

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,
Eighth Appellate District
Court of Appeals
Case No. CA-06-087781

REPLY BRIEF OF APPELLANT ALLSTATE INSURANCE COMPANY

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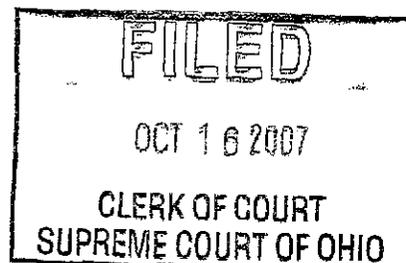


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ARGUMENT IN REPLY

Proposition of Law

A negligence claim arising from 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 the Court of Common Pleas, not a "service related" claim subject to the exclusive jurisdiction of the Public Utilities Commission of Ohio under R.C. 4905.26.

Appellee-Defendant The Cleveland Electric Illuminating Company (hereinafter referred to as "CEI") seems to present this Court with two, and only two, possible outcomes of the determination of the jurisdictional issue raised in the present appeal: (1) a customer will be responsible as a matter of law for a utility company's negligent response to an emergency call as long as the utility makes a *prima facie* showing that its actions were consistent with its practices and procedures, or (2) utility customers (i.e., the public) will be responsible for subsidizing changes to each utility's practices and procedures in order to eliminate the possibility that delay in responding to an emergency call will result in damage to lives or property.

Allstate proposes that these dire conclusions depend upon untenable assumptions, hyperbole, linguistic ambiguity, and fallacious logic. It is only by arguing around the central questions of this appeal – for example, the scope of the word "service" as used by the legislature in enacting Ohio Rev. Code § 4905.26 (hereinafter, "R.C. 4905.26") – that CEI manages to support propositions such as asserting that any dispute involving "servicing its customers" is properly heard by the Public Utilities Commission of Ohio (hereinafter referred to as "PUCO"). (See, CEI's Merit Brief (hereinafter referred to as the "CEI Brief"), p. 9.) Indeed, CEI's refusal to address issues crucial to this appeal is telling.

Appellant-Plaintiff Allstate Insurance Company (hereinafter referred to as "Allstate") asserts that the reasoning presented in the CEI Brief is not relevant to the facts of this case, but is instead an attempt to preserve a quasi-immunity from liability for the results of its negligence in

responding to customer emergency calls that is an unintentional effect of the diction of R.C. 4905.26. Specifically, Allstate will demonstrate that CEI's attempt to relitigate the question of its negligence is not relevant to the jurisdictional issue before this Court; that CEI's refusal to address the question of the meaning of "service" under R.C. 4905.26 reflects either a basic misunderstanding of the nature of the statute's ambiguity or an attempt to sidestep the issue in hopes of maintaining the *status quo*; and that CEI cannot simply rely upon purported compliance with one of its business practices to show that it acted non-negligently in a specific instance.

A. CEI's Attempt to Relitigate the Question of Its Negligence Is Not Germane to the Jurisdictional Question Upon Which This Appeal is Based.

Although this appeal concerns the question of jurisdiction over Allstate's claim of negligence, the CEI Brief predominantly addresses *proof* of said claim by asserting that it acted reasonably, that no duty or breach thereof has been alleged, and that its equipment and personnel functioned properly. (*See*, CEI Brief, pp. 1, 4-7, 9-10, 12-14, 15, and 16.) Specifically, CEI argues that because Allstate has not articulated a negligence claim and/or because CEI can disprove Allstate's negligence claim, PUCO's jurisdiction over the dispute is proper. Neither proposition is supportable.

1. There Is No Merit to the Argument that "Allstate's Claim Is Not a Negligence Claim."

CEI states, "Allstate's claim is not a negligence claim." (CEI Brief, p. 7.) CEI is aware that this statement is erroneous, as it has already admitted to the Cuyahoga County Court of Appeals that "**Allstate's sole claim against CEI is one of negligence.**" (Brief of Defendant-Appellant Cleveland Electric Illuminating Company (filed July 21, 2006, hereinafter referred to as the "CEI 8th District Brief"), p. 9 (emphasis added).) Allstate asserts that CEI's bold statement to this Court is a result of its refusal to address the distinction between "service

related”¹ and “pure common law tort” claims.²

To paraphrase R.C. 4905.26, PUCO’s jurisdiction is dependent upon characterization of a customer’s claim as essentially “service related.” Accordingly, courts have fashioned shorthand labels that divide negligence claims against utilities into two categories: “pure common law tort claims” (properly heard by the Court of Common Pleas) versus “complaints related to rates or services” (properly heard by PUCO). *See, e.g., Gayheart v. Dayton Power & Light Co.*, 98 Ohio App.3d 220, 228 (Ohio App. 2 Dist., 1994). The phrase “pure common law tort” claim is a term of art, because it does not refer to tort or negligence claims generally, but rather only to those tort claims that are not essentially “service related”.

