EXHIBIT 2 (2)

(Continued)

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

K. HOVNANIAN FOREST LAKES, LLC, Plaintiff, vs. AQUA OHIO, INC., et al. Defendants.	CASE NO. CV-2020-02-0740 JUDGE ALISON BREAUX **PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

NOW COMES Plaintiff, K. Hovnanian Forest Lakes, LLC (hereinafter referred to as "Plaintiff"), by and through undersigned counsel, and for its Response in Opposition to Defendants' Motion to Dismiss, states as follows:

I. INTRODUCTION

On February 25, 2020, Plaintiff filed this underlying action. In doing so, Plaintiff sought and was granted a temporary restraining Order against Defendants, temporarily restraining and enjoining them from forcing Plaintiff to use ductile iron in its projects in Ohio and Ordering that Plaintiff had the right to use PVC piping in its construction projects in Ohio unless otherwise Ordered by this Court. Further, Defendants were restrained from taking any action in retaliation against Plaintiff. In response, Defendants filed a motion to dismiss, claiming this Court lacks subject-matter jurisdiction over this matter. However, for the reasons more fully explained below, Defendants' motion is misguided and should be denied.

II. RELEVANT FACTS

On or about August 20, 2018, K. Hovnanian Northern Ohio Division, LLC entered into a Real Estate Purchase Agreement (hereinafter referred to as the "Purchase Agreement") with a seller of property in Green, Summit County, Ohio, whereby it agreed to purchase 50.93 acres of

undeveloped land (hereinafter referred to as the "Property").[1] It was the intent to develop the Property into a minimum of 223 fee simple lots.[2] In this regard, on February 20, 2020, K. Hovnanian Northern Ohio Division, LLC assigned all of its rights, duties, and obligations under the Purchase Agreement to Plaintiff.[3] The Purchase Agreement is scheduled to close on the same on March 2, 2020.[4]

After entering into the Purchase Agreement discussed above, Plaintiff retained an engineer to prepare preliminary drawings for the development of the lots.[5] On September 27, 2019, an initial review of the preliminary engineering drawings (hereinafter referred to as the "Plans") was held.[6] On October 21, 2019, the Plans were sent to Defendant Aqua and Defendant Flanary for review and comments.[7] On October 28, 2019, Plaintiff sent the Plans out for preliminary pricing prior to the official bidding process.[8]

On October 29, 2019, the first review of the Plans was performed.[9] On October 30, 2019, Plaintiff received the first set of comments to the Plans from Defendant Aqua.[10] On November 12, 2019, Plaintiff received revised Plans from its engineer.[11] On January 6, 2020, Plaintiff received updated Plans with changes from governing agencies and construction entities including, but not limited to, Defendant Aqua.[12] On January 7, 2020, Plaintiff sent revised Plans to Defendant Aqua and bidders for pricing quotes.[13] On January 21, 2020, bids on the Project and Plans were received and reviewed by Plaintiff.[14] On January 23, 2020, revised Plans were sent to all governing agencies and construction entities including, but not limited to, Defendant Aqua.[15]

On February 6, 2020, Plaintiff's engineer requested the installation specifications that a contractor would obtain from Defendant Aqua to direct it as to the types of piping used in projects

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[1] *See* Plaintiff's February 25, 2020 Verified Complaint at Paragraphs 6-7.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id* at Paragraph 8.
[6] *Id* at Paragraph 9.
[7] Id at Paragraph 10.
[8] *Id* at Paragraph 11.
[9] *Id* at Paragraph 12
[10] *Id* at Paragraph 13.
[11] *Id* at Paragraph 14.
[12] *Id* at Paragraph 15.
[13] *Id* at Paragraph 16.
[14] *Id* at Paragraph 17.
[15] *Id* at Paragraph 18.

Defendant Aqua was overseeing in Ohio.[16] In response, on February 6, 2020, Defendant Flanary—construction coordinator for Defendant Aqua Ohio, Inc.—responded to Plaintiff's engineer stating there were no installation specifications.[17] On February 11, 2020, Plaintiff contacted Defendant Aqua via telephone and spoke to Donald Snyder—construction supervisor for Defendant Aqua Ohio, Inc.—***who confirmed that Defendant Aqua had no written specifications or policies requiring the use of ductile iron piping for the development in Green, Ohio, and that other divisions of Defendant Aqua exclusively used PVC piping in projects throughout Ohio***.[18] On the same date—February 11, 2020—Defendant Flanary corresponded with Plaintiff taking that position that under Ohio Administrative Code (hereinafter referred to as "the OAC") Rule 4901:1-15-30(E), Defendant Aqua had the right to require the exclusive use of CL 52 ductile iron pipe on the Project.[19] In taking this position, Defendant Flanary sent a "Material Specifications" sheet to Plaintiff, a copy of which was attached to the Verified Complaint as Exhibit A.[20] Said "Material Specifications" sheet had no semblance of proof that it was used or relied upon by Defendant Aqua in its business practices and appears to be a document specifically produced in an attempt to bolster the erroneous position being taken by Defendant Flanary and Defendant Aqua.[21]

In an attempt to resolve this matter, Plaintiff communicated with Defendant Flanary, stating:

> Thank you for the response. However, this still does not get to the heart of the issue. The Stark Division is just a subset of the Aqua Ohio/Aqua America waterworks company. As such, why are other divisions exclusively using PVC materials, as opposed to ductile iron? If the use of PVC or alternative materials is good enough for other divisions of Aqua Ohio, why are they not so for the Stark Division? Why is the Stark Division specifically refusing to allow for these materials which are code-compliant and also a commercially accepted industry practice in the majority of the other regions compared to the use of ductile iron?
>
> Also, you had provided in correspondence dated 2/6/2020, that the Stark Division had no specific material specifications. Why was that communication made if such specifications exist?[22]

After receiving no response from Defendants to the above, on February 13, 2020, Plaintiff

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[16] *Id* at Paragraph 19.
[17] *Id* at Paragraph 20.
[18] *Id* at Paragraph 21.
[19] *Id* at Paragraph 22.
[20] *Id* at Paragraph 23.
[21] *Id* at Paragraph 24.
[22] *Id* at Paragraph 25.

corresponded with Keith Nutter—head of Defendant Aqua' s Stark Division—asking for the legal and logical rationale behind requiring the installation of only ductile iron on the Project.[23] Said correspondence asked that a response be tendered on or before February 16, 2020, and if none was received by that deadline, legal action would be taken.[24] As no meaningful response was tendered, this action was filed.[25]

III. LAW AND ARGUMENT

A. Standard of Review

The Ninth District Court of Appeals in *Crestmont Cleveland Partnership v. Ohio Dept. of Health* (2000), 139 Ohio App.3d 928, held that the standard of review for a motion to dismiss pursuant to Civ.R. 12(B)(1) is "whether any cause of action cognizable by the forum has been raised in the complaint." *Id.* at 936, *citing State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77, 80. In this regard, an appellate court's review of a motion to dismiss brought pursuant to Civ.R. 12(B)(1) is de novo where the court must review the issues independently of the trial court's decision. *Crestmont Cleveland Partnership v. Ohio Dept. of Health* (2000), 139 Ohio App.3d 928, 936. Finally, when a motion to dismiss is brought pursuant to Civ R 12(B)(1), the Ninth District Court of Appeals in *DMC, Inc. v. SBC Ameritech*, 2006-Ohio-2970, held:

> The trial court is not confined to the allegations of the complaint when determining its subject-matter jurisdiction pursuant to a Civ.R. 12(B)(1) motion to dismiss, and it may consider material pertinent to such inquiry without converting the motion into one for summary judgment." *Id.*, at ¶ 6, *citing Southgate Development Corp. v. Columbia Gas Transmission Corp.* (1976), 48 Ohio St.2d 211, 358 N.E.2d 526, at paragraph one of syllabus.

With this in mind, Defendants' Motion to Dismiss should be denied as having no merit.

B. The Public Utility Commission of Ohio Does Not Have Exclusive Jurisdiction Over the Claims Raised in this Action

In addressing Defendants' motion, it is not disputed that Defendant Aqua Ohio, Inc. is a regulated public utility pursuant to ORC 4905.03(G) and therefore regulated by Public Utilities Commission of Ohio (hereinafter referred to as the "PUCO"). In this regard, ORC 4905.04 provides:

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[23] *Id* at Paragraph 26.
[24] *Id* at Paragraph 27.
[25] *Id* at Paragraph 28.

> The Public Utilities Commission is hereby vested with the power and jurisdiction to supervise and regulate public utilities and railroads, to require all public utilities to furnish their products and render all services exacted by the commission or by law, and to promulgate and enforce all orders relating to the protection, welfare, and safety of railroad employees and the traveling public, including the apportionment between railroads and the state and its political subdivisions of the cost of constructing protective devices at railroad grade crossings.

However, where Defendants' argument fails is that this matter does not involve an issue that is proper before the PUCO. While Defendants argue that the issue at hand involves an issue that requires the PUCO's administrative expertise and is manifestly service-related, nothing could be further from the truth.

In taking this position, the Ohio Supreme Court in *Inc. Vill. of New Bremen v. Pub. Utilities Comm'n,* 103 Ohio St. 23; 132 N.E. 162 (1921) held:

> The Public Utilities Commission is an administrative board, and only has such authority as the statute creating it has given it. This court has repeatedly declared that the powers of the commission are conferred by statute, and that it has no other authority than that thus vested in it. City of Cincinnati v. Public Utilities Commission, 96 Ohio St. 270, 117 N. E. 381; Interurban Ry. & Terminal Co. v. Public Utilities Commission, 98 Ohio St. 287, 120 N. E. 831, 3 A. L. R. 696; Sylvania Home Telephone Co. v. Public Utilities Commission, 97 Ohio St. 202, 119 N. E. 205; and Village of Oak Harbor v. Public Utilities Commission, 99 Ohio St. 275, 124 N. E. 158.
>
> The judicial power of the state is vested in courts, the creation of which and their jurisdiction is provided for in the judicial article of the Constitution (article 4). The Public Utilities commission is in no sense a court. It has no power to judicially *31 ascertain and determine legal rights and liabilities, or adjudicate controversies between parties as to contract rights or property rights. The Miller Act does not purport to confer such power upon the Public Utilities Commission, and if it did so in any of its terms it would be to that extent invalid. *Inc. Vill. of New Bremen, supra* at 30–31.

The Ohio Supreme Court in *Milligan v. Ohio Bell Tel. Co.*, 56 Ohio St. 2d 191; 383 N.E.2d 575, 578 (1978) advanced this rule by holding:

> In *New Bremen v. Pub. Util. Comm.* (1921), 103 Ohio St. 23, at pages 30-31, 132 N.E.162, this court noted that the commission has no power to judicially ascertain and determine legal rights and liabilities, since such power has been vested in the courts by the General Assembly pursuant to Article IV of the Ohio Constitution. Thus, 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. *See State ex rel. Dayton Power & Light Co. v. Riley*

> (1978), 53 Ohio St.2d 168, 169-170, 373 N.E.2d 385; *Richard A. Berjian, D. O. Inc. v. Ohio Bell Tel. Co.* (1978), 54 Ohio St.2d 147, 375 N.E.2d 410. *Milligan, supra* at p 195.

