

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

ALLSTATE INSURANCE COMPANY,
Plaintiff-Appellant,

v.

CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Defendant-Appellee.

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

APPELLEE, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY'S,
MOTION FOR RECONSIDERATION

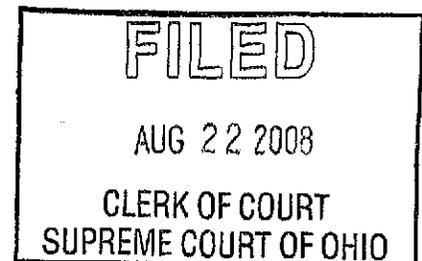
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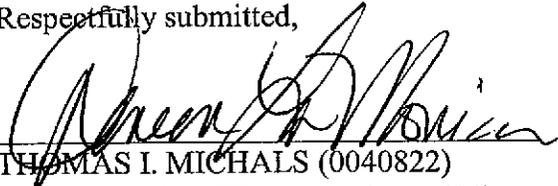
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Allstate Insurance Company



Pursuant to S. Ct. Prac. R. XI § 2, Defendant-Appellee, The Cleveland Electric Illuminating Company (“CEI”), respectfully moves the Court to reconsider its August 12, 2008 Slip Opinion reversing the decision of the Eighth District Court of Appeals in the above matter. The Court’s Opinion (a copy of which is attached as Exhibit A) adopted a two-prong test, created in Pacific Indemnity Insurance Company v. Illuminating Company, Cuyahoga App. No. 82074, 2003-Ohio-3954, which removes from the jurisdiction of the Public Utilities Commission of Ohio (“PUCO”) any matter for which it is determined that the “administrative expertise” of the PUCO is not required. The Court then applied the Pacific Indemnity test to this case in a way that would remove from the PUCO’s jurisdiction any case in which a court concluded that a jury could be made to understand the issues being disputed. The Court, in so holding, failed to consider fully the impact of the Pacific Indemnity standard, which would divest the PUCO of the exclusive jurisdiction granted to it by Ohio Revised Code section 4905.26.

The Court has exceeded its authority by creating a judicial test that rewrites R.C. 4905.26 as it pertains, by its unambiguous language, to service calls. Accordingly, CEI requests that this Court reconsider and vacate its Opinion and affirm the decision of the Court of Appeals.

Respectfully submitted,



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MEMORANDUM IN SUPPORT OF APPELLEE, THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY'S, MOTION FOR RECONSIDERATION

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I. INTRODUCTION

This case involves a claim by Plaintiff-Appellant, Allstate Insurance Company (“Allstate”), that the PUCO-compliant service guidelines of Defendant-Appellee, The Cleveland Electric Illuminating Company (“CEI”), setting the time by which CEI had to respond to the service call of Allstate’s insured, were inadequate. In its brief to the Eighth District Court of Appeals, Allstate urged the Court of Appeals to hold that the two-prong test that it created in Pacific Indemnity Insurance Company v. Illuminating Company, Cuyahoga App. No. 82074, 2003-Ohio-3954, required a finding that the case at bar was outside the exclusive jurisdiction of the Public Utilities Commission of Ohio. Appellee’s Brf. at 10-11. The Court of Appeals declined to apply its test in that fashion, holding instead that “[q]uality of service complaints,” like the complaint at issue here, “are under PUCO’s jurisdiction.” See Journal Entry, a copy of which is attached as Exhibit B, at 6. In so holding, the Court of Appeals followed “the Ohio Supreme Court and other state appellate courts” in concluding “that tort claims alleging disruption in service or the adequacy of utility service fall under the exclusive jurisdiction of PUCO.” Id. Now, however, this Court is departing from that well-established principle in a way that muddies the waters in this area of law.

In its August 12, 2008 Slip Opinion, the Court adopted the Pacific Indemnity test and applied it as follows:

The ultimate question in this case is whether the delay between CEI’s receipt of the emergency calls and arrival at the Harris residence was reasonable. That issue is particularly appropriate for resolution by a jury.

