THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE FARM FIRE & CASUALTY COMPANY,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2003-L-032**
- vs -	:	
CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 02 CV 000420.

Judgment: Affirmed.

Patrick J. O'Malley, Uhlinger, Keis & George, 55 Public Square, #800, Cleveland, OH 44113 (For Plaintiff-Appellant).

Ernest L. Wilkerson, Jr. and *Scott J. Robinson*, Wilkerson & Associates Co., L.P.A., 1422 Euclid Avenue, #248, Cleveland, OH 44115 (For Appellee-Cleveland Electric Illuminating Company).

DIANE V. GRENDELL, J.

{¶1} State Farm Fire & Casualty Co. ("State Farm") appeals the January 24, 2003 judgment entry of the Lake County Court of Common Pleas granting Cleveland Electric Illuminating Company's ("CEI") motion to dismiss for lack of jurisdiction. For the reasons set forth below, we affirm the decision of the trial court in this matter.

{¶2} On April 4, 1999, a fire occurred at the residence of Curtis Petersen ("Petersen"). State Farm was the insurer of Petersen's residence. On March 2, 2002, State Farm filed an insurance subrogation action against CEI[1] claiming that the "fire and resulting damage were the direct and proximate result of the negligence of [CEI]."

{¶3} Subsequent discovery, via deposition testimony of Barbara Larkin, a State Farm claims representative, revealed that the basis of State Farm's negligence claim was the meter base affixed to the residence. Thus, it was State Farm's contention that CEI negligently inspected the meter, resulting in the fire.

{¶4} On November 12, 2002, CEI filed a motion to dismiss for lack of subject matter jurisdiction. On January 23, 2003, the trial court found that this matter was in the exclusive jurisdiction of the Public Utilities Commission of Ohio ("PUCO") and, therefore, the trial court granted CEI's motion to dismiss for lack of jurisdiction.

{¶5} State Farm timely appealed and raised the following assignment of error:

{¶6} "The trial court erred to the prejudice of plaintiff-appellant in granting the defendant-appellee's motion to dismiss."

{¶7} In its sole assignment of error, State Farm argues that a court of common pleas retains jurisdiction over common law tort claims against a public utility. Thus, State Farm claims that its negligence claim properly was before the Lake County Court of Common Pleas. State Farm further asserts that the trial court's dismissal of the complaint denies State Farm access to the courts in violation of the Ohio Constitution.

{¶8} The standard of review regarding a claimed lack of subject matter jurisdiction "is whether any cause of action cognizable by the forum has been raised in the complaint." *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77, 80 (citations

1. The complaint also named First Energy Corporation as a defendant, but State Farm eventually dismissed its claims against First Energy.

omitted). When determining its subject matter jurisdiction, "the trial court is not confined to the allegations of the complaint." *Southgate Dev. Corp. v. Columbia Gas Transm. Corp.* (1976), 48 Ohio St.2d 211, paragraph one of the syllabus. The trial court can consider material beyond the complaint "without converting the motion into one for summary judgment." Id.

{¶9} The PUCO has exclusive jurisdiction over service and rate complaints, see *State ex rel. N. Ohio Tel. Co. v. Winter* (1970), 23 Ohio St.2d 6, paragraph one of the syllabus, "effectively denying to all Ohio courts (except [the Supreme Court of Ohio]) any jurisdiction over such matters." *State ex rel. Cleveland Elec. Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas*, 88 Ohio St.3d 447, 450, 2000-Ohio-379. The PUCO, however, is not a court and, therefore, it does not have the "power to judicially ascertain and determine legal rights and liabilities." *State ex rel. Ohio Power Co. v. Harnishfeger* (1980), 64 Ohio St.2d 9, 10, citing *New Bremen v. Pub. Util. Comm.* (1921), 103 Ohio St. 23, 30-31. Thus, courts "retain limited subject-matter jurisdiction over pure common-law tort and certain contract actions involving utilities regulated by the commission." *State ex rel. Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas*, 97 Ohio St.3d 69, 2002-Ohio-5312, at ¶20 (citations omitted).

{¶10} We must, therefore, determine whether State Farm's claim is a pure common-law tort or whether it primarily relates to service. See id. at ¶21. In doing so, "we must review the substance of the claim rather than mere allegations that the claims sound in tort." Id. (citation omitted). Moreover, since review and determination of PUCO's provisions "is best accomplished by the commission with its expert staff technicians familiar with the utility commission provisions," *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St.3d 147, 153, we must determine whether a

review of the claim requires an interpretation of tariffs filed with and approved by PUCO or of PUCO's own provisions. Id. at 154.