Finally, the Second District Court of Appeal in *Gayheart v. Dayton Power & Light Co.*, 98 Ohio App. 3d 220; 648 N.E.2d 72, 76 (1994), citing the above precedent, held:

> However, PUCO does not have exclusive jurisdiction over every claim brought against a public utility. 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, 18 O.O.3d 130, 412 N.E.2d 395; *Milligan v. Ohio Bell Tel. Co.* (1978), 56 Ohio St.2d 191, 10 O.O.3d 352, 383 N.E.2d 575; *Steffen v. Gen. Tel. Co.* (1978), 60 Ohio App.2d 144, 14 O.O.3d 111, 395 N.E.2d 1346. As stated by the Ohio Supreme Court, "the Commission has no power to judicially ascertain and determine legal rights and liabilities * * *." *Milligan, supra,* 56 Ohio St.2d at 195, 10 O.O.3d at 354, 383 N.E.2d at 578. *Gayheart, supra* at 228.(A copy of this opinion is attached hereto and incorporated herein as **Exhibit A**).

Based on the above-cited precedent, it is clear that the PUCO's jurisdiction is limited and cannot be invoked in this matter.

Specifically, attached hereto and incorporated herein as **Exhibit B** is the Affidavit of Michael Mercier—authorized member and in-house counsel for Plaintiff—which clearly reveals this Court has jurisdiction over this matter. Even a cursory review of this affidavit reveals, among other things, that the PUCO was contacted by Mr. Mercier regarding Defendant Aqua, Inc.'s mandate of requiring the sole use of ductile iron on the Project and he was informed that the PUCO "had no control or authority over the specifications required by Aqua Ohio, Inc."[26] Upon hearing this, Plaintiff went further and asked Aqua Ohio, Inc. to explain the basis for this mandate. However, all that was given as the reason was the citation to Ohio Administrative Code Rule 4901:1-15-30(E).[27] Even so, as seen from Exhibit B and the February 25, 2020, Verified Complaint filed in this matter, this case involves the adjudication of legal rights and liabilities which take this matter outside the purview and jurisdiction of the PUCO.[28] *Inc. Vill. of New Bremen, supra* at 30–31; *Milligan, supra* at p 195; *Gayheart, supra* at 228.

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[26] *See* Exhibit B at Paragraph 6.
[27] *Id.*, at Paragraph 8.
[28] *Id.*, at Paragraphs 3-5. It is important to note that in support of their Motion to Dismiss, Defendants improperly and misleadingly cite *The State ex rel. Columbus Southern Power Company v. FAIS, Judge*, 117 Ohio St.3d 340, 884 N.E.2d 1 (2008) as standing for the proposition that "any functions of the utility that are related to charges and costs of service, ***such as the extra cost involved in complying with the utility's tariff-authorized rules for infrastructure***

Further, in bringing this action, Plaintiff is seeking injunctive relief, a declaratory judgment and damages stemming from the common law tort of tortious interference with business relationships/expectancies. In reviewing the Verified Complaint, it is clear that as one of Plaintiff's remedies, it is seeking—and obtained—the equitable remedy of an injunction. In this regard, the Sixth District Court of Appeals in *Ziolkowski v. Columbia Gas of Ohio, Inc.*, No. L-77-293, 1978 WL 214815 (Ohio Ct. App. July 21, 1978), held:

> However, in the instant case, the plaintiffs do not seek to compel the gas company to provide them with service. Rather, plaintiffs seek damages for breach of an allegedly valid executory contract. As to the adjudication of contract rights between parties and the award of damages for breach of contract, the common pleas court, not the PUCO, has jurisdiction. In *Coss v. PUCO* (1920), 101 Ohio St. 528, in which an individual filed a complaint with the PUCO to enforce against the present utilities company a contract made with the predecessor company, the Ohio Supreme Court affirmed the dismissal of the complaint by the PUCO on the ground that the order sought by the complainant was contrary to express provisions of the utilities act, and went on to state, at p. 529:
>
> > "If the complainant stated a valid contract with the defendant itself the public utilities commission would be entirely wanting in jurisdiction to either enforce specific performance thereof or award damages incurred by reason of its violation by the company."
>
> *See also New Bremen v. PUC* (1921), 103 Ohio St. 23, wherein the Supreme Court recognized the subject matter jurisdiction of the common pleas court to entertain a suit by two municipalities against a gas company to enforce the provisions of an express contract. Cf. *State, ex rel City of Cleveland v. Ct. of App. for the 8th Dist.* (1922), 104 Ohio 96, wherein the court held, "The provisions of the act creating the public utilities commission, and conferring upon it jurisdiction to fix rates, in no way withdrew from the courts any of the equitable jurisdiction which they theretofore had." Cf. also *Newman v. East Ohio Gas Co.* (1948), 149 Ohio St. 360, wherein the Supreme Court affirmed the trial court's judgment granting an injunction to an individual user in a suit brought to enforce the contract between the municipality and the gas company, which contract conflicted with a PUCO emergency order.
>
> In summary, we find that the common pleas court, and not the PUCO, is the proper forum for the adjudication of the contract rights between the parties herein. Further, we reject appellees' contention that the furnishing of gas to individual users constitutes no contract at all between Columbia Gas and those users, but is merely the performance of a service contract between the gas company and the City of Toledo. We find that the allegations in the complaint are sufficient to raise a

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improvements, were under the exclusive jurisdiction of the PUCO," there is no such finding or holding by *The State ex rel. Columbus Southern Power Company Court.*

> question of fact as to the existence of a valid contract between the parties herein. *Ziolkowski, supra* at *3 (A copy of this Opinion is attached hereto and incorporated herein as **Exhibit C**).

Accordingly, this Court does retain jurisdiction over this matter.

Additionally, Plaintiff is seeking a declaratory ruling which is clearly governed by O R C 2721.01 *et seq.* and Civ R 57 and is therefore seeking a judicial determination of its legal rights and liabilities—actions the PUCO has no power to entertain. *Milligan, supra* at 195; *Gayheart, supra* at 228. Finally, Plaintiff is seeking damages under the theory of tortious interference with business relationships/expectancies which is also outside the jurisdiction of the PUCO. *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, at ¶ 20; *Pacific Indemn. Ins. Co. v. Illum. Co.*, 8th Dist. No. 82074, 2003-Ohio-3954, 2003 WL 21710787, at ¶ 11; *State Farm Fire & Cas. Co. v. Cleveland Elec. Illum. Co.*, 11th Dist. No. 2003–L–032, 2004-Ohio-3506, 2004 WL 1486664, at ¶ 9; *Suleiman v. Ohio Edison Co.* (2001), 146 Ohio App.3d 41, 45, 764 N.E.2d 1098. In short, all of Plaintiff's claims are squarely within in the jurisdiction of this Court and not the PUCO. *Inc. Vill. of New Bremen, supra* at 30–31; *Milligan, supra* at p 195; *Gayheart, supra* at 228; *Ziolkowski, supra* at *3.

As a final point, it is curious that in support of their motion to dismiss, Defendants reference their Tariff.[29] However, in reviewing the same, it is clear that Defendants themselves are not complying with it. Specifically, Section 3-7 of Exhibit A-1 to Defendants' Motion to Dismiss, under the heading "Extension of Mains," the Tariff provides, in pertinent part, "All main extensions and subsequent connections to main extensions ***shall be made pursuant to written contracts***." (Emphasis provided). However, no such contract exists in this instance.[30] Instead, Defendants are forcing Plaintiff to comply with using only ductile iron based on an oral agreement/mandate with the intent to ***later*** enter into a written contract as OAC 4901:1-15-30(A).[31] What makes this so insidious is that if a contract existed as required by Section 3-7, Plaintiff would be entitled to a refund of the cost to put in the lines using ductile iron. (*See* Exhibit A-1 to Defendants' Motion to Dismiss). Accordingly, per its own Tariff, this matter involves the

[29]*See* Exhibit A-1 attached to Defendants' Motion.
[30]*See* Exhibit B at Paragraph 3.
[31]Specifically, this provision states all such contracts "shall be in writing and signed by the company and the parties involved"—unequivocally making this a contract action and outside the jurisdiction of the PUCO. Curiously this same section provides that when the waterworks company enters into a main extension agreement, ***then*** the provisions of 4901:1-15-30 apply, including, but not limited to, subsections (E) & (F).

contractual terms relating to the construction of a water main extension which is outside the jurisdiction of the PUCO. *Ziolkowski, supra* at *3.

Finally, pursuant to OAC 4901:1-15-30(F), the design of the water main in question has to be undertaken in accordance with "generally accepted utility engineering practices." However, as evidenced by the Affidavit of Michael Mercier, the PUCO has made it clear that its administrative function/jurisdiction ***does not*** include exerting control over the specifications of water mains.[32] Accordingly, this Court can render a decision pursuant to make a decision pursuant to ORC 2721.01 *et seq.* and Civ R 57. This, coupled with the case law cited herein, makes it ardently clear that the exclusivity of the PUCO's jurisdiction is limited to the administrative functions it carries out. *Inc. Vill. of New Bremen, supra.* Therefore, to the extent the dispute involved herein is over what the "generally accepted utility engineering practices" encompass and control the contractual relationship between Aqua and Plaintiff, this issue falls outside PUCO's administrative function and renders jurisdiction proper in this Court. *Inc. Vill. of New Bremen, supra* at 30–31; *Milligan, supra* at p 195; *Gayheart, supra* at 228; *Ziolkowski, supra* at *3. Accordingly, because this case, among other things, involves a contractual issue relating to Plaintiff's construction of water lines, this issue is not outside the jurisdiction of this Court as Defendants claim. *Inc. Vill. of New Bremen, supra* at 30–31; *Milligan, supra* at p 195; *Gayheart, supra* at 228; *Ziolkowski, supra* at *3. This is especially true where Plaintiff is not a customer of Defendants and is not complaining about rates, charges, classifications or services.

III. CONCLUSION

Once the foregoing is applied to the pleadings and evidence filed in this, it is clear this Court has jurisdiction over this matter. Therefore, Defendants' Motion to Dismiss must be denied. This is especially true where the PUCO has taken the position that it does not involve itself in decisions regarding what materials are to be used in projects thereby creating a situation where there is no procedure within the PUCO to challenge Defendants' mandate. Accordingly, by granting Defendants' Motion to Dismiss, said action would essentially mean Plaintiff has no remedy available—a result which is an untenable position. Therefore, rather than creating a situation with no legal remedy, it makes sense for this Court to conclude that this is not an issue within the purview or jurisdiction of PUCO's exclusive jurisdiction. Further, if the case is dismissed by this Court, Defendants will be allowed to circumvent the equitable powers granted

[32] *See* Exhibit B at Paragraph 6.

solely to this Court and terminate the validly issued temporary restraining Order while the issue of the mandate of using only ductile iron is decided. Such a ruling would allow a public utility to terminate validly issued injunctive relief by simply claiming it is a "public utility" and the courts do not have jurisdiction to hear such matters. This is not what the intent of the statutes and case law would or should condone. Accordingly, Defendants' Motion to Dismiss must be denied.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court deny Defendants' Motion to Dismiss; award Plaintiff its attorney fees and costs incurred in having to defend against this motion and award Plaintiff such further and additional relief this Court deems appropriate and just.