However, CEI asserts that Allstate’s Proposition of Law “mischaracterizes Allstate’s claim as a ‘negligence’ claim. ...By characterizing the claim as a ‘negligence’ claim, [Allstate’s] proposition of law decides the issue [of jurisdiction] in a conclusory fashion.”³ (CEI Brief, p. 7;

¹ For purposes of this Brief and in the interests of brevity, when Allstate uses the term “service related” contained in quotes, it refers generally to “matters which are in essence rate and service oriented” under R.C. 4905.26 as opposed to “pure common-law tort claims” as distinguished by this Court in, e.g., *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St. 3d 147, 153-54 (1991). Allstate intends this quoted phrase to refer both to a utility customer’s complaints about their service as well as about practices relating to such service. Similarly, “pure common law tort” contained in quotes refers to matters which are distinct from “service related” claims. Specific discussion of the meaning of the word “service” as used in R.C. 4905.26 can be found in section B of Allstate’s Merit Brief (previously filed with this Court) and in section C, *infra*.

² The only time CEI addresses the circumstances in which a negligence claim may be brought against a utility is near the end of its Brief where it cites *Wilburn v. Cleveland Electric Illuminating Co.*, 74 Ohio App. 3d 401 (8 Dist., 1991). (CEI Brief, pp. 15-16.) Notably, this case does not address the question of PUCO’s jurisdiction at all, much less the scope of “service” under R.C. 4905.26. Ironically, the fact that a claim against a utility for failure to appropriately respond to a customer’s emergency call is cognizable as a “pure common law tort” claim undercuts CEI’s argument that PUCO has exclusive jurisdiction over such matters.

³ It should also be noted that CEI’s attack on Allstate’s Proposition of Law is devoid of authority and fails to suggest what CEI believes would be an appropriate proposition. (CEI Brief, pp. 6-8.)

see, Proposition of Law, *supra*.) CEI’s argument is only true if one assumes that characterization of a claim as a negligence claim is the equivalent of characterizing the claim as a “pure common law tort” claim (distinct from “service related” claims). In other words, CEI’s reasoning is sound if and only if one does not question the slight of hand which substitutes a general term – “negligence” claim – for a term of art – “pure common law tort” claim – when drawing the jurisdictional distinction required by R.C. 4905.26.⁴

Categorizing claims against a utility into “negligence” versus “service related” claims is facially unsupportable because it cannot seriously be asserted that no “service related” claims sound in negligence. Such a substitution accrues only one benefit to CEI: the ability to attack Allstate’s negligence claim without addressing the question of what kinds of claims are “service related” or whether Allstate’s claim is “service related”. Under the dichotomy proposed by CEI, it need merely show that a claim is not one for negligence in order to prove by exclusion that the claim must be “service related”. (*See*, CEI Brief, pp. 6-7 and 12-14.) Arguing that Allstate has not articulated a claim of negligence only results in confusing these proceedings and highlighting the efforts by which utility companies strive to maintain ambiguity as to what matters are “service related” so that they may in good faith continue to argue that any activity related to “servicing” their customers is properly addressed by PUCO. (*See, id.* at p. 9.)

⁴ A similar linguistic trick can be found in section III.D.2 of the CEI Brief, where it misconstrues Ohio courts’ distinction between “an isolated individual act of negligence” and a “practice related to service” as instead a requirement that Allstate, in order to prevail on its negligence claim, must somehow “isolate” the exact “individual act of negligence” that CEI committed. (*See*, CEI Brief, pp. 12-13.) Ohio law does not require Allstate to pinpoint the exact locus of time and space that “contains” the negligent act (or failure to act) in order to prevail on a claim of negligence, and CEI provides no authority for such a proposition. Tellingly, CEI argues both that Allstate should have isolated the specific act of negligence and that it should not be allowed to do same, because it is not PUCO. (*Compare*, CEI Brief, pp. 12-13 *with* pp. 7 and 13-14.)

2. There Is No Legal Basis for Finding that a Claim Is “Service Related” Based Upon a Purported Failure to Prove a Negligence Claim at Trial.

Further avoiding discussion of the jurisdictional issue before this Court, CEI asserts that Allstate has failed to allege any duty or breach thereof on the part of CEI. (CEI Brief, pp. 5-6 and 10-14.) Again, this statement is simply untrue. (See, e.g., Complaint, ¶¶ 23-24.) In fact, the CEI Brief contradicts its own assertion by arguing that one of the duties *alleged by Allstate* either does not apply or was not breached because CEI feels it acted reasonably under the circumstances. (CEI Brief, pp. 13-14.) When combined with CEI’s repeated assertions that it did not cause the fire at Ms. Harris’s home (*id.* at pp. 1, 4-5, 6, and 7), it becomes clear that CEI is not attacking the *existence* of allegations of negligence, but rather the *proof* thereof. Even though CEI admits that only one of its asserted assignments of error – “the jurisdictional issue” – is before this Court (*id.* at p. 1), CEI attempts to relitigate the issue of its negligence (i.e., its assignments of error numbers two through five) by posing the question as a jurisdictional one. Even assuming, *arguendo*, that it is possible to establish the jurisdiction of PUCO over a dispute by proving that as a matter of law no duty applied to a complained of activity, CEI has not attempted such an argument before this Court, and would not be successful if it did so.⁵

