

[Cite as *Pro Se Commercial Properties v. Illum. Co.*, 2010-Ohio-516.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 92961**

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**PRO SE COMMERCIAL PROPERTIES, ET AL.**

PLAINTIFFS-APPELLANTS

vs.

**ILLUMINATING COMPANY**

DEFENDANT-APPELLEE

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**JUDGMENT:  
AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-567512

**BEFORE:** Blackmon, P.J., Dyke, J., and Cooney, J.

**RELEASED:** February 18, 2010

**JOURNALIZED:**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

**PATRICIA ANN BLACKMON, P.J.:**

{¶ 1} Plaintiffs-appellants, Pro Se Commercial Properties (“Pro Se”), Elfvin & Besser Co. LPA (“E&B”), and Nessa G. Siegel, LPA (“NGS”) (collectively referred to as “plaintiffs”), appeal the trial court’s granting the motion to dismiss of appellee, the Cleveland Electric Illuminating Company (“CEI”). The plaintiffs assign the following error for our review:

**“I. The Cuyahoga County Court of Common Pleas erred as a matter of law, when it issued a decision which was in conflict with the law in this District and the recent Ohio Supreme Court holding in *Allstate v. CEI*, and dismissed the negligence claims against CEI for lack of subject matter jurisdiction on October 17, 2006.”**

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court’s decision. The apposite facts follow.

### **Facts**

{¶ 3} Pro Se owns a small commercial building in which two of its tenants are the law firms of E&B and NGS. On February 25, 2005, the building experienced an electrical power surge causing various office equipment to emit sparks and smoke. The plaintiffs shut down their electrical power. While the main power breakers were off and the building was without power, a CEI employee entered the building and informed the plaintiffs that it was safe to restore power. This was approximately an hour after the initial power surge.

{¶ 4} The tenants restored power and began testing their equipment for problems. While testing the equipment, a second power surge occurred. According to the plaintiffs, the second power surge damaged their office equipment in excess of \$50,000.

{¶ 5} On July 13, 2005, the plaintiffs filed a complaint against CEI for the damages caused by the power surges.<sup>1</sup> CEI filed a motion to dismiss the complaint, arguing that the Public Utilities Commission (“PUCO”) had exclusive jurisdiction over the matter. On October 17, 2006, the trial court granted CEI’s motion to dismiss; however, because claims remained pending against other defendants, the dismissal did not become final until the other claims were disposed of on March 4, 2009. (While the remaining claims were pending, Pro Se filed its claim with PUCO, which on September 10, 2008 entered a decision in CEI’s favor.)

### **Jurisdiction**

{¶ 6} In their sole assigned error, the plaintiffs contend that the trial court erred by dismissing their complaint against CEI for lack of jurisdiction. We disagree.

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<sup>1</sup>The other defendants named in the complaint were Travelers Insurance Company, Northcoast Business Systems, Inc., De Lage Landen Financial Services, and Northcoast Equipment Leasing. The claims against these defendants have all been settled and dismissed.

{¶ 7} “The standard of review for a dismissal pursuant to Civ.R. 12(B)(1) is whether any cause of action cognizable by the forum has been raised in the complaint.”<sup>2</sup> We review the trial court’s decision de novo.<sup>3</sup>

{¶ 8} PUCO has exclusive jurisdiction over various matters involving public utilities, such as rates and charges, classifications, and service.<sup>4</sup> R.C. 4905.22 specifies that “every public utility shall furnish necessary and adequate service \* \* \*.” R.C. 4905.26 confers exclusive jurisdiction on PUCO to determine whether any “service rendered” by a public utility or any “practice affecting or relating to any service furnished by a public utility, or in connection with such service” is in any respect unjust, unreasonable, or in violation of law.

{¶ 9} Notwithstanding PUCO’s exclusive jurisdiction over service-related matters, it has been recognized that “courts retain limited subject-matter jurisdiction over pure common-law tort and certain contract

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<sup>2</sup>*State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77, 80, 893 N.E.2d 824; *Brethauer v. Federal Express Corp., et al.* (2001), 143 Ohio App.3d 411, 758 N.E.2d 232.

<sup>3</sup>*Shockey v. Fouty* (1995), 106 Ohio App.3d 420, 424, 666 N.E.2d 304.

<sup>4</sup>*Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, 893 N.E.2d 824; *State ex rel. Columbia Gas of Ohio, Inc. v. Henson*, 102 Ohio St.3d 349, 351-352, 2004-Ohio-3208, 810 N.E.2d 953, at ¶16; *State ex rel. Cleveland Elec. Illum. Co. v. Cuyahoga Cty. Court of Common Pleas* (2000), 88 Ohio St.3d 447, 450, 727 N.E.2d 900.

actions involving utilities regulated by [PUCO].”<sup>5</sup> The mere fact that a plaintiff casts its allegations to sound in tort, however, is insufficient to confer jurisdiction upon the common pleas court.<sup>6</sup> Instead, it is the substance of the claims that is controlling; if the claims are manifestly service-related, they are within the exclusive jurisdiction of the commission.<sup>7</sup>

{¶ 10} Recently in *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.*, the Ohio Supreme Court adopted the following two-part test to determine whether PUCO has exclusive jurisdiction over an action:

**“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?”**

**“If the answer to either question is in the negative, the claim is not within PUCO’s exclusive jurisdiction.”<sup>8</sup>**

{¶ 11} Here, the plaintiffs argue that CEI is responsible for damages stemming from two alleged power surges. Plaintiffs’ claim calls into question

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<sup>5</sup>*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.