Respectfully submitted,

/s Erik L. Walter
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CERTIFICATE OF SERVICE

A copy of the foregoing Plaintiff's Response in Opposition to Defendants' Motion to Dismiss was served by email this 11th day of March, 2020, on the following:

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KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Lawko v. Ameritech Corp., Ohio App. 8 Dist., December 7, 2000

98 Ohio App.3d 220
Court of Appeals of Ohio,
Second District, Greene County.

GAYHEART, et al., Appellees,
v.
DAYTON POWER & LIGHT COMPANY, Appellant.

No. 93-CA-60.
|
Decided Oct. 28, 1994.

Synopsis
Property owners brought negligence action against electric utility, arising from fire that destroyed their barn, equipment, and livestock, alleging that power surge on neutral electricity line caused fire. The Common Pleas Court, Greene County, entered judgment for owners. Utility appealed. The Court of Appeals, Brogan, J., held that: (1) Public Utilities Commission of Ohio (PUCO) did not have exclusive jurisdiction over action; (2) evidence was sufficient to support res ipsa loquitur instruction; (3) whether utility's negligence proximately caused fire was question for jury; and (4) owner was not qualified as expert to answer question at his deposition as to whether utility had duty to inspect owner's electric wiring and, thus, trial court could refuse to allow utility to read into evidence that question and answer after owners had read excerpts of deposition.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (31)

[1] **Public Utilities**
Exclusive and concurrent powers

Public Utilities Commission of Ohio (PUCO) did not have exclusive jurisdiction over property owners' negligence action against electric utility, arising from fire that destroyed barn, equipment, and livestock, alleging that power surge on neutral electricity line caused fire and, thus, trial court had jurisdiction over action; action did not involve dispute concerning rates and did not concern "practice" of utility within meaning of statute governing Commission's exclusive jurisdiction, alleged power surge was isolated act of negligence, and Commission's expertise in interpreting regulations was not necessary to resolution of action. R.C. § 4905.26.

9 Cases that cite this headnote

[2] **Public Utilities**
Legislative and judicial powers and functions

Purpose of providing Public Utilities Commission of Ohio (PUCO) with jurisdiction to adjudicate utility customer complaints related to rates or services of utility is that resolution of such claims is best accomplished by Commission with its expert staff technicians familiar with utility commission provisions. R.C. § 4905.26.

6 Cases that cite this headnote

[3] **Courts**
Appellate or Supreme Courts

Public Utilities
Exclusive and concurrent powers

When Public Utilities Commission of Ohio (PUCO) has jurisdiction over complaint against utility under statute governing Commission's exclusive jurisdiction, that jurisdiction is exclusive and reviewable only by Supreme Court. R.C. § 4905.26.

2 Cases that cite this headnote

[4] **Public Utilities**
Exclusive and concurrent powers

Public Utilities Commission of Ohio (PUCO) does not have exclusive jurisdiction over every claim brought against public utility. R.C. § 4905.26.

1 Cases that cite this headnote

[5] **Public Utilities**
Exclusive and concurrent powers

Contract and pure common-law tort claims against public utility may be brought in common pleas court, rather than before Public Utilities Commission of Ohio (PUCO). R.C. § 4905.26.

2 Cases that cite this headnote

[6] **Public Utilities**
Exclusive and concurrent powers

For purposes of contract and pure common-law tort claims against public utility, Public Utilities Commission of Ohio (PUCO), has no power to judicially ascertain and determine legal rights and liabilities. R.C. § 4905.26.

2 Cases that cite this headnote

[7] **Negligence**
Happening of accident or injury

General rule is that there is no inference or presumption of negligence from mere injury or accident.

1 Cases that cite this headnote

[8] **Negligence**
Res Ipsa Loquitur

Doctrine of res ipsa loquitur, literally meaning, "the thing speaks for itself," is exception to general rule that there is no inference or presumption of negligence from mere injury or accident.

3 Cases that cite this headnote

[9] **Negligence**
Elements or Conditions of Application

Doctrine of res ipsa loquitur must be applied only when special reasons for its existence are present.

[10] **Negligence**
Creation of inference or presumption

Doctrine of "res ipsa loquitur" is evidentiary, as opposed to substantive, rule of law which allows jury to infer negligence in cases where prerequisites for its application are met.

4 Cases that cite this headnote

[11] **Negligence**
Operation and Effect of Doctrine

Application of res ipsa loquitur does not change plaintiff's claim, but merely allows plaintiff to prove his case through circumstantial evidence.

4 Cases that cite this headnote

[12] **Negligence**
Res ipsa loquitur

Whether it is proper for trial court to give instruction of res ipsa loquitur is determination that must be made on case-by-case basis.

[13] **Appeal and Error**
Negligence in general

Whether there is sufficient evidence to properly give instruction on res ipsa loquitur is question of law to be determined initially by trial court, subject to review upon appeal.

[14] **Negligence**
Nature and character of accident or injury

In determining whether doctrine of res ipsa loquitur applies, question must be answered as to whether facts show that injury occurred under such circumstances that in ordinary course of events it would not have occurred if ordinary care had been observed by defendant.

3 Cases that cite this headnote

[15] **Electricity**
Instructions and verdict and findings

Evidence was sufficient to support res ipsa loquitur instruction in property owners' negligence action against electric utility, arising from fire that destroyed barn, despite utility's expert testimony that fire was caused by improper insulation in breaker panels in barn and owners' inability to point to exact cause of power surge; owners' expert testified that fire

was caused by power surge on neutral electricity line, that high voltage on neutral line was under exclusive control of utility, that in absence of lightning or automobile accidents, which had not occurred, power surge would not occur in absence of negligence, and that owners' wiring in barn was "up to Code," and there was not evidence of equally efficient causes of injury.

6 Cases that cite this headnote

[16] **Negligence**
Res ipsa loquitur

As a general rule, rebuttal by defense will not automatically make res ipsa loquitur instruction improper if it is otherwise supported by plaintiff's evidence.

[17] **Negligence**
Cause of injury, and parties' relation thereto
Negligence
Proximate Cause

When it has been shown by evidence adduced that there are two equally efficient and probable causes of injury, one of which is not attributable to negligence of defendant, rule of res ipsa loquitur does not apply; in other words, when trier of facts could not reasonably find one of probable causes more likely than the other, instruction on inference of negligence may not be given.

2 Cases that cite this headnote

[18] **Appeal and Error**
Sufficiency and scope of motion

Electric utility's counsel's asking of trial court, during on-the-record conference in chambers held at close of all evidence, as to whether it was still court's position that directed verdict motion would be overruled, was sufficient to renew utility's motion for directed verdict, made at close of property owners' evidence, for purposes of preserving for appeal alleged error of denial of directed verdict motion, in owners' negligence action against utility, arising from fire that destroyed owners' barn, alleging that power surge on neutral electricity line caused fire.

[19] **Appeal and Error**
Sufficiency and scope of motion

Motion for directed verdict made at close of plaintiff's evidence which is denied by trial court must be renewed at close of all evidence to properly preserve error for appeal.

[20] **Appeal and Error**
Sufficiency and scope of motion

Electric utility's failure to specify in its motions for directed verdict ground that property owners did not present sufficient evidence that jury could reasonably conclude that utility's negligence proximately caused fire, rendered proximate cause issue not preserved for appeal, in owners' negligence action against utility, arising from fire that destroyed barn, equipment, and livestock, alleging that power surge on neutral electricity line caused fire. Rules Civ.Proc., Rule 50(A)(3).

1 Cases that cite this headnote

[21] **Electricity**
Questions for Jury

Whether electric utility's negligence proximately caused fire that destroyed property owners' barn, equipment, and livestock was question for jury in owners' negligence action against utility, alleging that power surge on neutral electricity line caused fire. Rules Civ.Proc., Rule 50(A)(4).

[22] **Trial**
Weight of evidence
Trial
Credibility of Witnesses

In ruling on motion for directed verdict, trial court shall not consider weight of evidence or credibility of witnesses. Rules Civ.Proc., Rule 50(A)(4).

[23] **Trial**
⊕ Substantial evidence
Trial
⊕ Inferences from evidence

On motion for directed verdict, if nonmoving party presents substantial evidence to support its case upon which reasonable minds could reach different conclusions, motion must be denied. Rules Civ.Proc., Rule 50(A)(4).

[24] **Appeal and Error**
⊕ Necessity of objection in general

Failure of electric utility's counsel to object specifically to trial court's phrasing of res ipsa loquitur instruction, in referring to term as "Two Dollar Fifty Cent" phrase as had property owners' attorney during closing arguments, rendered alleged error unpreserved for appeal in owners' negligence action against utility, arising from fire that destroyed barn, equipment, and livestock, alleging that power surge on neutral electricity line caused fire. Rules Civ.Proc., Rule 51.

4 Cases that cite this headnote

[25] **Electricity**
⊕ Instructions and verdict and findings
Trial
⊕ Opinion or Belief of Judge as to Facts

Trial court's phrasing of res ipsa loquitur instruction, in referring to term as "Two Dollar Fifty Cent" phrase as had property owners' attorney during closing arguments, was not prejudicial to electric utility so as to constitute error in owners' negligence action against utility, arising from fire that destroyed barn, equipment, and livestock, alleging that power surge on neutral electricity line caused fire; trial court's remark did not influence jury or reveal opinion of trial court on application of doctrine of res ipsa loquitur.

3 Cases that cite this headnote

[26] **Trial**
⊕ Opinion or Belief of Judge as to Facts

Trial court must exercise utmost care when instructing jury to avoid revealing opinion of court on particular issue.

[27] **Pretrial Procedure**
⊕ Use

Property owner was not qualified as expert to answer question at his deposition as to whether electric utility had duty to inspect owner's electric wiring and, thus, trial court could refuse to allow utility to read into evidence at trial that question and answer after owners had read excerpts of deposition in owners' negligence action against electric utility, arising from fire that destroyed barn, equipment, and livestock, alleging that power surge on neutral electricity line caused fire; subject matter of question was not within owner's comprehension, and there was no information that owner had specific knowledge as to utility's duties as public utility. Rules Civ.Proc., Rule 32(A)(4), (B).

[28] **Pretrial Procedure**
⊕ Part of deposition

When party reads part of deposition into evidence, opposing party has right to read the rest of it; however, right is not unqualified, and parties may only introduce into evidence parts of deposition which are not otherwise objectionable. Rules Civ.Proc., Rule 32(A)(4), (B).

[29] **Evidence**
⊕ Matters involving scientific or other special knowledge in general

Unless matter is within comprehension of layperson, expert testimony is necessary.

[30] **Evidence**
⊕ Necessity of qualification

Before testifying as expert, witness must first be qualified as expert.

[31] **Appeal and Error**
⇦ Negligence and torts in general

Any error was harmless in trial court's refusal to allow electric utility to read into evidence question and answer at owner's deposition, as to whether electric utility had duty to inspect owner's electric wiring, after owners had read portions of deposition into evidence, in light of ample evidence produced by utility that owners were responsible for electrical panel and wiring that utility alleged caused fire, in owners' negligence action against utility, arising from fire that destroyed barn, equipment, and livestock, alleging that power surge on neutral electricity line caused fire. Rules Civ.Proc., Rule 32(A)(4), (B).