A simple, undisputable fact is that the jurisdictional determination of R.C. 4905.26 does not address proof of negligence. The very fact of this appeal demonstrates that CEI does not

⁵ CEI has argued below that under Ohio law it had no duty to act affirmatively for the protection of another’s property (which it alludes to in the CEI Brief, p. 1). However, this argument ignores the fact that CEI accepted and processed Ms. Harris’s emergency call, and promised to send someone out. (CEI Brief, p. 4; Supplement to Merit Brief of Appellee The Cleveland Electric Illuminating Company, pp. 41:5 – 42:19 and 43:7-10.) “[O]nce a duty is undertaken voluntarily, it must be performed with ordinary care.” *Sawicki v. Village of Ottawa Hills*, 37 Ohio St. 3d 222, 227 (1988); see also, section A.3, *infra*. CEI does argue that it “had no *affirmative and immediate* duty to respond” because it did not believe this was an emergency situation (CEI Brief, p. 16 (emphasis added); *but see* section C, *infra*).

believe that proof (at trial) of its negligence informs the jurisdictional determination, and it should not be allowed to argue the converse, that disproof of its negligence determines the appropriate forum for this dispute. CEI effectively asks this Court to fashion a rule that could not reasonably have been intended by the legislature: if a complainant cannot ultimately prove that the utility was negligent in a specific instance, then somehow the claim changes from a “pure common law tort” claim to a “service related” one.⁶ (*See*, CEI Brief, pp. 10-14.) Again, CEI seeks to establish that the claim is “service related” without the necessary inquiry into “service.”

Requiring a claimant to prove up a claim in order to establish jurisdiction is not unheard of in American jurisprudence, but CEI has provided no basis for the implication that this dispute is one where “the question of the court’s jurisdictional grant blends with the merits of the claim.” *Fisher v. United States*, 402 F.3d 1167, 1171-72 (Fed. Cir. 2005) (en banc) (discussing this “source of confusion for litigants and a struggle for courts” in actions for money damages against the United States brought pursuant to the Tucker Act (28 U.S.C. §1491).) Notably, even in such actions “it does not follow that, after deciding the case on the merits, the court loses jurisdiction because plaintiff loses the case.” *Id.* at 1176. In claims against a utility in Ohio, Allstate asserts that question of the jurisdiction of the Court of Common Pleas is not affected by the ultimate proof of the elements of negligence, but rather by characterization of the claim as “service related” as posed by the legislature. Once again, CEI has ignored the central issue of this appeal.

3. In the Event that CEI’s Claims Are Pertinent to the Jurisdictional Question or Otherwise, CEI Has Not Disproved Allstate’s Cause of Action for Negligence..

CEI maintains that Allstate’s negligence cause of action must fail because CEI was not

⁶ This assertion is intertwined with the fallacious syllogism by which CEI purports to prove that Allstate’s claim is really one about a business practice (discussed in detail in section C, *infra*).

subject to any standard of care concerning the protection of Ms. Harris's property; that even if it was subject to such a duty, it could not have breached same because it acted consistently with its "tree limb on wire" business practice; it did not "cause" the fire at Ms. Harris's house; and that Allstate or Ms. Harris should be held responsible for this loss. None of these theories are proven.

Primarily because CEI asserts that its equipment was not involved in this loss, CEI argues that it can not be negligent because it did not breach the duty "to exercise the highest degree of care consistent with the practical operation of its business in the construction, maintenance, and inspection of its equipment." *See, Otte v. Dayton Power & Light Co.*, 37 Ohio St. 3d 33, 38 (1988); CEI Brief, pp. 1, 3, 4-6, 13-14, and 16. This argument ignores two important facts. First, it is undisputed that CEI owned the power line which, due to the weight of the tree limb, pulled Ms. Harris's service mast away from her house.⁷ (CEI 8th District Brief, pp. 10-11.) CEI has not shown why the duty expressed in *Otte* does not apply to a situation in which a customer has notified CEI that *its own power line* is "ready to snap" due to the weight of a tree limb that has fallen thereon. (Supplement to Merit Brief of Appellee The Cleveland Electric Illuminating Company (hereinafter referred to as "CEI Supplement"), pp. 16:17 – 23:18.) Second, CEI's argument only addresses the *Otte* duty, which may be the most stringent standard, but is certainly not the only duty applicable to a utility company. For example, CEI has failed to address why it did not breach the general common law duty applicable to all actors or why it did not breach the duty which arose when it took and processed Ms. Harris's emergency calls. *See, e.g., Mussivand*

