier Supermarket, Inc. v. Toledo Edison, 61 Ohio St. 3d 147, 153 (1991) (recognizing that “there is perhaps no field of business subject to greater statutory and governmental control than that of a public utility” and holding that the PUCO has exclusive jurisdiction over service-related claims); State ex rel. Columbia Gas of Ohio, Inc. v. Henson, 102 Ohio St. 3d 349, 352 (2004) (stating that “the mere fact that [plaintiff] cast its allegations in the underlying case to sound in tort is insufficient to confer jurisdiction upon the common pleas court”); State ex rel. The Illuminating Co. v. Cuyahoga County Court of Common Pleas, 97 Ohio St. 3d 69, 73 (2002) (noting that, to determine whether PUCO has exclusive jurisdiction over the matter, the court must review the substance of the claims rather than mere allegations that the claims sound in tort or contract).

In its Memorandum in Support of Jurisdiction, Allstate incorrectly argues that the Eight District’s decision eliminates an Ohio resident’s ability to advance a common law tort theory against a utility in common pleas court. To the contrary, the Eighth District’s decision is consistent with the well-established case law that confers jurisdiction on Ohio’s common pleas courts for pure tort claims. This case simply is *not* such a pure tort claim and the Eighth District correctly so concluded.

Accordingly, this case does *not* involve an issue of great public or general interest. Instead, it is Allstate’s attempt to obtain a windfall as a result of its decision to insure against losses from fire. Allstate chose to take that risk for a fee and Allstate paid the claims of its insureds in accordance with its contractual obligations when the fire occurred. This Court already has addressed the PUCO issue raised by Allstate in its Jurisdictional Memorandum, correctly stating the law applicable in this instance. Ultimately, what Allstate seeks is to have

CEI reimburse it the money it paid its insureds *and* allow it to keep the premiums it charged because, in Allstate's view, taking six hours to respond is unreasonable. Such a proposition of law is not tenable under Ohio jurisprudence. Consequently, this Court should not accept Allstate's discretionary appeal.

## II. ARGUMENT IN SUPPORT OF APPELLEE'S POSITION REGARDING APPELLANT'S LONE PROPOSITION OF LAW

In its Jurisdictional Memorandum, Allstate espouses the following proposition of law:

*A utility company's failure to respond to a customer's emergency call, resulting in 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.*

See Memorandum in Support of Jurisdiction, at 4.

### A. Both the Applicable Statute and This Court's Prior Decisions Support the Decision of the Eighth District Court of Appeals in This Matter.

This proposition of law not only misstates the facts of record but it also is grossly misleading and confuses the PUCO jurisdictional issue decided below by the Eighth District Court of Appeals. Specifically, it implies that CEI somehow was the cause of the fire. As stated above, *everyone* agreed that no action or inaction of CEI caused the fire. Rather, it was caused by the insured's tree limb and electrical equipment.

Thus, Allstate's proposition of law centers around CEI's alleged failure only to respond to a customer call. Indeed, the allegation is that CEI did not respond fast enough to prevent the fire. However, under Ohio law, the manner by which CEI classifies its trouble calls, and how quickly it responds to them, is a matter within the exclusive jurisdiction of the PUCO.

Ohio Revised Code § 4905.26 defines the scope of PUCO's jurisdiction and provides, in pertinent part:

Upon complaint in writing against any public utility by any person, firm, or corporation . . . 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. The commission may adjourn such hearing from time to time. The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.

(Emphasis added).

The broad scope of § 4905.26 encompasses any practices relating to any services or practices of a public utility. It is well-settled by this Court and other Ohio courts that where the Ohio General Assembly enacts a complete and comprehensive statutory scheme governing review of claims arising under a certain area of law by an administrative agency, exclusive jurisdiction is vested within that agency. See, e.g., *Kazmaier Supermarket, Inc. v. Toledo Edison*, 61 Ohio St. 3d 147, 153 (1991).

As this Court recognized in *Kazmaier*, “there is perhaps no field of business subject to greater statutory and governmental control than that of a public utility.” *Id.*, at 151. Indeed, the General Assembly has enacted an entire chapter of the Ohio Revised Code dealing with public utilities that, among other things, regulates adequacy of electrical service and provides for review procedures when electrical service is called into question. See Ohio Rev. Code § 4901.01, et seq. If a party’s claims fall within PUCO’s jurisdiction, a court must dismiss those claims. See,

e.g., Kazmaier at 150; Suleiman v. Ohio Edison, 146 Ohio App. 3d 41, 45 (Mahoning Cty. 2001) (dismissing the complaint for lack of subject matter jurisdiction where PUCO had exclusive jurisdiction over the claims). Accordingly, both the applicable Ohio statute and this Court's prior decisions support the decision of the Eighth District Court of Appeals in this matter and Allstate's Memorandum in Support of Jurisdiction should be denied.

**B. CEI's Alleged Failure to Prevent a Fire it Did Not Cause Does Not Give Rise to a Common Law Tort Claim.**

The determination of whether a trial court has jurisdiction over a case involving an electric utility depends upon whether the claims asserted in the complaint are common law tort claims that are *distinct* from electrical service-related claims. See State Farm Fire & Casualty Co. v. Cleveland Electric Illuminating Co., 2004 Ohio App. LEXIS 3159 (Lake Cty., June 30, 2004) (noting that the issue of exclusive jurisdiction depends on whether the claim is a "pure common-law tort" or whether it "primarily relates to service"); Suleiman, 146 Ohio App.3d, at 45 (noting that the issue of exclusive jurisdiction turns on whether the claims raised in the complaint are allegations of common law negligence or service complaints).