Slip Opinion at 6. Depriving the PUCO of its exclusive jurisdiction over any issue that is “appropriate for resolution by a jury” will result in the PUCO losing its exclusive jurisdiction over every utility case, because juries, with the assistance of experts, regularly decide issues

involving complex areas of expertise. The Court should reconsider its ruling, vacate its Opinion, and enforce Ohio Revised Code section 4905.26 as written.

II. DISCUSSION

A. Reconsideration Is Appropriate Here.

Previously, this Court has “invoked the reconsideration procedures set forth in S.Ct. Prac. R. XI to correct decisions which, upon reflection, are deemed to have been made in error.” State ex rel. Huebner v. West Jefferson Village Council, 75 Ohio St. 3d 381, 383 (1996) (citing State ex rel. Mirlisena v. Hamilton Cty. Bd. of Elections, 67 Ohio St. 3d 597 (1993)). Appellate courts reconsider decisions where the motion calls to the court’s attention an “obvious error” or where, as here, it “raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been.” See Columbus v. Hodge, 37 Ohio App. 3d 68 (Franklin Cty.1987). The Court should reconsider its decision here because that decision, if left unmodified, rewrites the PUCO’s jurisdiction to remove from the Commission’s exclusive jurisdiction all complaints related to service calls.

B. The Court’s Opinion Rewrites the Statute.

R.C. 4905.26 unambiguously grants the PUCO exclusive jurisdiction over a “complaint in writing against any public utility . . . that any . . . service . . . or service rendered . . . 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.” The PUCO’s exclusive jurisdiction over utility service calls is appropriate because it is the PUCO that sets standards by which utilities operate. See,

e.g., Ohio Admin. Code § 4901:1-10-09. Here, however, the PUCO has not set any standard that is applicable to facts at bar or told the utilities what they must do in response to calls like the one made by Allstate's insured. By turning these decisions over to juries, a utility in central Ohio, for example, would have to look for jury verdicts in every county in Ohio, rather than look to the PUCO, to determine the standards by which they should operate. The General Assembly enacted R.C. 4905.26 to prevent this from happening, and this Court should respect and enforce the General Assembly's enactment.

At oral argument, as CEI's counsel was explaining the need for the PUCO's expertise in evaluating the adequacy of CEI's service practices, the Court asked: "Isn't the issue that a jury can decide whether CEI was negligent or not just as well as three members of the Public Utilities Commission can? . . . Juries decide more difficult questions than that every day." The Court also commented, "Why couldn't a jury understand that? So far, you haven't been explaining brain surgery here." Under such a standard, however, no case would be heard by the PUCO, because juries do decide brain surgery cases. With the help of expert witnesses, juries are given the ability to decide the most complex cases, from antitrust cases to securities fraud cases to patent cases to brain surgery cases. Cf. Ohio R. Evid. 702(A) ("A witness may testify as an expert if . . . [t]he witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons"). Expert witnesses can be employed to assist jurors in deciding almost any issue, but the General Assembly expressly requires that utility service calls be evaluated exclusively by the PUCO.

Indeed, under the test adopted by the Court, no case would fall within the exclusive jurisdiction of the PUCO. A plaintiff could bring any type of utility-related case – service cases, classification cases, even rate cases – and the PUCO's "administrative expertise" would not be

“required” because the parties could present expert witnesses (including former PUCO officials) to explain the PUCO-related issues to the jury. This Court previously held that “the jurisdiction specifically conferred by statute upon the Public Utilities Commission over public utilities of the state . . . is so complete, comprehensive and adequate as to warrant the conclusion that it is likewise exclusive.” State ex rel. The Illuminating Co. v. Cuyahoga Cty. Court of Com. Pls., 97 Ohio St. 3d 69, 72 (2002) (citations omitted). The adoption of the Pacific Indemnity test, as applied by the Court, would convert the PUCO’s jurisdiction from exclusive to empty.