⁷ CEI attempts to disguise this fact by referring to its power line simply as "some wires" or "one wire [that] was holding everything up" and by claiming that Ms. Harris and her daughter "did not know whether the wires [onto which the limb had fallen] were cable or electrical wires." (CEI Brief, pp. 2 and 5.) CEI's own Supplement shows that Allstate's insureds were well aware that the branch was on CEI's electric wire. (CEI Supplement, pp. 25:9-12.) CEI also asserts, "The wires that were sparking [on the ground in Ms. Harris's back yard] were Ms. Harris's home wires and not CEI's wires." (CEI Brief, p. 3.) This claim is not supported by the record (CEI cites to its Supplement, pp. 44-46).

v. David, 45 Ohio St. 3d 314, 318-19 (1989); *and, Pacher v. Invisible Fence of Dayton*, 154 Ohio App. 3d 744, 752-53 (2 Dist., 2003).

Regarding the question of breach of duty, CEI's sole but oft-asserted argument is that because it acted consistently with its "tree limb on wire" practice, it was not negligent in responding to Mrs. Harris's emergency calls. (CEI Brief, pp. 1, 3, 4, 5, 6, 7, 9-10, 12-15, 16, 17, 18, and 19.) This premise is unsupported and is discussed fully in section C, *infra*.

As to causation, CEI simply claims "it is undisputed that no action or inaction of CEI caused the fire," presumably because it believes that its equipment was not involved in the loss. (CEI Brief, pp. 1, 3, 4-5, 6, 7.) To the contrary, Allstate has shown that CEI's equipment was integrally involved in causing the fire at Ms. Harris's home. Further, under CEI's view of causation, as long as its equipment does not fail, its actions or failure to act could never "cause" a fire at a customer's house. (*See, e.g.*, CEI Brief, pp. 1 and 16.) Ohio law does not require proof that an alleged tortfeasor's equipment caused the plaintiff harm, but rather that the "breach of the duty [owed the plaintiff] proximately caused the plaintiff's injury." *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565 (1998). The question of causation also requires analysis of whether CEI acted reasonably under the circumstances. CEI sidesteps this entire issue by assuming consistency with a business practice is conclusive evidence of appropriate care in a specific instance. CEI is without authority for such a premise. (*See*, section C, *infra*.)

The only time when CEI will even acknowledge the question of negligence in this specific case is when it blames Allstate or Ms. Harris for the loss. CEI argues that Allstate was negligent in issuing a policy of insurance to Ms. Harris because it believes that Allstate failed to foresee the danger posed by the subject tree limb.⁸ (CEI Brief, pp. 2 and 18.) However, CEI

⁸ CEI also implies that Allstate assumed the risk of loss by insuring Ms. Harris and that Allstate

does not identify what duty Allstate breached due to its alleged lack of foresight, much less whether the limb falling was foreseeable. CEI implies that Ms. Harris is somehow at fault because she reported the emergency to CEI rather than calling a tree trimmer or an “electrician knowledgeable of the NEC, which governs a home’s electrical equipment.” (*Id.* at p. 16.) Even assuming, *arguendo*, that Ms. Harris should have called a third party to deal with a tree limb on an electrical wire owned by CEI, the utility does not attempt to justify its failure to inform Ms. Harris or her daughter of same during any of their multiple calls.

CEI’s conclusory analysis of Allstate’s negligence claim, even if relevant to the jurisdictional question before this Court, fails to prove that CEI was free from any duty in responding to Mrs. Harris’s calls, fails to show that CEI met the appropriate standard(s) of care, fails to establish that its response to the emergency calls at issue was not the legal cause of the fire, fails to address (and meet) the standards governing appellate review of questions of fact (like breach of duty and causation) and fails to shift the blame to another party. *See, e.g., State ex rel. Shady Acres Nursing Home, Inc. v. Rhodes*, 7 Ohio St. 3d 7, 8-9 (1983). Accordingly, CEI’s negligence arguments amount to little more than smoke and mirrors, confusing and detracting from discussion of the jurisdictional scope of R.C. 4905.26.

B. CEI’s Refusal to Address the Question of the Scope of “Service” as Used in R.C. 4905.26 Demonstrates that CEI Cannot Refute Allstate’s Argument.

Although this appeal addresses the narrow issue of whether Allstate’s claim is “service related” under R.C. 4905.26, it is telling that CEI has never, at any point in this litigation, even attempted to formulate what criteria distinguish a complaint about “service” from one distinct

is simply greedy. (CEI Brief, pp. 2, 12, and 19.) These are actually anti-subrogation arguments.

from “service.”⁹ Instead, CEI relies on equivocation and confusion in a transparent attempt to maintain the *status quo*.