<sup>6</sup>*Id.*; *State ex rel. Columbia Gas of Ohio, Inc. v. Henson*, *supra*.

<sup>7</sup>See *State ex rel. Columbia Gas of Ohio, Inc.*, 102 Ohio St.3d at 352, 810 N.E.2d 953; *Milligan v. Ohio Bell Tel. Co.* (1978), 56 Ohio St.2d 191, 383 N.E.2d 575, at paragraph two of the syllabus; *Higgins v. Columbia Gas of Ohio, Inc.* (2000), 136 Ohio App.3d 198, 202, 736 N.E.2d 92; *Suleiman v. Ohio Edison Co.*, 146 Ohio App.3d 41, 2001-Ohio-3414, 764 N.E.2d 1098; *Farra v. Dayton* (1989), 62 Ohio App.3d 487, 576 N.E.2d 807.

<sup>8</sup>*Allstate*, 119 Ohio St.3d at ¶12-13.

the manner by which CEI provided electrical service. In addressing the power surges, it will be necessary to determine whether CEI's response and correction of the problem complied with industry standards. The answer to these questions require the expertise of the PUCO administration because jurors do not have the experience or understanding regarding the distribution of electricity. The determination of issues related to applicable laws and regulations, industry practices and standards, is best accomplished by PUCO with its expert staff technicians familiar with the utility commission provisions.<sup>9</sup>

{¶ 12} The plaintiffs argue that their claim is not service-related because their claim is concerned with the CEI employee negligently informing them it was safe to restore power. However, this does not alter the fact that the claim is related to the power surges. Moreover, the determination of whether it was reasonable for the CEI employee to inform the plaintiffs that it was safe to restore power requires an understanding of power surges and the likelihood of a second surge occurring after the CEI employee informed them it was safe to restore power.

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<sup>9</sup>*Gayheart v. Dayton Power & Light Co.* (1994), 98 Ohio App.3d 220, 228, 648 N.E.2d 72; *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St.3d 147, 151-152, 573 N.E.2d 655.

{¶ 13} The cases cited by the plaintiffs in support of their argument that the court has jurisdiction are distinguishable. In *Gayheart v. Dayton Power & Light Co.*,<sup>10</sup> a fire occurred on the plaintiffs' property; the plaintiffs contended it was due to a power surge. Unlike the instant case, a motion to dismiss was not filed. After discovery was concluded, a dispute arose as to what was the exact cause of the fire. A trial was conducted, and it was not until the close of the plaintiffs' case that the electric company moved for a directed verdict based on its contention that the court lacked jurisdiction; the motion was overruled by the trial court. On appeal, the court affirmed the trial court's decision stating, "[T]he 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 [the electric company] was unreasonable."<sup>11</sup> Thus, the court found the matter appropriate for determination by the jury. We do not have a dispute as to the cause of the damage in the instant case.

{¶ 14} In *Pacific Indem. Ins. Co. v. The Illum. Co.*,<sup>12</sup> the plaintiff's property was damaged by a power surge caused by the electric company

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<sup>10</sup>98 Ohio App.3d 220, 648 N.E.2d 72.

<sup>11</sup>Id. at 228.

<sup>12</sup>Cuyahoga App. No. 82074, 2003-Ohio-3954.

jerry-rigging electrical wires to the plaintiff's property without the plaintiff's knowledge or consent. We concluded in that case that it could not be determined from the face of the complaint that PUCO had exclusive jurisdiction and that further inquiry was necessary. Unlike the complaint in *Pacific Indem.*, the claims in this plaintiffs' complaint are not subject to more than one interpretation. The language of the complaint focuses on the power surges and the employee's directive regarding the restoration of power.

{¶ 15} The claim alleged in the instant case more closely resembles service-related claims than pure common law tort actions.<sup>13</sup> In so holding, we realize, in spite of the Ohio Supreme Court's test set forth in *Allstate Ins. Co. v. Cleveland Electric Illum. Co.*, determining whether PUCO has jurisdiction requires a case-by-case analysis. When one suffers damages related to events that are purely electrical, like here, the claim is service-related and under PUCO's jurisdiction.

{¶ 16} We note that CEI argues in its brief that PUCO has already decided the plaintiffs' claims; therefore, *res judicata* bars the plaintiffs'

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<sup>13</sup>See, *Heiner v. Cleveland Elec. Illum. Co.* (Aug. 9, 1996), 11<sup>th</sup> Dist. No. 95-G-1948 (claim for damage to t.v. by power surge is service-related and within PUCO's jurisdiction); *Miles Mgmt. Corp. v. FirstEnergy Corp.*, Cuyahoga App. No. 84197, 2005-Ohio-1496 (manner in which electric company provided or failed to provide electrical service is service-related); *LaForge v. Cleveland Elec. Illum. Co.* (1996), 115 Ohio App.3d 740, 686 N.E.2d 311 (damage to furnace due to low voltage was service-related).

appeal. However, because we have determined that PUCO has jurisdiction over the matter, we need not address this issue. Accordingly, the plaintiffs' assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellants their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

ANN DYKE, J., and  
COLLEEN CONWAY COONEY, J., CONCUR