{¶11} In this case, State Farm's negligence complaint alleges that CEI negligently inspected the meter base affixed to Petersen's residence. In essence, State Farm alleges that the service provided by CEI in inspecting the meter was negligently performed. Thus, although sounding in tort, State Farm's claim primarily relates to service. See *Suleiman v. Ohio Edison Co.*, 146 Ohio App.3d 41, 46, 2001-Ohio-3414 (a negligence claim regarding the defendant's replacement of an electrical meter "affect[s] or relat[es] to service" and, thus, "falls within the exclusive jurisdiction of PUCO"); *Lawko v. Ameritech Corp.* (Dec. 7, 2000), 8th Dist. No. 78103, 2000 Ohio App. LEXIS 5687, at *7-*8 (a negligence 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"); *Farra v. Dayton* (1989), 62 Ohio App.3d 487, 493-494 (a claim regarding the removal of electric and gas meters, "in essence, sought damages for acts affecting and relating to service" and, thus, is within the exclusive jurisdiction of PUCO).

{¶12} Moreover, State Farm's claim rests on a determination of the respective rights and responsibilities of CEI and Petersen regarding the meter. This clearly would necessitate an extensive interpretation of CEI's service tariff, PUCO No. 13, Regulation XI, which provides:

{¶13} "The customer shall supply all wiring on the customer's side of the point of attachment as designated by the Company. All of the customer's wiring and electrical equipment should be installed so as to provide not only for immediate needs but for reasonable future requirements and shall be installed and maintained by the customer

to at least meet the provisions of the National Electrical Code, the regulations of the governmental authorities having jurisdiction and the reasonable requirements of the Company. As required by the Ohio Administrative Code, all new installations shall be inspected and approved by the local inspection authority or, where there is not local inspection authority, by a licensed electrician, before the Company connects its service. Changes in wiring on the customer's premises shall also be inspected and approved by the local inspection authority or, where there is no local inspection authority, by a licensed electrician."

{¶14} The determination of liability would also necessitate an interpretation of Ohio Adm.Code 4901:1-10-01 et seq. regarding the "Electrical Service and Safety Standards" of the meter's installation, inspection and maintenance. Since State Farm's claim requires an interpretation of CEI's tariffs, as well as Ohio Adm.Code 4901:1-10-01 et seq., it is best accomplished by PUCO and its expert technicians who are familiar with these provisions. *Kazmaier*, 61 Ohio St.3d at 153. Thus, this is a matter within the exclusive jurisdiction of PUCO and "review by any other court other than the Supreme Court would amount to usurpation of authority." *Hiener v. Cleveland Elec. Illuminating Co.* (Aug. 9, 1996), 11th Dist. No. 95-G-1948, 1996 Ohio App. LEXIS 3358, at *4-*5; see, also, *Illuminating Co.*, 2002-Ohio-5312, at ¶¶25-31 (an interpretation of Ohio Adm.Code 4901:1-10-24 is within the exclusive jurisdiction of PUCO); *Kazmaier*, 61 Ohio St.3d at 154 ("determin[ing] the mutual rights and responsibilities of the parties" regarding the defendant's tariffs is a matter within the exclusive jurisdiction of PUCO).[2]

2. The dissent cites to *Gayheart v. Dayton Power & Light Co.* (1994), 98 Ohio App.3d 220, 229, in support of its position that State Farms' claim does not fall within the exclusive jurisdiction of PUCO. *Gayheart* is factually distinctive. In *Gayheart*, the court specifically found that the claim did not require an interpretation of any tariffs or Ohio Admin.Code 4901:1-10-01 et seq., id., while State Farms' claim in this case does require such an interpretation. Moreover, in *Gayheart*, a power surge was the claimed act of negligence. "In fact, the crucial question presented *** involved deciding which of two possible causes of

{¶15} Although State Farm challenges the constitutionality of R.C. 4905 et seq., as applied to it, State Farm failed to raise this constitutional challenge in the court below. "Failure to raise at the trial court level the issue of the constitutionality of a statute or its application *** constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal." *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus. Thus, we will not consider State Farm's constitutional challenge to R.C. 4905 et seq.

{¶16} For the foregoing reasons, we find that this matter is within the exclusive jurisdiction of the PUCO. Thus, we hold that State Farm's sole assignment of error is without merit. The decision of the Lake County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs.

WILLIAM M. O'NEILL, J., dissents with a Dissenting Opinion.

WILLIAM M. O'NEILL, J., dissenting.

{¶17} For the reasons that follow, I must respectfully dissent. It is clear the power of the Public Utilities Commission under the legislative scheme of R.C. Title 49 is comprehensive and plenary. However, this does not mean that exclusive original jurisdiction over all complaints of individuals against public utilities is lodged in the commission.