Generally, the practice of obtaining a conclusion through the improper or ambiguous use of words is referred to as a verbal fallacy. Specifically, the verbal fallacy of employing the same word in two or more senses is referred to as equivocation. A classic example of equivocation is the following: (1) heavy things have a great mass, (2) this is a heavy fog, therefore (3) this fog has a great mass. Obviously, the argument is faulty, because when “heavy” is used in relation to fog, it describes visual density, not molecular density. CEI’s arguments follows the same formula: generally, (1) PUCO has jurisdiction over a “complaint...against any public utility...that any...service...is unjust” (R.C. 4905.26), (2) a thing that a utility does for a customer is a service, therefore (3) PUCO has jurisdiction over a “complaint...against any public utility...that any...thing it does for a customer...is unjust”; and specifically (1) PUCO has jurisdiction over “service related” complaints; (2) responding to a customer’s call is related to service; therefore (3) PUCO has jurisdiction over “responding to a customer’s call” complaints.

In the first instance, CEI exploits the difference between the pedestrian meaning of service and the term as reasonably used in R.C. 4905.26 in order to argue that any matter it wishes must be heard by PUCO. For example, CEI states, “[Allstate’s] interpretation of Section 4905.26 is oblivious to the fact that a large aspect of a public utility’s business involves *servicing* its customers by intaking, categorizing, and responding to calls concerning a variety of matters.” (CEI Brief, p. 9 (emphasis added).) Of course, CEI never addresses the question of why the

⁹ In its Brief, CEI relies solely on the “plain language” of R.C. 4905.26 and “this Court’s announcement in *Kazmaier* concerning statutory and governmental control over public utilities to define the scope of R.C. 4905.26. (CEI Brief, p. 9.) *Kazmaier*, although assuredly noting the distinction between “pure common law tort” and “service related” claims, does not discuss the scope of the word “service” because the dispute was about rates. *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St. 3d 147 (1991).

legislature bothered to enumerate the disputes over which PUCO has jurisdiction when it would have been so much simpler to refer to “complaints against a public utility.”

The latter example is more insidious, because CEI capitalizes on the courts’ use of the phrase “service related” as a term of art – including complaints about a customer’s utility service as well as complaints about practices related to such service (*see, fn. 1, supra*) – by substituting a general relational standard (i.e., can it be related to service?) in the term of art’s stead. CEI states, “Indeed, only an attorney can fashion an argument, as Allstate is doing here, that a utility’s response to a customer service call is somehow unrelated to service.” (CEI Brief, p. 9.) Notwithstanding that Allstate is not an attorney, this is a perfect example of how CEI uses *both* examples of equivocation: using the generic phrase “service call” as an implication that a complaint regarding the utility’s response is essentially “service related” and at the same time asserting that a matter has to be “unrelatable” to service in order to invoke the jurisdiction of the Court of Common Pleas.

It should be noted that these arguments are not unique to CEI. Even a cursory review of the applicable Ohio case law shows that these arguments by utilities are commonplace. CEI claims that the present state of Ohio law is sufficient to resolve the question of what matters are “service related.” (CEI Brief, p. 18.) This may be true for utility companies with the resources and the desire to litigate this somewhat arcane question of statutory interpretation, but what CEI ignores in its attacks on Allstate is that subrogation is only possible when an individual insured has a cause of action against a utility. The simple reality is that the questions of fact and law involved in this case are substantially identical to those which would have arisen if this case were brought by an individual with no insurance. The ambiguity of R.C. 4905.26 – and the ease with which utilities have learned to exploit that ambiguity – provides a significant disincentive for

individuals to pursue redress for harm they feel has been caused by a utility's negligence. Unless there is a particular case, statute, tariff, or PUCO order exactly on point, litigants face tremendous uncertainty as to whether matters not explicitly addressed by R.C. 4905.26 (such as rates charged) will ultimately be found to be "service related," and absolute certainty that the utility will strive for such a determination at every possible opportunity.¹⁰ This uncertainty also hampers the settlement process.

Besides taking advantage of the general confusion regarding the scope of the word "service" under R.C. 4905.26, CEI confuses Allstate's arguments addressed thereto. For example, CEI objects to Allstate's characterization of "service" by stating, "Allstate argues that Title 49 only confers exclusive jurisdiction to PUCO over 'issues with the quality of the electrical service provided by CEI.' [Allstate Brief] at 9." (CEI Brief, p. 9.) This is not true, and ignores Allstate's discussion of "practices affecting or relating to any service furnished by the public utility". (Allstate Brief, pp. 13-16.)