In making this determination, a trial court should not defer to how the plaintiff articulates the claims in its complaint. See State ex rel. Columbia Gas of Ohio, Inc. v. Henson, 102 Ohio St.3d 349, 352 (2004) (stating that "the mere fact that [plaintiff] cast its allegations in the underlying case to sound in tort is insufficient to confer jurisdiction upon the common pleas court"); Higgins v. Columbia Gas of Ohio, Inc., 136 Ohio App. 3d 198, 202 (Belmont Cty. 2000) (stating that "[c]asting the allegations in the complaint to sound in tort or contract is not sufficient to confer jurisdiction upon a trial court when the basic claim is one relating to service"); State ex rel. The Illuminating Co. v. Cuyahoga County Court of Common Pleas, 97 Ohio St. 3d 69, 73 (2002) (noting that, to determine whether PUCO has exclusive jurisdiction

over the matter, the court must review the substance of the claims rather than mere allegations that the claims sound in tort or contract). Regardless of how a plaintiff characterizes the claims in its complaint, if it claims less than adequate service and repair, PUCO has *exclusive* jurisdiction. See, e.g., Lawko v. Ameritech Corp., 2000 Ohio App. LEXIS 5687 (Cuyahoga Cty., Dec. 7, 2000) (finding that a customer's allegation of negligence based on a utility's failure to respond to repeated phone calls concerning problems with her phone service was a service matter within the exclusive province of PUCO).

The State Farm and Lawko cases cited above are on point. In State Farm, the insurer, State Farm, filed a subrogation action against CEI based on fire damage to its insured's residence. State Farm alleged that CEI negligently inspected the meter base affixed to the residence. CEI promptly filed a motion to dismiss for lack of subject matter jurisdiction. The trial court granted the motion finding that the matter was within the exclusive jurisdiction of PUCO. The appellate court affirmed. The court found that State Farm's allegation that the service provided by CEI in inspecting the meter was negligently performed, although sounding in tort, primarily related to service. Consequently, the court concluded that PUCO had exclusive jurisdiction.

In Lawko, the plaintiff sued Ameritech over problems with her phone service. The plaintiff alleged, among other things, that Ameritech failed to correct the problems in spite of numerous complaints regarding the problem from the plaintiff and her clients. The plaintiff asserted both tort and contract claims. The trial court dismissed the action for lack of subject matter jurisdiction on the basis that PUCO had exclusive jurisdiction over the dispute. Although the plaintiff had asserted tort and contract claims, the court found that the plaintiff essentially claimed that Ameritech had provided her with less than adequate service and repair of her

telephone system. Because this was a service-related matter, the Eighth District Court of Appeals affirmed the dismissal, finding that PUCO had exclusive jurisdiction.

Here, Allstate alleged a service-related claim. Specifically, Allstate alleged that its insured made a few calls to CEI's customer service center concerning her tree limb that had fallen. Allstate alleged that CEI failed to timely respond to these service calls and a fire ensued. Again, Allstate's claim is that CEI did not *respond* quickly enough to prevent a fire it did not cause.

The tree limb eventually caused the insured's electrical equipment to pull away from her house and caused a short inside the home resulting in a fire to the insured's ungrounded house. This is not a pure common law tort claim. There is no allegation that CEI's equipment malfunctioned or failed in any way, or that CEI failed to construct, maintain, or inspect its equipment, or that CEI did anything to *cause* the fire. Instead, the substance of Allstate's claim is CEI's failure to respond to service calls. Clearly, the way in which CEI responds to *service* calls is related to CEI's business of providing residential electrical service to its customers.

In addition, the determination of liability would also necessitate an interpretation of CEI's service tariffs since Allstate's claim rests upon the duties and/or responsibilities of CEI as it relates to the wires providing electrical service to the insured's residence. Review and determination of PUCO's provisions are best accomplished by the PUCO with its expert staff technicians familiar with the utility commission provisions and industry standards. See Kazmaier, 61 Ohio St.3d at 153.

Allstate also mischaracterizes the record. Allstate states that "CEI promised to fix" the problem; that "CEI misclassified [Allstate's insured's] service call and failed to dispatch an employee to her home;" and that CEI somehow assumed a duty to act. See Memorandum in

Support of Jurisdiction, at 7. However, not only are these assertions false, Allstate neither made these allegations in the underlying action nor was there any evidence introduced to support them. Allstate alleged in its Complaint that CEI was negligent because it did not prevent a fire. In Allstate's view, a utility must drop everything and respond immediately whenever a customer calls to report that one of her tree limbs is touching a line. CEI gets thousands of service-related calls. How CEI classifies such calls and how fast it needs to respond is within the expertise of the PUCO and undercuts Allstate's argument for jurisdiction. Consequently, because Allstate's claim against CEI was service-related, irrespective of how Allstate pled it, the Eighth District Court of Appeals correctly applied Ohio law and existing precedent when it found that the PUCO had exclusive jurisdiction over the dispute. For this reason also, Allstate's Memorandum in Support of Jurisdiction should be denied.

### III. CONCLUSION

For the foregoing reasons, Allstate's Memorandum in Support of Jurisdiction should be denied. This case does not involve an issue of public and great general interest and addresses issues that already are well-settled under Ohio law.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

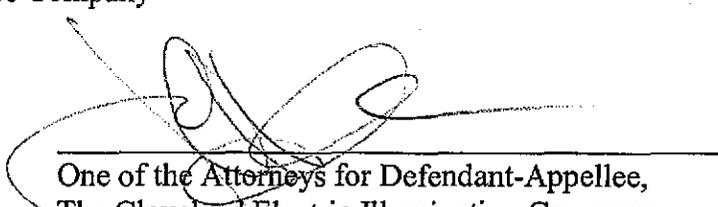
This is to certify that a copy of the foregoing Memorandum in Response to Appellant's Memorandum in Support of Jurisdiction was served this 12th day of April, 2007, by First Class

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