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the fire occurred -- the power surge or faulty wiring -- not deciding whether any '*service*' rendered *** was unreasonable." Id. (emphasis added). In this case, State Farms' claim alleges that the *service* rendered by CEI in inspecting the meter base was negligently performed, a claim that clearly primarily relates to service.

{¶18} In its simplest terms, this is a lawsuit concerning a fire at a residence that was caused by the failure of a "meter base," which had been inspected by employees of appellee, Cleveland Electric Illuminating Company. It is unnecessary to examine the relative merits of the claim, as the trial court dismissed the action on a jurisdictional basis, finding that "[p]laintiff has not alleged any cause of action cognizable to this forum and that this Court lacks subject matter jurisdiction over this claim." This is a simple negligence claim, and there is no question that courts of common pleas have jurisdiction over such matters. While the alleged tort feasor may be a large publicly regulated corporation, the simple act of negligence is neither unique nor complicated.

{¶19} The Supreme Court of Ohio addressed this issue and found that "[c]ourts of this state ARE available to supplicants who have claims sounding in contract against a corporation coming under the authority of the Public Utilities Commission."[3] The Supreme Court expanded this holding to tort cases as well, holding that "claims sounding in contract or tort have been regarded as reviewable in the Court of Common Pleas, although brought against corporations subject to the authority of the commission."[4]

{¶20} It is important to distinguish between matters which are unique to utilities, such as rates and practices, and isolated acts of negligence when determining the jurisdiction of the courts of this state. Obviously, broad questions of policy and rate-making are within the exclusive purview of the PUCO. However, less lofty questions such as negligence leading to fires in a solitary residence are clearly within the competence and jurisdiction of the courts of common pleas. Appellee's argument,

3. (Emphasis added.) *State ex rel. Dayton Power & Light Co. v. Riley* (1978), 53 Ohio St.2d 168, 169, citing *Southgate Dev. Corp. v. Columbia Gas. Transm. Corp.* (1976), 48 Ohio St.2d 211; and *New Bremen v. Pub. Util. Comm*. (1921), 103 Ohio St. 23.
4. (Citations omitted.) *Milligan v. Ohio Bell Tel. Co.* (1978), 56 Ohio St.2d 191.

followed to its logical conclusion, would require the dismissal of all lawsuits which name a utility as a defendant…without regard to the subject matter of the dispute. That is not the law of Ohio. As stated by the Supreme Court of Ohio, access to the courts is granted to "supplicants" even when they have the temerity to sue their utility provider.[5]

{¶21} The reasoning of the Second District Court of Appeals, in *Gayheart v. Dayton Power & Light Co*. is appropriate in this matter. In that matter, the court reasoned:

{¶22} "We recently revisited the issue of jurisdiction in *Mid-American Fire & Cas. Co. v. Gray*.[6] In *Mid-American*, we held that the trial court had jurisdiction over a tort claim against a utility where a serviceman failed to respond timely to a service call. We found that this was an isolated act of negligence, not a 'practice' as in *Farra*,[7] and, therefore, the trial court had proper jurisdiction.

{¶23} "In essence, every negligence claim brought against a public utility will be one involving some aspect of 'service.' However, we find the present case to be one not reasonably contemplated by the legislature in enacting R.C. 4905.26. In the present case, there is no evidence to suggest that DP & L authorized a power surge or that such a power surge was a 'practice' engaged in regularly by DP & L. Instead, the power surge alleged is an isolated act of negligence. In fact, the crucial question presented in this case involved deciding which of two possible causes of the fire occurred—the power surge or faulty wiring—not deciding whether any 'service' rendered by DP & L was unreasonable. The expertise of PUCO in interpreting regulations is not necessary

5. See *State ex rel. Dayton Power & Light Co. v. Riley*, supra.
6. *Mid-American Fire & Cas. Co. v. Gray* (June 15, 1993), 2d Dist. No. 13763, 1993 WL 211651.
7. *Farra v. Dayton* (1989), 62 Ohio App.3d 487.

to the resolution of this case. Rather, this is a case that is particularly appropriate for resolution by a jury. Thus, the trial court properly exercised jurisdiction over the claim."[8]

{¶24} The trial court was wrong when it decided that there was no jurisdiction over this negligence action. The matter should be reversed for trial so that a competent fact finder can resolve the respective negligence of the parties. This is NOT a matter which requires the expertise of the Public Utilities Commission of Ohio.

8. *Gayheart v. Dayton Power & Light Co*. (1994), 98 Ohio App.3d 220, 229.