CEI also states, "to avoid PUCO jurisdiction, Allstate attempts to contort the definition of 'service' to include that it had to be done for a separate fee." (CEI Brief, p. 12 (no citation to the Allstate Brief).) This is also untrue, as CEI refers to a footnote containing the popular definition of "service" in the midst of Allstate's explanation of how CEI uses the word. (Allstate Brief, p. 9.) Since the closest CEI comes to discussing the scope of the word "service" in R.C. 4905.26 is

¹⁰ In response to Allstate's claim that PUCO's expertise is not necessary for resolution of this dispute, CEI argues that Ohio Admin. Code § 4901:1-10 "evidences PUCO's authority" over all aspects of a utility's customer service. (CEI Brief, p. 10.) The only part of 4901:1-10 that pertains to customer service calls is the requirement that such calls, on a monthly average, must be answered within sixty seconds. Ohio Admin. Code § 4901:1-10-09 (B). In fact, Allstate's research did not uncover any other section or PUCO Order that in any way relates to customer service calls. Rather, if this section implies anything, it merely confirms PUCO's authority over average call processing – a practice related to its utility service – and not over standards of care applicable to any individual call.

to blatantly misconstrue Allstate's arguments, it should be assumed that CEI does not wish to address the issue, preferring instead to exploit the term's latent ambiguities. It is not reasonable to assume that the legislature intended the term to include anything that a utility chooses to call a service, and it is unfair to Ohio's utility customers to allow utilities to argue such in order to avoid financial liability for their negligence.

C. **CEI Cannot Simply Rely Upon Assertions of Compliance with One of Its Business Practices to Prove that It Acted Non-Negligently with Respect to Ms. Harris's Calls.**

CEI argues as though a *prima facie* showing that it acted consistently with (one of) its business practices – the “tree limb on wire” procedure – is a talisman that not only converts Allstate's claim into one about its business practices, rather than an isolated act of negligence, but also doubles as proof that (1) CEI acted non-negligently with respect to Ms. Harris's calls, and (2) the delay in responding to notification that CEI's charged, electrical service wire was “ready to snap” was somehow at the direction of CEI. Allstate will demonstrate that under Ohio law, compliance with a practice or standard does not disprove negligence in a specific instance and CEI's logic fails due to its reliance on a hidden, fallacious assumption.

CEI argues that “what Allstate classifies as an isolated act of negligence is really CEI following the same practices and procedures that it follows every time it receives a customer service call similar to the calls at issue in this action.” (CEI Brief, p. 12.) In other words, CEI asserts that because it followed a business practice that categorizes “tree limb on wire” calls as low priority, non-emergency requests, its response to Ms. Harris's calls was not negligent. This argument ignores a well established maxim of negligence: “What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.” *Kohli v. PUCO*, 18 Ohio St.

3d 12, 14-15 (citing *Texas & Pacific Ry. Co. v. Behymer*, 189 U.S. 468, 470 (1903)); see, *Grabill v. Worthington Indus., Inc.*, 98 Ohio App. 3d 739, 743-44 (10 Dist., 1994) for a discussion of its holding that compliance with the NESC standards and requirements is not dispositive of whether a utility met the requisite standard of care in a specific situation.

CEI also improperly uses purported compliance with its business practice as proof that Allstate's claim is one about a "practice...relating to any service." R.C. 4905.26. In short, it argues that: Allstate complains that a customer's issue was handled negligently, but because the issue was handled consistently with CEI's business practices, Allstate is therefore complaining about negligent business practices, a PUCO matter. (*See, e.g.*, CEI Brief, p. 13.) Like the argument addressed immediately above, this assertion confuses CEI's standard for responding to "tree on limb calls" generally with the legal standard of care applicable to CEI's specific activity. Stated another way, CEI's argument confuses a sufficient condition (i.e, if CEI responds to a customer's call in a specific fashion, the response is consistent with its business practice) with a necessary condition (i.e., in order for a response to be consistent with CEI's business practice, it must respond to the call in a specific fashion). The logical disconnect of CEI's argument is that it undertakes to prove the sufficient condition, but then concludes as if it had proven the necessary condition: CEI had no choice but to respond as it did to Ms. Harris's situation.

CEI paints a picture of a call center staffed by automatons who, upon receiving a call in any way involving a tree limb touching a wire, code "tree limb on wire" and "low priority" and route the call to Forestry because it cannot be an emergency call as long as lights are on and the wire has not actually fallen down yet. (CEI Brief, p. 4.) CEI attempted this argument at trial, but was unsuccessful, as shown by the very materials included in the Supplement to the CEI Brief. The Director of FirstEnergy Contact Centers at first testified that all "tree limb on wire" calls are

classified as low priority calls:

Q. Now, in the context of a tree limb on a wire call, are there different priorities of a tree limb on wire call?

A. No. It's a tree limb on wire. It's classified the same.

(CEI Supplement, p. 36:12-16.) However, the Director admitted immediately thereafter that this was not the case. He confessed that factors such as the current weather affect the priority of a "tree limb on wire" call (*id.* at 36:17 – 37:3) and also that CEI's representatives are actually trained to ask a series of questions about the situation. In other words, CEI representatives are empowered to use their judgment to determine the appropriate priority (*id.* at 37:8-19). Thus, the failure to respond properly to Ms. Harris's plea for help was not attributable to CEI's "practices" but rather either to the failure to apply the appropriate practice to this individual situation or to the fact that CEI's representative simply did not believe Ms. Harris or her daughter when they repeatedly informed CEI that this was an "emergency" situation.