Attorneys and Law Firms

*225 **75 Richard Hempfling, Dayton, for appellees.

Neil F. Freund, Dayton, for appellant.

Opinion

BROGAN, Judge.

Dayton Power and Light ("DP & L") appeals from the final judgment of the Greene County Common Pleas Court entered upon the jury verdict finding DP & L guilty of negligence.

*226 DP & L advances five assignments of error on appeal. Among other claims, DP & L contends that the trial court lacked subject matter jurisdiction over the cause of action and erred in instructing the jury on the doctrine of *res ipsa loquitur.*

On February 9, 1989, a fire occurred on the property of Chester and Phyllis Gayheart. The fire destroyed the Gayhearts' barn, equipment and livestock, including sixteen thoroughbred horses.

On July 28, 1989, the Gayhearts filed a complaint alleging that DP & L had been negligent in designing and maintaining its electrical equipment. The Gayhearts allege that, because of DP & L's negligence, a surge of electricity on the neutral electricity line entered their property and caused a fire. DP & L filed an answer on August 28, 1989. The Gayhearts filed an amended complaint on March 15, 1990.

Following an extensive discovery period, during which depositions of the parties and several experts were taken, DP & L filed a motion for summary judgment, which was overruled by the trial court.

Chester Gayheart died before the trial began. Mr. Gayheart's death was unrelated to the events of the lawsuit. Phyllis Gayheart, as executor of Chester's estate, was substituted as a party in his place.

Prior to trial, the trial court bifurcated the issues of liability and damages. On May 11, 1992 through May 14, 1992 the case was tried before a jury on the issue of liability only.

At trial, plaintiffs presented testimony from several witnesses to establish their theory that the fire was caused by a power surge created by DP & L's negligence. First, portions of Chester Gayheart's deposition were read into evidence, and Phyllis Gayheart testified concerning the events of the fire. Paul Dillard, an electrician, testified that the Gayhearts' wiring and electrical system were "up to Code."

Plaintiffs then called several expert witnesses. Among the experts was John Terpak, a metallurgist, who testified that a glob of metal found at the scene of the fire was a piece of aluminum wire which melted as a result of an electrical surge on the neutral line. Fire Chief Clifton Beegle testified that the fire was started by some type of an electrical short.

Dr. Morris Mericle, an electrical engineering expert, testified that a power surge had occurred and that there were five possible causes of such a surge. Dr. Mericle testified that because there was no evidence of two of the possible causes —lightning and accidents—the power surge had been caused by one of the other three possibilities. He testified that the remaining three possibilities were all under the exclusive control of DP & L and would not normally occur in the *227 absence of DP & L's negligence. Dr. Mericle admitted that it was impossible to tell which of the remaining three causes of a power surge had actually occurred.

At the close of plaintiffs' evidence, the defendant moved for a directed verdict on the ground that the trial court did not have,

subject matter jurisdiction over the cause of action. The trial court overruled the motion.

The defense then presented opposing evidence, including the following: Larry Hatchett, a Greene County Task Force fire investigator, testified that the cause of the fire was a malfunction of the electrical panels in the Gayhearts' barn; William Brown, an investigator for the Ohio State Fire Marshall's Office, testified that the fire was **76 caused by a short in the electrical panels; George Luken, an electrical engineering expert, testified that no power surge had occurred and that the fire had been caused by a failure to insulate the breaker panel in the barn; and Orin Queen, an expert in electrical engineering, testified that a power surge could not have caused the fire.

At the conclusion of the evidence, the trial court's instructions to the jury included an instruction on *res ipsa loquitur*. DP & L objected to the *res ipsa loquitur* instruction. The jury returned a verdict for the plaintiffs, finding DP & L to be negligent.

DP & L moved for judgment notwithstanding the verdict, for a new trial, and for a dismissal. All motions were overruled by the trial court.

The parties subsequently agreed to an amount of damages. Final judgment was entered in favor of the plaintiffs on August 11, 1993. DP & L then asserted this timely appeal.

[1] Appellant's first assignment of error provides:

"The trial court lacked subject matter jurisdiction over the instant case."

In support of this assignment of error, DP & L contends that pursuant to R.C. 4905.26, the Public Utilities Commission of Ohio ("PUCO") has exclusive jurisdiction over this case.

R.C. 4905.26 provides in part:

"Upon complaint in writing against any public utility by any person * * * that any rate, fare, charge, toll, rental, schedule, classification, or 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 said 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, * * * if it appears that reasonable grounds for complaint are stated, the commission shall *228 fix a time for hearing and shall notify complainants and the public utility thereof * * *."

[2] [3] The Ohio Supreme Court has held that PUCO has jurisdiction to adjudicate utility customer complaints related to rates or services of the utility. *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St.3d 147, 573 N.E.2d 655. The purpose of providing PUCO with such jurisdiction is that the resolution of such claims "is best accomplished by the commission with its expert staff technicians familiar with the utility commission provisions." *Id.* at 153, 573 N.E.2d at 660. Where PUCO does have jurisdiction as provided by the statute, that jurisdiction is exclusive and reviewable only 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.

[4] [5] [6] However, PUCO does not have exclusive jurisdiction over every claim brought against a public utility. 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, 18 O.O.3d 130, 412 N.E.2d 395; *Milligan v. Ohio Bell Tel. Co.* (1978), 56 Ohio St.2d 191, 10 O.O.3d 352, 383 N.E.2d 575; *Steffen v. Gen. Tel. Co.* (1978), 60 Ohio App.2d 144, 14 O.O.3d 111, 395 N.E.2d 1346. As stated by the Ohio Supreme Court, "the Commission has no power to judicially ascertain and determine legal rights and liabilities * * *." *Milligan, supra*, 56 Ohio St.2d at 195, 10 O.O.3d at 354, 383 N.E.2d at 578.

To dispose of DP & L's first assignment of error, we must determine if the Gayhearts' claim is related to service as contemplated by R.C. 4905.26 or is a pure common-law tort claim. In essence, the Gayhearts' cause of action against DP & L alleges that DP & L was negligent in allowing a power surge to enter the Gayheart's property.

In support of its argument that the trial court lacks subject matter jurisdiction, DP & L cites *Kazmaier*, wherein the Supreme Court held that PUCO had exclusive jurisdiction over a claim that a utility had negligently overcharged a customer. The court concluded that because the basis of

the action **77 was the charging of unreasonable rates, PUCO had exclusive jurisdiction. As the present case does not involve a dispute concerning rates, we find that *Kazmaier* is distinguishable.

DP & L also cites *Farra v. Dayton* (1989), 62 Ohio App.3d 487, 576 N.E.2d 807, wherein we held that PUCO had exclusive jurisdiction over the plaintiff's claim even though it sounded in tort. However, *Farra* can also be distinguished from the present case. In *Farra*, the tort claim was based on a DP & L serviceman's trespass and destruction of property that occurred while he was removing a *229 customer's meters. We held that the method of removal of meters authorized by DP & L was a "practice" directly related to service and therefore PUCO had exclusive jurisdiction over the claim. The present case does not concern a "practice" of DP & L.

We recently revisited the issue of jurisdiction in *Mid-American Fire & Cas. Co. v. Gray* (June 15, 1993), Montgomery App. No. 13763, unreported, 1993 WL 211651. 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*, and, therefore, the trial court had proper jurisdiction.

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 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. Appellant's first assignment of error is overruled.

As its second assignment of error, DP & L raises the following:

"The trial court's instruction of *res ipsa loquitur* to the jury constituted an abuse of discretion and was prejudicial as a matter of law."

In support of this assignment of error, DP & L contends that the prerequisites for the application of *res ipsa loquitur* were not established and that several possible causes of the fire exist. Conversely, the Gayhearts contend that the prerequisites for a jury instruction on *res ipsa loquitur* were properly established by the evidence adduced at trial, and, therefore, the trial court had a duty to instruct the jury on *res ipsa loquitur*.

[7] [8] [9] The general rule is that there is no inference or presumption of negligence from a mere injury or accident. *Laughlin v. Cleveland* (1959), 168 Ohio St. 576, 7 O.O.2d 452, 156 N.E.2d 827. However, the doctrine of *res ipsa loquitur*, literally meaning "the thing speaks for itself," is an exception to this general rule. *Soltz v. Colony Recreation Ctr.* (1949), 151 Ohio St. 503, 39 O.O. 322, 87 N.E.2d 167. Because it is an exception, it must be applied "only where *230 the special reasons for its existence are present." *Id.* at 511, 39 O.O. at 325, 87 N.E.2d at 171.

[10] [11] The doctrine of *res ipsa loquitur* is an evidentiary, as opposed to substantive, rule of law, which allows the jury to infer negligence in cases where the prerequisites for its application are met. *Morgan v. Children's Hosp.* (1985), 18 Ohio St.3d 185, 18 OBR 253, 480 N.E.2d 464; *Becker v. Lake Cty. Mem. Hosp. W.* (1990), 53 Ohio St.3d 202, 560 N.E.2d 165. The application of *res ipsa loquitur* does not change the plaintiff's claim, but merely allows the plaintiff to prove his case through circumstantial evidence. *Jennings Buick, Inc. v. Cincinnati* (1980), 63 Ohio St.2d 167, 17 O.O.3d 102, 406 N.E.2d 1385.

The Ohio Supreme Court has set forth the prerequisites for application of the *res ipsa loquitur* doctrine as follows:

**78 "To warrant application of the rule a plaintiff must adduce evidence in support of two conclusions: (1) That the instrumentality causing the injury was, at the time of the injury, or at the time of the creation of the condition causing the injury, under the exclusive management and control of the defendant; and (2) that the injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed."

Hake v. Wiedemann Brewing Co. (1970), 23 Ohio St.2d 65, 66–67, 52 O.O.2d 366, 366–367, 262 N.E.2d 703, 705.

[12] [13] It is well established that whether it is proper for the trial court to give the instruction of *res ipsa loquitur* is a determination that must be made on a case-by-case basis. See *Jennings Buick, supra.* Whether there is sufficient evidence to properly give the instruction "is a question of law to be determined initially by the trial court, subject to review upon appeal." *Hake, supra,* 23 Ohio St.2d at 67, 52 O.O.2d at 367, 262 N.E.2d at 705.

[14] Although the prerequisites for applying the *res ipsa loquitur* doctrine appear to be straightforward, courts have recognized that the mere statement of the rule is usually much easier than its actual application. *Soltz, supra.* In determining whether the doctrine applies, the following question must be answered: "[D]o the facts show that the injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed by the defendant[?]" *Jennings Buick, supra,* 63 Ohio St.2d at 171, 17 O.O.3d at 105, 406 N.E.2d at 1388.

[15] In the present case, the Gayhearts claim they have produced sufficient evidence to warrant the instruction to the jury on *res ipsa loquitur* and, thus, the instruction was proper. However, DP & L contends that the *res ipsa loquitur* instruction was improper because DP & L produced reliable evidence at trial that *231 it was not responsible for the cause of the fire. We must therefore examine the evidence to determine if the two prerequisites for *res ipsa loquitur* were established.