By adopting the Pacific Indemnity test and applying it in a way that takes a service-related call like the one at issue here out of the jurisdiction of the PUCO, the Court has effectively rewritten R.C. 4905.26 to remove all references to complaints about a utility’s service. However, “it must be recognized that a court, in interpreting a legislative enactment, may not simply rewrite it on the basis that it is thereby improving the law.” Seeley v. Expert, Inc., 26 Ohio St. 2d 61, 71 (1971). “[A] statute which is free from ambiguity is not subject to judicial modification under the guise of interpretation.” Pulley v. Malek, 25 Ohio St. 3d 95, 96-97 (1986). Moreover, “[a]ll statutes relating to procedure are remedial in their nature and should be liberally construed and applied to effect their respective purposes.” The Wellston Iron Furnace Co. v. Rinehart, 108 Ohio St. 117 (1923), at ¶ 1 of the syllabus; see also R.C. 1.11 (same). Here, the Court has construed R.C. 4905.26 so narrowly that claims that fall within its plain language are now excluded. The Court’s adoption and application of the Pacific Indemnity test run counter to well-established principles of statutory construction.

In Columbus-Suburban Coach Lines, Inc. v. Public Utilities Comm’n, 20 Ohio St. 2d 125, 127 (1969), this Court held: “In determining legislative intent it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used.” See also

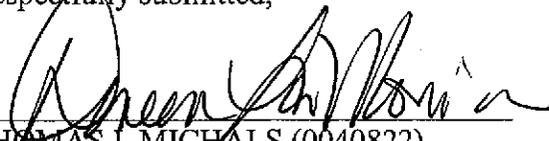
R.C. 1.47(B) (“In enacting a statute, it is presumed that . . . The entire statute is intended to be effective.”); State v. Cowan, 101 Ohio St. 3d 372, 376 (2003) (court cannot create a procedure for review of post-conviction petitions in municipal court because to do so would rewrite the post-conviction relief statute).

The Court recognized that this case involved a service call, and the statute plainly says that service calls are within the exclusive jurisdiction of the PUCO. The Court must apply the statute as written. The statute cannot be given effect as written if the Court allows any case that a jury could decide to be tried first in a court of common pleas. The Court should reconsider and vacate its Opinion.

III. CONCLUSION

“Casting the allegation in a complaint to sound in tort or contract is not sufficient to confer jurisdiction upon a trial court when the basic claim is one that the Public Utilities Commission of Ohio has exclusive jurisdiction to resolve.” State ex rel. The Illuminating Co., 97 Ohio St. 3d at 73. The Court’s Opinion here goes even farther – it allows a plaintiff to avoid the PUCO’s exclusive jurisdiction whenever the plaintiff can present expert evidence to allow a jury to decide a utility complaint – in other words, in every case, tort, contract, or otherwise. For these and the foregoing reasons, CEI’s Motion for Reconsideration should be granted, and the Court should vacate its August 12, 2008 Slip Opinion and affirm the Court of Appeals’ decision.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served this 22nd day of August, 2008, by

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EXHIBIT A

The Supreme Court of Ohio

FILED

AUG 12 2008

CLERK OF COURT
SUPREME COURT OF OHIO

Allstate Insurance Company

v.

Cleveland Electric Illuminating Company

Case No. 2007-0452

JUDGMENT ENTRY

APPEAL FROM THE
COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is reversed and this cause is remanded to the court of appeals, consistent with the opinion rendered herein.

It is further ordered that a mandate be sent to the Court of Appeals for Cuyahoga County to carry this judgment into execution and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County.

(Cuyahoga County Court of Appeals; No. 87781)



THOMAS J. MOYER
Chief Justice

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, Slip Opinion No. 2008-Ohio-3917.]

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

SLIP OPINION NO. 2008-OHIO-3917

**ALLSTATE INSURANCE COMPANY, APPELLANT, v. CLEVELAND ELECTRIC
ILLUMINATING COMPANY, APPELLEE.**

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, Slip Opinion No. 2008-Ohio-3917.]

Jurisdiction — Court of common pleas has jurisdiction over common-law tort claim brought against a utility.

(No. 2007-0452 — Submitted February 26, 2008 — Decided August 12, 2008.)