Moreover, it is simply preposterous to claim that Ms. Harris's calls were not "life-threatening" and that this was not a situation "posing a danger to anyone" because the calls did not involve a "live wire [already] down" or an "outage" situation. (CEI Brief, pp. 3, 4, 5, 10, and 16.) First, CEI admitted at trial that the term "outage calls" includes situations when customers call CEI because of an emergency situation:

Q. Now when you say outage calls, what kind of calls you [sic] referring to?

A. Generally speaking that's when a customer – that is our moment of truth. A customer calls in and they tell us they are without lights. *Or they have an emergency situation.* And we process those accordingly.

(CEI Supplement, p. 35:1-8 (emphasis added).) CEI is well aware that this situation not only posed a significant danger to Ms. Harris, but resulted in actual, life-threatening danger when her house burst into flames. The only thing that separates Ms. Harris's calls' as an imminent "wire down" situation, from a "wire [already] down" situation is that CEI did not believe Ms. Harris

when she informed CEI that her electric wire was “ready to snap,” instead, CEI categorized the call like a run-of-the-mill “tree limb on wire” call, ignoring Ms. Harris’s clear observation of the situation and her pleas for assistance.

These are factual issues which involve determinations such as whose testimony was more believable. CEI failed to convince the jury that it responded appropriately to Ms. Harris’s calls, and now, even though the issue is not part of the jurisdictional question before this Court, CEI wishes to second-guess this determination merely because it does not believe that a situation where a tree limb’s weight pulls the service mast off of a home, resulting in a fire inside that home, poses danger to anyone.

Finally, CEI cannot seriously contend that, unlike the situations discussed in *Mid-American Fire & Casualty Co.* and related cases, the failure to timely respond to Ms. Harris’s request for assistance was at the direction of CEI. *See*, 1993 WL 211651 at *3 (Ohio App. 2 Dist.). Such a stance is dependent not only upon accepting that Ms. Harris’s calls related to a non-emergency situation, but also that upon the proposition that CEI has some business practice to the effect that low priority calls are not to be responded to, for example, before six hours have passed. The simple fact is that CEI has a duty to respond to all of its customer calls in a fashion that is reasonable under all of the circumstances. While the classification assigned a specific call might be *one of* such circumstances, a designation of “low priority” is not tantamount to a direction to fail to timely respond to the call. Again, asserting that an action is *consistent* with policy is not the same as showing that policy *directed* that a specific action be taken.

CEI’s failure to perceive of a situation in which its actions might be both consistent with a business practice and inappropriate to the specific situation at hand does not mean that such situations do not exist. This is simple recognition of the fact that real life often does not fit into

neat, preordained categories. This case involved an isolated act of negligence, and determination of same ultimately depends upon the facts of the specific situation, not on what might be a reasonable practice to apply to situations in general. CEI should not be allowed to escape liability for the damages that resulted from its failure to properly respond to an emergency call just because it has a practice of categorizing calls with *some* similar circumstances as non-emergency calls or low priority.

D. CEI's Policy Arguments Are Strictly Hyperbole.

Without the support of fallacious conclusions, the distraction of its negligence argument, and the assumption that PUCO's expertise extends to anything related to servicing a utility's customers, CEI's policy arguments lose their teeth. Allstate asserts that neither misconstruction of the nature of this appeal nor a threat to pass along the costs CEI's negligence to Ohio ratepayers should inform this Court's jurisdictional determination.

CEI claims, "If Allstate were to prevail, CEI would have no idea as to what specific practice was deficient and, consequently, would not know how to change that practice to correct the deficiency." (CEI Brief, p. 12.) However, if Allstate were to prevail, this would actually stand for the proposition that CEI committed an isolated act of negligence, not that CEI's business practice was deficient. That CEI may decide that the only way to address the potential that its employees might negligently handle a customer call is to establish new, better (but expensive) practices for its call center does not alter the nature of Allstate's claim.

It is undisputed that CEI receives numerous "tree limb on wire" calls and it is not doubted that many of these calls are low priority, non-emergency situations. The fact that Ms. Harris's specific situation did involve an emergency does not implicate the failure of a business practice that may well address the overwhelming majority of "tree limb on wire" calls. Furthermore, that

CEI's employees error in assessing the danger to Ms. Harris and her property does not imply that CEI's business practice directed such a mistake.

CEI also alleges that PUCO's jurisdiction is necessary because the decision of the Court of Common Pleas will not advise CEI as to exactly what went wrong. (CEI Brief, p. 17-18.) First, this argument is irrelevant, because if Allstate has presented a "pure common law tort" claim, PUCO is not competent to adjudicate the matter. *State ex rel. Ohio Power Co. v. Harnishfeger*, 64 Ohio St. 2d, 9, 10 (1980). Second, even if CEI's claims of ignorance are to be believed, it has not shown why PUCO is prevented from assisting CEI in making the appropriate changes or at least making a determination of same.