The Gayhearts produced expert testimony at trial to attempt to support the two prerequisites for *res ipsa loquitur* as set forth by the Ohio Supreme Court. First, the Gayhearts had to establish that the instrumentality causing the injury was under the exclusive control of the defendant. See *Hake, supra.* The Gayhearts' expert witness, Dr. Mericle, testified that the fire was caused by a power surge on the neutral electricity line coming onto the Gayhearts' property and thus the power surge was the "instrumentality" which caused the fire. Dr. Mericle further testified that, under the circumstances of this case, the high voltage on the neutral line was under the exclusive control of DP & L. To reach this conclusion, Dr. Mericle presumed that other possible causes of a power surge that would not be under the exclusive control of DP & L, such as lightning and car accidents, did not occur on the night of the fire because there was no evidence of their occurrence.

Second, the Gayhearts had to produce evidence that such an injury would not occur in the absence of negligence. See *Hake, supra.* Again, the Gayhearts presented the expert testimony of Dr. Mericle to satisfy this prerequisite. Dr. Mericle testified that, in the absence of lightning or car accidents, such a power surge would not occur in the absence of negligence. Further, the Gayhearts presented testimony that the wiring in their barn was "up to Code."

In opposition, DP & L presented expert testimony to establish that no power surge occurred on the neutral line and that, alternatively, if there had been a power surge, it would not have caused a fire. DP & L then produced expert testimony that the fire was caused by improper insulation in the breaker panels in the Gayhearts' barn.

DP & L contends that the Gayhearts did not establish the prerequisites. DP & L first claims that because there were several possible causes of the power surge, including two that could occur in the absence of DP & L's negligence, the Gayhearts failed to establish that the instrumentality was in the exclusive control of DP & L and that it would not occur in the absence of negligence. In furtherance of this claim, DP & L argues that **79 the Gayhearts are unable to point to the exact cause of the power surge.

DP & L's argument is unpersuasive. There was evidence presented that the two nonnegligent possible causes of the power surge were not present on the night of the fire. In fact, DP & L's own witness, George Luken, testified that neither lightning nor an accident occurred on the night of the fire. The Gayhearts' expert witness plainly testified that a power surge caused by any of the three remaining possible causes was under the exclusive control of DP & L. *232 The fact that the Gayhearts cannot specify exactly which of the three remaining possible causes created the power surge does not strengthen DP & L's argument. Rather, it makes the case a particularly appropriate one for the application of the *res ipsa loquitur* doctrine. Had the Gayhearts been able to point to the exact cause of the power surge, there would be no need for the *res ipsa loquitur* doctrine in this case.

DP & L also contends that the instruction was improper because the Gayhearts did not eliminate the possibility that the fire was caused by their own faulty wiring. The Gayhearts did, however, present testimony that their electrical system

was "up to Code." Additionally, the Ohio Supreme Court has recognized that:

"[A] plaintiff seeking to invoke the doctrine of *res ipsa loquitur* in a negligence action need not eliminate all reasonable non-negligent causes of his injury. It is sufficient if there is evidence from which reasonable men can believe that it is more probable than not that the injury was the proximate result of a negligent act or omission." *Jennings Buick, supra,* 63 Ohio St.2d at 172, 17 O.O.3d at 106, 406 N.E.2d at 1389, citing *Adam Hat Stores, Inc. v. Kansas City* (Mo.1958), 316 S.W.2d 594.

We find that the expert testimony produced by the Gayhearts was sufficient for the jury to find it more probable than not that the fire was a result of a power surge caused by DP & L's negligence.

Finally, DP & L argues that the instruction was improper because it produced evidence that no power surge occurred and that the fire was caused by the Gayhearts' faulty wiring and failure to insulate.

[16] We recognize the general rule, as cited by the Gayhearts, that a rebuttal by the defense will not automatically make a *res ipsa loquitur* instruction improper if it is otherwise supported by the plaintiff's evidence: "It is a well-established principle that a court may not refuse as a matter of law to instruct on the doctrine of *res ipsa loquitur* merely upon the basis that the defendant's evidence sufficiently rebuts the making of such an inference." *Morgan, supra,* 18 Ohio St.3d at 189, 18 OBR at 256, 480 N.E.2d at 467; *Fink v. New York Cent. RR. Co.* (1944), 144 Ohio St. 1, 28 O.O. 550, 56 N.E.2d 456. To do so would improperly invade the province of the jury to weigh the evidence and decide which party's evidence was more persuasive. For example, in *Morgan,* the Ohio Supreme Court held that a *res ipsa* instruction was proper even though the defendant presented evidence that an air embolism, not the negligence of the hospital employees as the plaintiff claimed, caused the injury to the plaintiff.

[17] However, we also recognize that:

*233 "Where it has been shown by the evidence adduced that there are two equally efficient and probable causes of the injury, one of which is not attributable to the negligence of the defendant, the rule of *res ipsa loquitur* does not apply. In other words, where the trier of facts could not reasonably find one of the probable causes more likely than the other, the instruction on the inference of negligence may not be given." *Jennings Buick, supra,* 63 Ohio St.2d at 171, 17 O.O.3d at 105, 406 N.E.2d at 1388; see, also, *Glowacki v. N.W. Ohio Ry. & Power Co.* (1927), 116 Ohio St. 451, 157 N.E. 21; *Loomis v. Toledo Railways & Light Co.* (1923), 107 Ohio St. 161, 140 N.E. 639.

For example, in *Jennings Buick,* the plaintiff presented evidence through expert testimony that a water main break had probably been caused by the improper backfilling technique of the defendant city. However, on cross-examination, the plaintiff's expert admitted that it was equally as probable that the water main break was due to other **80 causes not related to negligence. Further, the city presented evidence that the water main break was caused by corrosion. The court held that the instruction of *res ipsa loquitur* should not be given to the jury because "there was evidence presented to the trier of the facts which would have allowed the jury to find that one or another potential cause of the injury not attributable to the negligence of the city was equally as probable as was a cause attributable to the negligence of the city." *Jennings Buick, supra,* 63 Ohio St.2d at 174, 17 O.O.3d at 106–107, 406 N.E.2d at 1390. Thus, an instruction on *res ipsa loquitur* would have unfairly strengthened one side's case.

Upon close examination of the expert testimony presented by the parties in this case, we find that there was not evidence of "equally efficient" causes of the injury under the standard set forth in *Jennings Buick.* Unlike the evidence presented in *Jennings Buick,* the testimony of Gayhearts' expert did not state that other equally probable causes of the fire existed. In fact, Dr. Mericle plainly testified that the fire was caused by a power surge created as a result of DP & L's negligence.

Upon examining the record, we find that the state of the evidence presented was more similar to that in *Morgan* than in *Jennings Buick.* We recognize that DP & L presented opposing evidence that the fire was caused by failure to insulate the breaker panels, not by a power surge. However, the jury could reasonably find that one of the causes asserted by the parties was more probable than the other based on the strength of the evidence presented and the credibility of the witnesses.

Thus, as the Gayhearts have presented sufficient evidence to satisfy the prerequisites for instructing a jury on *res ipsa loquitur* and DP & L has merely presented evidence tending to rebut the inference of negligence created by the *234 Gayhearts' evidence, we find that the trial court did not err in instructing the jury on *res ipsa loquitur.* Appellant's second assignment of error is overruled.

As its third assignment of error, DP & L raises the following:

"The trial court improperly allowed the jury to speculate that DP & L's conduct was the proximate cause of the fire."

In support of this assignment of error, DP & L argues that the Gayhearts did not present sufficient evidence that the jury could reasonably conclude that DP & L's negligence proximately caused the fire and, therefore, the trial court should have granted DP & L's motion for directed verdict.

[18] As a threshold issue, we must first determine whether DP & L properly preserved this alleged error for appeal. The Gayhearts first argue that the alleged error was not preserved for appeal because DP & L did not properly renew its motion for directed verdict at the close of all evidence.

[19] It is well established that a motion for directed verdict made at the close of plaintiff's evidence which is denied by the trial court must be renewed at the close of all evidence to properly preserve the error for appeal. *Chem. Bank of New York v. Neman* (1990), 52 Ohio St.3d 204, 556 N.E.2d 490; *Helmick v. Republic-Franklin Ins. Co.* (1988), 39 Ohio St.3d 71, 529 N.E.2d 464.

In this case, DP & L moved for a directed verdict at the close of the Gayhearts' evidence, which the trial court subsequently overruled. Upon close examination of the record, DP & L did in fact renew its motion for directed verdict at the close of all evidence. During an on-the-record conference in chambers, held at the close of all evidence, counsel for DP & L specifically asked the court if it was still the court's position that a motion for directed verdict would be overruled. The court answered in the affirmative. Although this may not be the preferable method for renewing a motion for directed verdict, we find that it was sufficient to renew the motion.

[20] However, the Gayhearts also argue that if the motion for directed verdict was properly preserved for appeal, it was preserved only as to the issue of jurisdiction and not as to the issue of proximate cause. Pursuant to Civ.R. 50(A)(3), "[a] motion for a directed verdict shall state the specific grounds therefor." The Gayhearts contend **81 that DP & L did not specify lack of evidence as to proximate cause as a ground for its motion.

In its initial motion for directed verdict, made at the close of the Gayhearts' evidence, the only ground DP & L specified for its motion was lack of subject matter jurisdiction. The issue of proximate cause was clearly not asserted as a ground for the motion. When renewing the motion at the close of all evidence in *235 the judge's chambers, DP & L again failed to specifically mention proximate cause as a ground for the motion:

"Mr. Greene: You have overruled our motion for a directed verdict but that was not on the record. Is it still your position that—

"The Court: That's correct."

It was DP & L's responsibility to clearly establish the basis for its motion on the record in order to enable the trial court to make an informed and relevant ruling on the motion. As DP & L failed to do this, the error was not preserved for appeal.

[21] [22] [23] Moreover, regardless of whether there was a proper preservation of error, we find that the Gayhearts did present sufficient evidence as to proximate cause to overcome a motion for a directed verdict. Civ.R. 50(A)(4) provides:

"When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

In ruling on the motion, the trial court shall not consider the weight of the evidence or the credibility of the witnesses. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 21 O.O.3d 177, 423 N.E.2d 467. Thus, if the nonmoving party presents substantial evidence to support its case upon which reasonable minds could reach different conclusions, the motion must be denied. *Kellerman v. J.S. Durig Co.* (1964), 176 Ohio St. 320, 27 O.O.2d 241, 199 N.E.2d 562;

Hawkins v. Ivy (1977), 50 Ohio St.2d 114, 4 O.O.3d 243, 363 N.E.2d 367.

In this case, the evidence presented by the Gayhearts as to proximate cause would allow reasonable minds to reach different conclusions. The Gayhearts' expert witness, Dr. Mericle, plainly testified that the cause of the fire was a power surge created by DP & L's negligence. Evidence was presented that there was no indication that other nonnegligent causes of a power surge such as lightning or car accidents had occurred on the night of the fire. There was further testimony presented that the Gayhearts' electrical system was "up to Code."