APPEAL from the Court of Appeals for Cuyahoga County, No. 87781,
2007-Ohio-157.

PFEIFER, J.

{¶ 1} Appellant Allstate Insurance Company contends that the trial court had jurisdiction to determine its subrogation claim against appellee Cleveland Electric Illuminating Company (“CEI”). Allstate alleged that CEI was negligent in failing to respond to a customer’s service call and that Allstate was obligated to pay claims to two of its insureds when a fire and property damage occurred. This case comes down to a simple question: Is the claim underlying Allstate’s

subrogation claim service related or is it a pure common-law tort claim? Because we conclude that Allstate's claim arises from a common-law tort and is outside the expertise of the Public Utility Commission of Ohio ("PUCO"), we hold that Allstate's claim was properly tried in the court of common pleas.

Facts and Procedural History

{¶ 2} On the morning of July 20, 2005, Margaret Harris and her daughter, Lisa Little, noticed that a large tree limb had broken and was leaning on service wires connected to the duplex where they lived. The tension from the limb had caused the electrical service mast to pull away from the duplex; it appeared to Harris and Little that a wire had snapped. Harris called CEI before noon to report the situation. She spoke with a customer service representative, who entered the information into the company's system. After a couple of hours passed without a response from CEI, Harris called again. Again, there was no response from CEI. Harris called a final time before 5:00 p.m. Shortly after this final call, the wires broke and the resulting sparks set the duplex on fire. Harris called the fire department, which arrived promptly, but it was unable to prevent extensive damage. CEI finally arrived at the Harris residence after the fire had started.

{¶ 3} Harris and her neighbor Anna Kaplan both submitted claims for damages under their respective Allstate homeowner's insurance policies. Allstate paid \$149,357.34 to Harris and \$12,435.13 to Kaplan, and then filed a subrogation claim in the Cuyahoga County Court of Common Pleas, alleging that CEI was negligent in failing to respond to the emergency calls.

{¶ 4} Shortly after Allstate filed its complaint, CEI moved the trial court to dismiss for lack of subject-matter jurisdiction, pursuant to Civ.R. 12(B)(1), arguing that PUCO has exclusive jurisdiction of all claims relating to electrical service. The trial court denied CEI's motion and a trial proceeded. A jury found CEI 100 percent negligent and awarded Allstate \$161,792.47 in damages, the

amount it had paid to Harris and Kaplan. CEI appealed, alleging, among other things, that the trial court did not have jurisdiction to hear the case. The court of appeals reversed and remanded, instructing the trial court to dismiss the action based on its determination that PUCO has exclusive jurisdiction over the matter. We accepted Allstate's discretionary appeal.

Analysis

{¶ 5} PUCO has exclusive jurisdiction over most matters concerning public utilities. "The General Assembly, by the enactment of statutory provisions requiring a public utility to file and adhere to rate schedules, forbidding discrimination among its customers, prohibiting free service, and providing a detailed procedure for service and rate complaints, has lodged exclusive jurisdiction in such matters in the Public Utilities Commission, subject to review by the Supreme Court." *State ex rel. N. Ohio Tel. Co. v. Winter* (1970), 23 Ohio St.2d 6, 52 O.O.2d 29, 260 N.E.2d 827, paragraph one of the syllabus.

{¶ 6} That PUCO has exclusive jurisdiction over service-related matters does not diminish "the basic jurisdiction of the court of common pleas * * * in other areas of possible claims against utilities, including pure tort and contract claims." *State ex rel. Ohio Edison Co. v. Shaker* (1994), 68 Ohio St.3d 209, 211, 625 N.E.2d 608. See *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St.3d 147, 154, 573 N.E.2d 655 ("pure common-law tort claims may be brought against utilities in the common pleas court"); *Milligan v. Ohio Bell Tel. Co.* (1978), 56 Ohio St.2d 191, 195, 10 O.O.3d 352, 383 N.E.2d 575 (claim that telephone company invaded customer's privacy was actionable in common pleas court); see also *Kohli v. Pub. Util. Comm.* (1985), 18 Ohio St.3d 12, 14, 18 OBR 10, 479 N.E.2d 840 (PUCO noted in its decision that a failure to warn landowners of dangers regarding voltage sounded in tort and was more properly cognizable in common pleas court). Moreover, PUCO is not a court and has no power to judicially ascertain and determine legal rights and liabilities. *State ex rel. Dayton*