CEI also asserts that PUCO should have jurisdiction over this matter because

"Only PUCO has the expertise necessary to understand the impact on a utility's business and/or the rates charged to customers caused by a mandated change to the utility's practices and procedures. PUCO understands the impact on rates of requiring a utility drop everything and immediately respond to all customer service calls."

(CEI Brief, p. 14.) If CEI is earnestly proposing that a finding of negligence in this case means that it "must drop everything and respond immediately whenever a customer calls to report that one of her tree limbs is touching a line," then it is either admitting that its employees cannot be trusted to respond to "tree limb on wire" calls in a non-negligent fashion or petulantly declaring that if it cannot categorize calls exactly as it wishes, it will refuse to categorize calls at all. (*See also, id.* at p. 17.) Again, CEI's stance does not address the jurisdictional question before this Court but is merely an attempt to avoid taking responsibility for the way in which it mishandled Ms. Harris's calls.

CEI also threatens to simply pass along the costs of its negligence to its customers if it is found liable in this instance, because if this Court affirms state court jurisdiction over this matter,

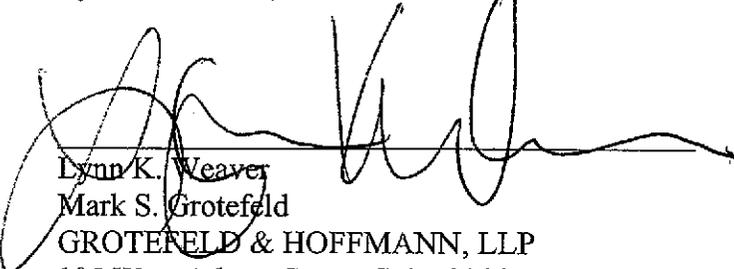
“CEI as well as all public utilities and their customers, will feel the impact in thousands of other incidents as utilities incur the cost of modifying their practices and procedure, and customers incur the rates passed on to them as a result.” (CEI Brief, p. 12.) Not only is CEI once again assuming that if it was found negligent, it must incur substantial costs in adjusting its business practices and confusing the question of jurisdiction with a finding of negligence, but it is also attempting to turn this dispute into one involving rates, which under R.C. 4905.26 is a matter for PUCO. Further, CEI conveniently ignores the fact that it is required to submit its rate tariffs to PUCO before charging its customers, so once again a finding of negligence by the Court of Common Pleas will not somehow allow CEI to freely “charge” its customers for the effects of its negligence.

CONCLUSION

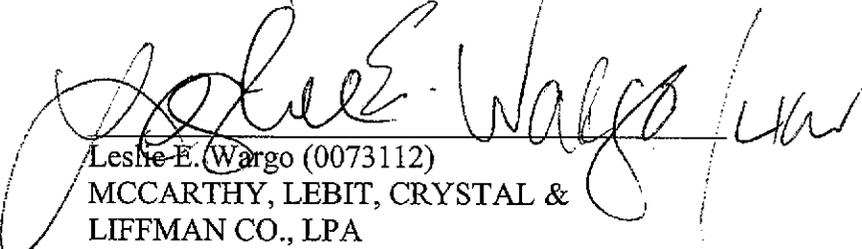
For all of the reasons and argument discussed above and in its Merit Brief, Appellant Allstate Insurance Company respectfully requests this Court find that under the facts of this case, a negligence claim arising from a utility company’s failure to respond to a customer’s emergency call, resulting in a fire at that customer’s home, is a pure common law tort claim subject to jurisdiction in a Court of Common Pleas, rather than a “service related” claim subject to the exclusive jurisdiction of the Public Utilities Commission of Ohio under to R.C. 4905.26.

Respectfully submitted,

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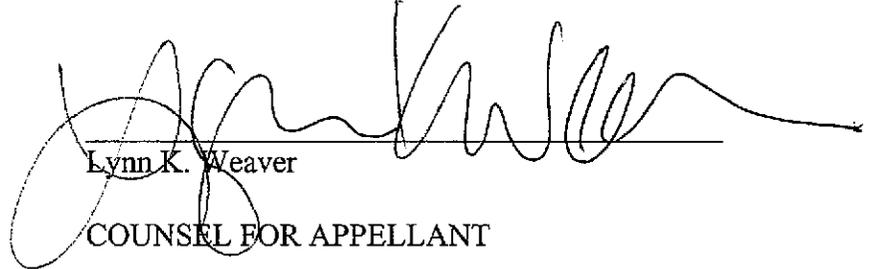


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Certificate of Service

I certify that a copy of this Merit Brief was sent by U.S. mail to counsel of record for appellees, Thomas L. Michals, Deneen Lamonica, Anthony F. Stringer, Calfee, Halter & Griswold, LLP, 1400 McDonald Investment Center, 800 Superior Avenue, Cleveland, Ohio 44114 on October 15, 2007.



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