We agree that DP & L did present opposing evidence that the cause of the fire was the Gayhearts' failure to properly insulate the panel box. However, this does not negate the evidence presented by the Gayhearts. It was appropriate for the jury to decide which party had presented more persuasive evidence. The evidence presented was sufficient that reasonable minds could reach different *236 conclusions as to the proximate cause. Thus, there was no error in overruling DP & L's motion.

Accordingly, DP & L's third assignment of error is overruled.

As its fourth assignment of error, DP & L raises the following:

"The trial court's comments about the res ipsa loquitur instructions were improper and unduly prejudiced the jury."

During closing arguments, the Gayhearts' counsel stated: "The judge is going to instruct you on one of the legal charges, something called res ipsa, which is a Two Dollar Fifty Cent word for the thing speaks for itself." Subsequently, when giving instructions to the jury, the trial court began its *res ipsa loquitur* instruction by stating: "Here is that Two Dollar Fifty Cent phrase referred to earlier."

DP & L contends that it was prejudiced by the trial court's "Two Dollar Fifty Cent phrase" comment during jury instructions. DP & L claims that the trial court's reference to the analogy made by the Gayhearts' **82 counsel strengthened the application of *res ipsa loquitur* in the minds of the jury.

[24] Again, we must initially address the issue of whether DP & L properly objected to this comment to preserve any alleged error for appeal. Pursuant to Civ.R. 51, to preserve error in the giving of a jury instruction for appeal, a party must object to the instruction before the jury retires, stating specifically the matter objected to and the grounds for the objection.

The record reveals that DP & L's counsel objected to the proposed jury instruction on *res ipsa loquitur* in the trial judge's chambers prior to the instruction's being given. However, the record reveals no objection to the court's "Two Dollar Fifty Cent" comment made during the actual instructions. In fact, subsequent to using the "Two Dollar Fifty Cent" phrase in its instructions to the jury, the trial court pointedly asked the parties if either had additions or corrections to make to the instructions. Counsel for DP & L specifically answered, "No, your Honor," and thereby failed to object to the court's phrasing of the jury instructions. Had DP & L properly objected, the alleged error could have been easily cured by the trial court.

[25] [26] Moreover, we find that the remark of the trial court was not prejudicial to DP & L. We recognize that a trial court must exercise utmost care when instructing the jury to avoid revealing the opinion of the court on a particular issue. *State v. Nutter* (1970), 22 Ohio St.2d 116, 51 O.O.2d 178, 258 N.E.2d 440. Certainly, there may be cases where it is error for the trial court to repeat a phrase used by a party in closing arguments in situations where it reveals the court's opinion on the evidence.

*237 However, in this case we find that the remark by the trial court did not influence the jury nor reveal the opinion of the trial court on the application of the doctrine of *res ipsa loquitur.* It is obvious that the court was simply alluding to the complex sound of the words "*res ipsa loquitur*" when it referred to it as a "Two Dollar Fifty Cent phrase." From the limited extent of the remark, we cannot say that it influenced the jury to apply the doctrine when it otherwise would not have done so. Accordingly, DP & L's fourth assignment of error is overruled.

As its fifth assignment of error, DP & L raises the following:

"Prejudicial error existed when the trial court refused to allow DP & L to read the complete testimony recorded in Chester Gayheart's deposition."

[27] At trial, the Gayhearts read into evidence portions of the deposition of Chester Gayheart taken before his death. DP & L was then provided the opportunity to read other portions of the deposition into evidence. The Gayhearts objected to a

question being read into evidence by DP & L, and the trial court sustained the objection. DP & L contends that the trial court erred in sustaining the objection.

The deposition testimony that was excluded by the court was the following question:

"Q. Okay. Are you suggesting that DP & L has a responsibility to inspect your panel and wiring?

"A. No sir."

The Gayhearts objected to the question on the basis that Mr. Gayheart was not qualified to answer the question.

[28] DP & L is correct in its assertion that when a party reads part of a deposition into evidence, the opposing party has the right to read the rest of it. Pursuant to Civ.R. 32(A)(4), if a party offers only a portion of deposition testimony into evidence, the adverse party has the right to introduce any other part of the deposition into evidence. However, this is not an unqualified right. "[O]bjection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying." Civ.R. 32(B). Therefore, parties may introduce into evidence only those parts of a deposition which are not otherwise objectionable.

The Gayhearts objected to the question on the basis that Mr. Gayheart was not qualified to answer the question. We must determine **83 whether the court's sustaining of the objection to the question was proper.

*238 [29] [30] Unless a matter is within the comprehension of a layperson, expert testimony is necessary. *Ramage v. Cent. Ohio Emergency Serv., Inc.* (1992), 64 Ohio St.3d 97, 592 N.E.2d 828. Before testifying as an expert, a witness must first be qualified as an expert. *Tinkham v. Groveport–Madison Local School Dist.* (1991), 77 Ohio App.3d 242, 602 N.E.2d 256.

It is clear in this case that Mr. Gayheart was not qualified as an expert. Additionally, the subject matter of the question was not within Mr. Gayheart's comprehension. The question called for Mr. Gayheart to state whether DP & L had a duty to inspect his wiring. There is no information in Mr. Gayheart's background that he had specific knowledge as to DP & L's duties as a public utility. We find that the question was properly excluded by the trial court on the basis that it called for an opinion that Mr. Gayheart was not qualified to render.

[31] Moreover, any error committed by the trial court in excluding this testimony was certainly not prejudicial to DP & L. At trial, ample evidence was produced by DP & L that the Gayhearts were responsible for the electrical panel and wiring that DP & L alleges caused the fire. In fact, it was not disputed that the Gayhearts were responsible for maintaining their own electrical system. Thus, DP & L's fifth assignment of error is overruled.

The judgment of the trial court will be affirmed.

Judgment affirmed.

WOLFF and FAIN, JJ., concur.

All Citations

98 Ohio App.3d 220, 648 N.E.2d 72

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IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

K. HOVNANIAN FOREST LAKES, LLC, Plaintiff, vs. AQUA OHIO, INC., et al. Defendants.	CASE NO. CV-2020-02-0740 JUDGE ALISON BREAUX **AFFIDAVIT OF MICHAEL MERCIER**

STATE OF OHIO)
) ss.
COUNTY OF SUMMIT)

I, **MICHAEL MERCIER**, being first duly sworn, deposes and states as follows:

1. I am of sound mind and over the age of eighteen (18) years.

2. I am an authorized member of and in-house counsel for K. Hovnanian Forest Lakes, LLC, an Ohio limited liability company conducting business in the State of Ohio (hereinafter referred to as "KHOV") and have knowledge of the facts and evidence related to this matter. As a result, I am able to testify regarding the same.

3. KHOV is not a customer of Aqua Ohio, Inc. (hereinafter referred to as "Aqua") and has no written contract with Aqua.

4. Further, this matter does not involve rates, charges, classifications or services.

5. Instead, this matter involves contractual construction issues and the legal rights and liabilities of the parties and the adjudication of those rights and liabilities.

6. In this regard, on February 6, 2020, I personally contacted the Public Utilities Commission of Ohio (hereinafter referred to as the "PUCO") about Aqua's

mandate of only using ductile iron on a water project in Green, Ohio, and was informed by the PUCO that it (the PUCO) had no control or authority over the specifications required by Aqua.

7. As a result, on February 11, 2020, I personally contacted Aqua via telephone and spoke to Donald Snyder--construction supervisor for Aqua--who confirmed to me that Aqua had no written specifications or policies requiring the use of ductile iron piping for the development in Green, Ohio, and that other divisions of Aqua exclusively used PVC piping in projects throughout Ohio.

8. On the same date--February 11, 2020, Jacob Flanary--construction coordinator for Aqua--corresponded with me via E-mail, taking that position that under OAC Rule 4901:1-15-30(B), Aqua has the right to require the exclusive use of CL 52 ductile iron pipe on its projects.

9. In an attempt to resolve this matter, I communicated with Jacob Flanary via E-mail, stating:

> Thank you for the response. However, this still does not get to the heart of the issue. The Stark Division is just a subset of the Aqua Ohio/Aqua America waterworks company. As such, why are other divisions exclusively using PVC materials, as opposed to ductile iron? If the use of PVC or alternative materials is good enough for other divisions of Aqua Ohio, why are they not so for the Stark Division? Why is the Stark Division specifically refusing to allow for these materials which are code-compliant and also a commercially accepted industry practice in the majority of the other regions compared to the use of ductile iron?
>
> Also, you had provided in correspondence dated 2/6/2020, that the Stark Division had no specific material specifications. Why was that communication made if such specifications exist?

10. After receiving no response from Jacob Flanary or Aqua regarding the above, on February 13, 2020, I corresponded with Keith Nutter--head of Aqua's Stark Division--via E-mail, asking for the legal and logical rationale behind requiring the installation of only ductile iron on the project ion Green, Ohio.

11. Said E-mail correspondence requested that a response be tendered on or before February 16, 2020, and if none was received by that deadline, legal action would be taken.

12. As a result of no substantive response being tendered, the underlying Complaint was filed.

13. In this regard, notice of filing the Certification of Counsel, Verified Complaint, Motion for Temporary Restraining Order, proposed Order Granting Plaintiff's Motion for Temporary Restraining Order and Signed Order Granting Plaintiff's Motion for Temporary Restraining was sent to Aqua and Jacob Flanary on February 25, 2020, but no response was ever tendered to the same until the filing of the underlying Motion to Dismiss on March 2, 2020.

14. If called upon as a witness, I can testify competently to the facts contained herein.

FURTHER AFFIANT SAYETH NAUGHT.

MICHAEL MERCIER

Sworn to before me and in my presence the above MICHAEL MERCIER, did sign his name of his own free will on this 4th day of March, 2020.

Notary Public

NATHAN FIJAL
Notary Public, State of Ohio
My Commission Expires
February 21, 2021

1978 WL 214815
Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Sixth District, Lucas County.

John F. Ziolkowski, et al., APPELLANTS
v.
Columbia Gas of Ohio, Inc., et al., APPELLEES

C. A. NO. L-77-293.
|
July 21, 1978.

APPEAL FROM COMMON PLEAS COURT NO. CV-77-1075.

DECISION & JOURNAL ENTRY

PER CURIAM.

*1 This cause came on to be heard upon the record in the trial court. Each assignment of error was reviewed by the court and upon review the following disposition made:

This is an appeal from the judgment by the Lucas County Common Pleas Court, granting defendants-appellees' motion to dismiss. The pleadings and briefs upon which the motion was submitted reveal the following facts. Ziolkowski owns real property and a commercial building at 1920 Clinton Street, Toledo. In March 1975, he applied for gas service to the building, and Columbia Gas of Ohio approved the application, subject to certain repairs being made. The repairs were made and gas service was furnished. On March 31, 1975, Ziolkowski leased the building to Precision Pattern & Model Corporation, and thereafter, Precision Pattern moved into the building. In May 1975, Columbia Gas terminated gas service to the building.

Ziolkowski and Precision Pattern brought suit against Columbia Gas and its District Manager, Pickens, for damages resulting from wrongful termination of service, i. e., termination without proper notification. Ziolkowski demanded the cost of the repairs he had performed, rental loss for breach of lease with Precision Pattern, costs of installing a new heating system, and punitive damages for wrongful termination of service. Precision Pattern demanded moving expenses, electrical expenses compensation for loss of business and for the costs of executing a new lease, and wages paid to Ziolkowski for setting up business machines.