Power & Light Co. v. Riley (1978), 53 Ohio St.2d 168, 170, 7 O.O.3d 317, 373 N.E.2d 385. See *New Bremen v. Pub. Util. Comm.* (1921), 103 Ohio St. 23, 30-31, 132 N.E. 162 (PUCO “has no power to judicially ascertain and determine legal rights and liabilities”).

{¶ 7} We must determine whether PUCO has exclusive jurisdiction over the subrogation claim filed by Allstate against CEI. To do that, we must determine whether the claim is service related or whether it involves a common-law tort. As a preliminary matter, we categorically reject CEI’s implicit argument that everything it does is service related. See *Harris v. Ohio Edison Co.* (Aug. 17, 1995), Mahoning App. No. 94 C.A. 84, 1995 WL 494584 (PUCO does not have exclusive jurisdiction over every action of a public utility).

{¶ 8} Allstate’s complaint alleges that CEI was negligent. Negligence is a common-law tort. At one time, the mere allegation that a complaint sounded in tort may have been enough to confer jurisdiction on the court of common pleas. See *Milligan*, 56 Ohio St.2d at 195, 10 O.O.3d 352, 383 N.E.2d 575 (a complaint sounding in tort “confers power upon the court [of common pleas] to hear the claim, and it is incumbent for it to do so unless the claim is alleged solely for the purpose of obtaining jurisdiction or is wholly insubstantial or frivolous”). We have held, however, that in cases involving public utilities, jurisdiction is not conferred based solely on pleadings. *State ex rel. Columbia Gas of Ohio, Inc. v. Henson*, 102 Ohio St.3d 349, 2004-Ohio-3208, 810 N.E.2d 953, ¶ 19 (mere fact that allegations were cast so as “to sound in tort is insufficient to confer jurisdiction upon the common pleas court”). See *State ex rel. Illum. Co. v. Cuyahoga Cty. Court of Common Pleas*, 97 Ohio St.3d 69, 2002-Ohio-5312, 776 N.E.2d 92, ¶ 21.

{¶ 9} In *Henson*, the complaint alleged that Columbia Gas had tortiously interfered with a business relationship. 102 Ohio St.3d 349, 2004-Ohio-3208, 810 N.E.2d 953, at ¶ 18. The substance of the claim involved “Columbia Gas’s

termination and restoration of natural-gas service.” Id. at ¶ 20. We determined that the claim was service related and therefore within the exclusive jurisdiction of PUCO. Id. In *Kazmaier*, despite the nature of the allegation, the substance of the claim involved a dispute over the rate charged, a matter patently within the jurisdiction of PUCO. 61 Ohio St.3d at 153, 573 N.E.2d 655. Most claims are not so close to one end of the continuum between rate or service related and common-law tort.

{¶ 10} In the present case, both parties make strong arguments for why they should prevail. CEI argues that if it was negligent, it was negligent regarding its own policies and procedures relating to service calls, and that determinations regarding a public utility’s policies and procedures are within the exclusive jurisdiction of PUCO. Allstate argues that CEI had a duty to exercise reasonable care for the safety of Harris’s property, that CEI breached that duty, and that determinations regarding negligence are within the jurisdiction of the court of common pleas. We concede that the distinction between the two arguments is a fine one.

{¶ 11} Trial courts determine their own jurisdiction. *State ex rel. Ohio Edison Co. v. Shaker* (1994), 68 Ohio St.3d 209, 211, 625 N.E.2d 608. Their determinations, however, can be challenged, as was done in this case. To help us and all other courts determine when a trial court’s determination that it, not PUCO, has jurisdiction over a case involving a public utility alleged to have committed a tort, we hereby adopt the following test from *Pacific Indem. Ins. Co. v. Illum. Co.*, Cuyahoga App. No. 82074, 2003-Ohio-3954, 2003 WL 21710787, ¶ 15:

{¶ 12} “First, is PUCO’s administrative expertise required to resolve the issue in dispute? Second, does the act complained of constitute a practice normally authorized by the utility?”

