

STATE OF MICHIGAN
COURT OF APPEALS

CITIZENS INSURANCE COMPANY, as
Subrogee of MICHELLE PETERS,

Plaintiff-Appellee,

v

CONSUMERS ENERGY COMPANY, f/k/a
CONSUMERS POWER COMPANY,

Defendant-Appellant.

UNPUBLISHED
April 6, 2001

No. 222054
Calhoun Circuit Court
LC No. 98-002809-NZ

Before: Talbot, P.J., and Sawyer and F.L. Borchard*, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying its motion for summary disposition. We reverse and remand for entry of judgment in favor of defendant on its motion for summary disposition. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On April 6 and 7, 1997 a severe wind storm swept through lower Michigan. At the time, plaintiff insured a home owned by Michelle Peters. On April 7, 1997 a fire caused substantial damage to Peters' home. Plaintiff paid Peters benefits in the amount of \$197,658.24. An investigation revealed that the fire was caused by a broken neutral electrical wire which ran from a telephone pole to Peters' home. When the wire broke a power imbalance occurred and an electrical surge entered the home, resulting in a fire.

Plaintiff brought suit against defendant, asserting claims of negligence, breach of contract, *res ipsa loquitur*, nuisance, and strict liability. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that under Rule B10.1 promulgated by the Michigan Public Service Commission (PSC), it was immune from liability for damages. That rule provides in pertinent part:

The Company shall not be liable for interruptions in the service, . . . or for any loss or damage of any kind or character occasioned thereby, due to causes or conditions beyond the Company's reasonable control, and such causes or

* Circuit judge, sitting on the Court of Appeals by assignment.

conditions shall be deemed to specifically include, but not be limited to, the following: . . . failure, malfunction, breakage, necessary repairs or inspection of machinery, facilities or equipment when the Company has carried on a program of maintenance consistent with the general standards prevailing in the industry; act of God; war; action of the elements; storm or flood

In support of its motion for summary disposition, defendant submitted an affidavit from an employee who stated that the neutral wire attached to Peters' home was one of thousands that were downed by the storm.

The trial court denied defendant's motion for summary disposition, finding that questions of fact existed regarding the cause of the broken wire. We granted defendant's application for leave to appeal the trial court's order denying its motion for summary disposition and, on our own motion, stayed further proceedings in the trial court pending resolution of the appeal.

We review a trial court's decision on a motion for summary disposition de novo. *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997).

Defendant argues that the trial court erred by denying its motion for summary disposition. We agree, reverse the trial court's decision and remand for entry of judgment in favor of defendant. Although damages arising out of the contractual relationship between a utility and its customer are within the jurisdiction of the PSC, a claim for damages arising in tort is cognizable in circuit court. *Rinaldo's Construction Co v Michigan Bell Telephone Co*, 454 Mich 65, 73; 559 NW2d 647 (1997); *Valentine v Michigan Bell Telephone Co*, 388 Mich 19, 25-26; 199 NW2d 182 (1972). Although plaintiff has stated causes of action sounding in tort, its essential claim is that defendant failed to adequately maintain and repair the equipment providing electrical service to Peters' home. Such a complaint is within the primary jurisdiction of the PSC. *Rinaldo's, supra* at 69 n 5. PSC Rule B10.1 provides defendant immunity from liability for damages caused by breakage or failure of equipment if it carried out a program of maintenance consistent with accepted industry standards. Plaintiff's claim that defendant failed to adequately inspect and maintain its equipment is properly within the jurisdiction of the PSC. *Id.* at 71. The trial court erred by failing to defer to the jurisdiction of the PSC.

The trial court's order denying defendant's motion for summary disposition is reversed, and this case is remanded to the trial court for entry of an appropriate order. The stay previously imposed is lifted. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Fred L. Borchard