Columbia Gas moved to dismiss pursuant to Civ. R. 12(B)(1)(6), alleging that the common pleas court lacked subject matter jurisdiction in that all matters involving adequacy of gas service, including ability to obtain such service, are in the exclusive jurisdiction of the Public Utilities Commission of Ohio, and that the PUCO authorized Columbia's actions, beginning with a PUCO emergency Interim Order of February 16, 1972. [Although not specifically admitted into evidence, this Interim Order was attached to defendants' brief without objection from plaintiffs' counsel. It is not clear whether, in dismissing the suit, the trial court considered the Interim Order, which authorized Columbia to refuse new or additional service after February 1972. The court's entry did not refer to the Order. Assuming, arguendo, that this Order was properly admitted into evidence and considered by the trial court, the Order did not prevent the court from assuming jurisdiction. The Order makes refusal of new service discretionary, and does not prevent the gas company from subsequently entering into a valid contract with users such as plaintiffs here]. Columbia further alleged that plaintiffs failed to state a claim upon which relief can be granted in that Columbia Gas only contracts with the City of Toledo, not with individual customers, and that, therefore, no contract ever existed between Columbia Gas and Ziolkowski.

*2 The trial court granted the motion to dismiss on the ground that "the Ohio Public Utilities Commission has the exclusive jurisdiction to determine the complainant's right to service * * *."

Ziolkowski and Precision Pattern appeal, assigning as errors: "The trial court erred in granting the motion to dismiss.

"The court erred in ruling on the motion to dismiss."

We find that the trial court did err in ruling that it had no subject matter jurisdiction in this case and in dismissing the suit. Both assignments of error are well taken.

"The Public Utilities Commission of Ohio is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute." Ohio Public Interest Action Group

v. PUC (1975), 43 Ohio St. 2d 175 Syl. 5, following Penn Central Transportation Co. v. PUC (1973), 35 Ohio St. 2d 97, Syl. 1.

R.C. Ch. 4905 sets forth the general powers of the PUCO. R.C. 4905.04, cited by the trial court, provides that the PUCO is vested with the power and jurisdiction "to supervise and regulate public utilities * * *, to require all public utilities to furnish their products and render all services exacted by the commission or by law * * *." Further, R.C. 4509.26, cited by Columbia Gas, provides the procedure by which the PUCO shall hear complaints that any rate or service or regulation is unreasonable or illegal, or that "any service is, or will be, inadequate or cannot be obtained * * *."

The Ohio Supreme Court has construed R.C. Ch. 4905 as providing that in matters relating to the provision or refusal of service, the PUCO has exclusive jurisdiction, and the common pleas court has no jurisdiction, to order service to be provided to users. See Inland Steel Development Corp. v. PUC (1977), 49 Ohio St. 2d 284, 288, (in which the Ohio Supreme Court ruled that the refusal of service by a public utility is a matter within the exclusive jurisdiction of the PUCO, subject to review by the Supreme Court); and State, ex rel., Northern Ohio Telephone Co. v. Winter (1970), 23 Ohio St. 2d 6, (in which the Ohio Supreme Court ruled that under R.C. Ch. 4905, the PUCO has exclusive jurisdiction in matters of service and rate complaints, subject to review by the Supreme Court, and that the common pleas court has no jurisdiction to grant a temporary restraining order to prevent discontinuation of service to a user). See also, North Ridge Investment Corp. v. Columbia Gas (1973), 49 Ohio App. 2d 74, (wherein the Ninth District Court of Appeals held that the PUCO has exclusive jurisdiction, and the common pleas court lacks jurisdiction in mandamus or injunction, to order a public utility to provide service to a prospective user), and Law Offices of Jack Gallon Co. v. Ohio Bell Telephone Co. (Lucas County C.A. No. 7920, Aug. 8, 1975), (wherein the jurisdiction of the common pleas court to adjudicate contract rights between a utility and a potential user was an issue, and this Court found that the trial court erred in holding as a matter of law that it did not have subject matter jurisdiction and remanded the cause for further proceedings). But see, Palmer v. Columbia Gas Co. (D. Ohio 1972), 32 Ohio Misc. 16, aff'd, 479 F. 2d 153 (6th Cir. 1973), a class action suit brought under 42 U.S.C. Sec. 1983, in which the district court enjoined the gas company from terminating service to customers without due process, and the court of appeals affirmed, noting that it was not an abuse of discretion by the District Court "to refuse to abstain from taking jurisdiction of this important civil rights case on the grounds that the P.U.C.O. might, at some time in the future, decide to review a similar grievance."

*3 However, in the instant case, the plaintiffs do not seek to compel the gas company to provide them with service. Rather, plaintiffs seek damages for breach of an allegedly valid executory contract. As to the adjudication of contract rights between parties and the award of damages for breach of contract, the common pleas court, not the PUCO, has jurisdiction. In Coss v. PUCO (1920), 101 Ohio St. 528, in which an individual filed a complaint with the PUCO to enforce against the present utilities company a contract made with the predecessor company, the Ohio Supreme Court affirmed the dismissal of the complaint by the PUCO on the ground that the order sought by the complainant was contrary to express provisions of the utilities act, and went on to state, at p. 529:

> "If the complainant stated a valid contract with the defendant itself the public utilities commission would be entirely wanting in jurisdiction to either enforce specific performance thereof or award damages incurred by reason of its violation by the company."

See also New Bremen v. PUC (1921), 103 Ohio St. 23, wherein the Supreme Court recognized the subject matter jurisdiction of the common pleas court to entertain a suit by two municipalities against a gas company to enforce the provisions of an express contract. Cf. State, ex rel City of Cleveland v. Ct. of App. for the 8th Dist. (1922), 104 Ohio 96, wherein the court held, "The provisions of the act creating the public utilities commission, and conferring upon it jurisdiction to fix rates, in no way withdrew from the courts any of the equitable jurisdiction which they theretofore had." Cf. also Newman v. East Ohio Gas Co. (1948), 149 Ohio St. 360, wherein the Supreme Court affirmed the trial court's judgment granting an injunction to an individual user in a suit brought to enforce the contract between the municipality and the gas company, which contract conflicted with a PUCO emergency order.

In summary, we find that the common pleas court, and not the PUCO, is the proper forum for the adjudication of the contract rights between the parties herein. Further, we reject appellees' contention that the furnishing of gas to individual users constitutes no contract at all between Columbia Gas and those users, but is merely the performance of a service contract between the gas company and the City of Toledo. We find that the allegations in the complaint are sufficient to raise a question of fact as to the existence of a valid contract between the parties herein.

On consideration whereof, the court finds that substantial justice has not been done the parties complaining and the judgment of the Lucas County Common Pleas Court is hereby reversed.

This cause is remanded to said court for further proceedings in accordance with law. Costs to abide the outcome of the further proceedings.

*4 A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Ten (10) days from the date hereof this document shall constitute the journal entry of judgment and shall be file stamped by the Clerk of the Court of Appeals, at which time the period for review will begin to run. App. R. 22(E).

John W. Potter, P.J., John J. Connors, Jr. and Frank W. Wiley, JJ., concur.

Judge Frank W. Wiley, Retired, sitting by assignment of the Chief Justice of the Ohio Supreme Court.

All Citations

Not Reported in N.E.2d, 1978 WL 214815

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IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

K. HOVNANIAN FOREST LAKES, LLC	)	CASE NO. CV-2020-02-0740
	)	
Plaintiff,	)	JUDGE ALISON BREAUX
	)	
vs.	)	
	)	**DEFENDANTS' MOTION FOR**
AQUA OHIO, INC., *et al.*	)	**LEAVE TO FILE *INSTANTER* A**
	)	**REPLY IN SUPPORT OF THEIR**
Defendants.	)	**MOTION TO DISMISS FOR LACK**
	)	**OF SUBJECT MATTER**
	)	**JURISDICTION**

Defendants Aqua Ohio, Inc. and Jacob Flanary, by and through counsel, move this Honorable Court for Leave to File *Instanter* a Reply in Support of Defendants' Motion to Dismiss for lack of Subject Matter Jurisdiction.

Defendants seek leave to file a Reply to address serious factual and legal inaccuracies contained in Plaintiff's Opposition.

The proposed Reply is attached hereto, and Defendants request that, if the Court grants Defendants' Motion for Leave, the Reply be deemed filed as of the date the Motion is granted to avoid the necessity for re-filing.

WHEREFORE, Defendants respectfully requests that their Motion for Leave to File *Instanter* a Reply be granted.

Respectfully Submitted,

/s/ Matthew M. Ries
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Attorneys for Defendants

CERTIFICATE OF SERVICE

A copy of the *foregoing* was sent via email on this 17th day of March 2020, to:

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IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

K. HOVNANIAN FOREST LAKES, LLC	)	CASE NO. CV-2020-02-0740
	)	
Plaintiff,	)	JUDGE ALISON BREAUX
	)	
vs.	)	
	)	**DEFENDANTS' REPLY IN SUPPORT**
AQUA OHIO, INC., *et al.*	)	**OF MOTION TO DISMISS FOR**
	)	**LACK OF SUBJECT MATTER**
Defendants.	)	**JURISDICTION**

It is hard to imagine how the Public Utilities Commissions of Ohio ("PUCO") does not have jurisdiction over this dispute. Plaintiff is challenging Aqua Ohio, Inc.'s ability to enforce its engineering standards and practices, which require the use of ductile iron pipe for main extensions in its water divisions, authorized pursuant to Aqua Ohio's PUCO-approved tariff.

Plaintiff's Opposition advances no legal support for its position. Instead, Plaintiff cites to a litany of cases that are either wholly inapplicable or that actually support Defendants' position in favor of PUCO's exclusive jurisdiction.

In a desperate attempt to circumvent PUCO's exclusive jurisdiction, Plaintiff mischaracterizes the nature of this dispute as a "breach of contract" or "tort claim". But Ohio courts have made clear that a party cannot superficially label a cause of action as a breach of contract or tort claim in order to avoid PUCO jurisdiction. As discussed below, this is not a breach of contract dispute because the parties do not have a contract (and Plaintiff has not even asserted a breach of contract claim). Similarly, this is not a tort case because Plaintiff is challenging Aqua Ohio's decision to require ductile iron pipe per its engineering standards and practices for water main extensions that have been in place for decades. The fact that Plaintiff

believes Aqua Ohio should allow the use of a cheaper material does not amount to a tort claim – it is a challenge to a public utility's established standards and practices that must be decided by the PUCO, which has exclusive jurisdiction to regulate public utilities and has the expertise of staff technicians to oversee disputes related to industry practices and standards.

I. LAW AND ARGUMENT

A. Plaintiff's Arguments are Contrary to Well-Settled Ohio Law

Plaintiff argues that PUCO lacks jurisdiction to determine whether Aqua Ohio's practice of requiring the use of ductile iron pipe for new construction water mains is within "generally accepted utility engineering practices". (Plt's Opp. pp. 8-9.) This is exactly the type of dispute that PUCO has exclusive jurisdiction to determine.