{¶ 13} If the answer to either question is in the negative, the claim is not within PUCO's exclusive jurisdiction.

{¶ 14} We now apply this test to the case before us. The substance of Allstate's claim is that CEI was negligent in failing to respond to emergency calls from the Harris residence. This claim is no different from those brought against a business that negligently fails to correct a known dangerous condition on its property. See *Kohli*, 18 Ohio St.3d at 14, 18 OBR 10, 479 N.E.2d 840 (failure to warn landowners of dangers regarding voltage sounded in tort). The ultimate question in this case is whether the delay between CEI's receipt of the emergency calls and arrival at the Harris residence was reasonable. That issue is particularly appropriate for resolution by a jury. The expertise of PUCO is not necessary to the resolution of this case. Accordingly, PUCO does not have exclusive jurisdiction over this case.

{¶ 15} CEI claims that it has guidelines in place that govern how it responds to emergency calls. CEI argues that its guidelines constitute a "practice * * * relating to any service furnished by the public utility," R.C. 4905.26, and, therefore, that Allstate's claim is service related and is within the exclusive jurisdiction of PUCO. The test we adopt today is not conjunctive; we need not address the second question because the answer to the first question – whether the utility's action constitutes a practice normally authorized by the utility – is that PUCO does not have exclusive jurisdiction. Moreover, we are not persuaded that a guideline that allows an emergency call to go without response for over six hours can be relied upon to avoid the general jurisdiction of the court of common pleas.

Conclusion

{¶ 16} Allstate's claim of negligence was properly before the court of common pleas. Moreover, even if Allstate had taken its complaint to PUCO, the commission lacks the authority to "determine legal rights and liabilities." *New*

Bremen, 103 Ohio St. at 30-31, 132 N.E. 162. It would have been wasteful and futile for Allstate to seek subrogation through PUCO. We conclude that the trial court properly determined that it had jurisdiction of this tort action and that it properly denied CEI's motion to dismiss. We reverse the judgment of the court of appeals. Because the court of appeals' erroneous disposition of the issue before us led it to hold that CEI's remaining assignments of error were moot, we remand to the court of appeals for consideration of those issues.

Judgment reversed
and cause remanded.

MOYER, C.J., and LUNDBERG STRATTON, O'CONNOR, O'DONNELL, and LANZINGER, JJ., concur.

CUPP, J., concurs in judgment only.

Grotefeld & Hoffmann, L.L.P., Lynn K. Weaver, and Mark S. Grotefeld; and McCarthy, Lebit, Crystal & Liffman Co., L.P.A., and Leslie E. Wargo, for appellant.

Calfee, Halter & Griswold, L.L.P., Thomas L. Michals, and Anthony F. Stringer, for appellee.

EXHIBIT B

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

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FILED _____ JOURNALIZED
PER APP. R. 22(E)

JAN 29 2007

GERALD E. FURST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

JAN 18 2007

GERALD E. FURST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

CA06087781

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

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.

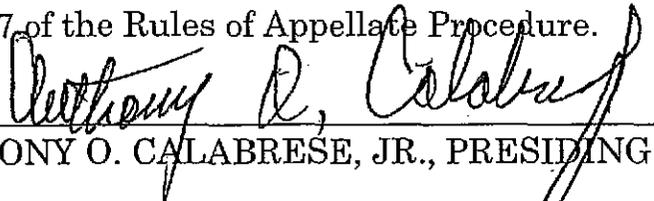
Based on the disposition of appellant's first assignment of error, we find appellant's remaining assignments of error to be moot. This case is to be remanded to the lower court with instructions to dismiss for lack of subject matter jurisdiction. Proper venue for this case is with the PUCO.

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 EILEEN 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.