R.C. 4901.01 *et seq.* is Ohio's statutory framework that vests exclusive jurisdiction for regulating public utilities with PUCO. R.C. §4905.26 provides that PUCO shall hear complaints against public utilities alleging 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." (Emphasis added.)

Ohio courts have long held that determinations based on generally accepted industry practices that implicate tariffs, interpretation of the utility regulatory provisions of the Ohio Administrative Code, and practices normally authorized by the utility are "service-related issues within PUCO's exclusive jurisdiction." *P. Indem. Co. v. Dorothy R. Deems et al.*, 10th Dist. No. 19AP-349, 2020-Ohio-250, ¶ 20; *see also Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St.3d at 154, 573 N.E.2d 655, 660 (1991)("determin[ing] the mutual rights and responsibilities of the parties" regarding the defendant's tariffs is a matter within the exclusive

jurisdiction of PUCO); *Ayers-Sterrett, Inc. v. Am. Telecomm. Sys., Inc.,* 162 Ohio App.3d 285, 290, 833 N.E.2d 348 (2005)("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.").

Here, Plaintiff is challenging Aqua Ohio's standards and practices requiring the use of ductal iron pipe for main extensions in its Stark Regional Division under the authority of the Ohio Administrative Code ("OAC") 4901:1-15-30 and in the manner required under its PUCO-approved Tariff, Extension of Mains, Section 3-7. *See*, Complt. p. 2, at ¶2. Moreover, Plaintiff seeks a declaration that Defendants' actions are "unlawful and void" under OAC 4901:1-15-30(F), contending that the use of ductile iron pipe is not a generally acceptable utility engineering practice and that the use of the cheaper, PVC piping is. *See*, Complt. p. 7, at ¶¶42-43; p. 9, at ¶2. Therefore, resolution of this matter is a service-related issue that falls squarely within PUCO's exclusive jurisdiction because this matter requires a review of Aqua Ohio's standard engineering practices as well as the adequacy of those practices authorized by its PUCO-approved tariff and the OAC.

B. <u>This is Not a Breach of Contract or Tort Case</u>

Plaintiff argues that PUCO does not have jurisdiction based on the legal proposition that trial courts retain jurisdiction over breach of contract and pure tort claims against a public utility. (Plt's Opp. pp. 5-7.)

Aqua Ohio does not dispute that trial courts retain jurisdiction to hear breach of contract and pure tort claims against a public utility. But this is not a breach of contract or tort case. Aqua Ohio does not even have a contract with Plaintiff, and Plaintiff has not asserted a breach of contract claim against Aqua Ohio. Similarly, Plaintiff has not asserted a pure tort claim against

Aqua Ohio. Rather, Plaintiff is seeking a declaratory judgment that Aqua Ohio cannot require the use of ductile iron pipe in its water divisions and injunctive relief to prevent Aqua Ohio from enforcing its engineering standards and practices for requiring said use of ductile iron.

While Plaintiff has asserted a tortious interference with a business relationship claim, this claim is premised on Aqua Ohio's enforcement of its ductile iron pipe requirement, authorized under its PUCO-approved tariff and OAC 4901:1-15-30(E). Plaintiff cannot superficially designate this claim as a "pure tort claim" in order to circumvent PUCO jurisdiction. It is well settled that, "Casting the allegations in the complaint to sound in tort or contract is not sufficient to confer jurisdiction upon a trial court when the basic claim is one relating to service, a claim which only the PUCO has jurisdiction to resolve." *Delost v. First Energy Corp.,* 7th Dist. No. 07-MA-194, 2008-Ohio-3086, at ¶21. Claims that are "manifestly service-related complaints" are within the exclusive jurisdiction of the PUCO. *Id.*

Plaintiff's characterization of this case as a breach of contract dispute (when the parties do not even have a contract) or a tort case is a blatant mischaracterization designed to create a loophole under Ohio law and evade PUCO's exclusive jurisdiction under R.C.4905.04.

C. Plaintiff's Cited Cases do not Support its Position

Throughout its Opposition, Plaintiff cites to a litany of cases purportedly in support of its position that the court has subject matter jurisdiction over this dispute. These cases *do not* support Plaintiff's position, and many of them actually support Aqua Ohio's position that the PUCO has exclusive jurisdiction over this dispute.

1. Plaintiff's Tortious Interference Claim does not Divest the PUCO of Jurisdiction

Plaintiff argues that "Plaintiff is seeking damages under the theory of tortious interference with business relationship/expectancies which is also outside the jurisdiction of the PUCO" and then cites to several cases purportedly in support of this argument. (Plt's Opp. p. 8.) It is unclear why Plaintiff cites to these cases. None – *literally none* – of these cases involve tortious interference claims:

1. The case *State ex rel. The Illuminating Co. v. Cuyahoga Cty. Ct. of Com. Pleas,* 97 Ohio St.3d 69, 776 N.E.2d 92 (2002) did not involve a tortious interference claim. Rather, the electric utility sued the property owner and its tenant to recover unpaid electricity bills for the property, and the property owner filed a counterclaim alleging fraud and rescission of contract based on fraud. *Id.* at 95.

Importantly, *The Illuminating Co.* case supports Aqua Ohio's position. In that case, the Ohio Supreme Court found that the PUCO *had* exclusive jurisdiction over a majority of the claims, even though they sounded in tort and contract claims, because... "[T]he counterclaim is based on conduct by [the utility company] that is illegal because it is expressly forbidden by the Ohio Administrative Code regulations promulgated by the Ohio Public Utilities Commission." *Id.* at 95. This is exactly what Plaintiff is doing here by arguing that "Defendants' actions are 'unlawful and void' under OAC 4901:1-15-30(F)". *See*, Complt. p. 9, at ¶2.

2. Plaintiff cites to *State Farm Fire & Cas. Co. v. Cleveland Elec. Illuminating Co.,* 11th Dist. No. 2003-L-032, 2004-Ohio-3506, which also did not involve a tortious interference claim. In that case, an insurer brought a tort action against an electric company, claiming that a fire to an insured's home was caused by the company's negligence. *Id.* at *1. The court held that the PUCO had exclusive jurisdiction over the dispute because the plaintiff's claims required

interpretation of the utility's tariff and the Ohio Administrative Code concerning utility service and safety standards. *Id.* at *3. Again, this case further supports Aqua Ohio's position.

3. Lastly, Plaintiff cites to *Suleiman v. Ohio Edison Co.,* 146 Ohio App.3d 41, 764 N.E.2d 1098 (2001), which did not involve a tortious interference claim. Rather, the case involved negligence and fraud claims against a utility company AND the court held that the PUCO had exclusive jurisdiction over the plaintiff's claims for negligence and fraud because they related to the utility's maintenance and replacement practices for its meters. *Id.* at 46.

There are Ohio cases that actually analyze jurisdictional issues over tortious interference claims against public utilities, and the courts routinely dismiss those claims due to lack of jurisdiction. *See, e.g., State ex rel. Columbia Gas of Ohio, Inc. v. Henson,* 102 Ohio St.3d 349, 810 N.E.2d 953 (2004)(tortious interference claim against utility company was within the exclusive jurisdiction of the PUCO); *Lawko v. Ameritech Corp.,* 8th Dist. No. 78103, 2000 WL 1800753, at *3 (although characterized as claims for interference with contractual relations, appellant's claims are clearly service-oriented and within the exclusive jurisdiction of the PUCO). The fact that Plaintiff included a tortious interference claim in its Complaint does not magically transform this lawsuit into a "pure tort action" that divests the PUCO of jurisdiction.

2. Plaintiff's Declaratory Judgment and Injunctive Relief Claims do not Divest the PUCO of Jurisdiction

Plaintiff argues that "Plaintiff is seeking a declaratory judgment which is clearly governed by ORC 2721.01 et seq. and Civ. R. 57 and is therefore seeking a judicial determination of its legal rights and liabilities – actions the PUCO has no power to entertain." (Plt's Opp. p. 8.) In support of this argument, Plaintiff cites to *Milligan v. Ohio Bell Tel. Co.,* 56 Ohio St.2d 191, 383 N.E.2d 575 (1978) and *Gayheart v. Dayton Power & Light Co.,* 98 Ohio App.3d 220, 648 N.E.2d 72 (1994). *Id.*

Neither of these cases involve declaratory judgment or injunctive relief claims. In *Milligan*, the telephone company was sued by a residential customer for charging unjust and unreasonable rates, wrongfully terminating service, and for invasion of privacy. *Milligan, supra,* 56 Ohio St.2d at 191. In *Gayheart*, the property owners brought a negligence action against an electric utility, arising from a fire that destroyed their barn, equipment, and livestock.

Regardless, Ohio courts routinely dismiss declaratory judgment and injunctive relief actions against public utilities in favor of PUCO jurisdiction. *See, e.g., State ex rel. Duke Energy Ohio, Inc. v. Hamilton Cty. Ct. of Com. Pleas,* 930 N.E.2d 299, 302 (2010) (trial court had no jurisdiction over declaratory judgment claim based on utility's alleged interference with contractual relationships as such jurisdiction was reserved exclusively for the PUCO); *State ex rel. Northern Ohio Tel. Co. v. Winter*, 23 Ohio St.2d 6, 260 N.E.2d 827 (1970) (trial court has no jurisdiction to grant a temporary restraining order or grant injunctive relief over utility for service matters that fall within PUCO jurisdiction); *State ex rel. Duke Energy Ohio, Inc. v. Hamilton Cty. Ct. of Com. Pleas*, 930 N.E.2d 299, 305 (2010) (trial court lacked subject matter jurisdiction over utility to issue preliminary injunction and provide injunctive relief because service-related claims fell within exclusive purview of PUCO jurisdiction).

D. The Ohio Supreme Court's Decision in *Columbus Southern Power* is Dispositive of Plaintiff's Claims

The Ohio Supreme Court's decision in the case of *The State ex rel. Columbus Southern Power Company v. FAIS, Judge*, 117 Ohio St.3d 340, 884 N.E.2d 1 (2008) is dispositive of Plaintiff's claims. In *Columbus Southern Power*, the Ohio Supreme Court held that the issue of whether a public utility's tariff could allocate extra costs for the construction of infrastructure improvements was within the exclusive jurisdiction of the PUCO to resolve.

In its Opposition, Plaintiff argues that:

> Defendants improperly and misleadingly cite *The State ex rel. Columbus Southern Power Company v. FAIS, Judge,* 117 Ohio St.3d 340, 884 N.E.2d 1 (2008) as standing for the proposition that "any functions of the utility that are related to charges and costs of service, *such as the extra cost involved in complying with the utility's tariff-authorized rules for infrastructure improvements,* were under the exclusive jurisdiction of the PUCO," there is no such finding or holding by *The State ex rel. Columbus Southern Power Company Court.* (Emphasis *sic.*)

(Plt's Opp. p. 6 fn 28.)

But that is exactly what the Court held in *Columbus Southern Power*. In that case, the issue was the utility company's "compliance with the commission-approved tariff and its refusal to adhere to the conflicting Reynoldsburg ordinance and directive to pay the costs associated with the ordered relocation of its facilities result[ing] in a charge or rate to Reynoldsburg for the service of relocating the facilities." *Id.* at 5. In finding that the PUCO had exclusive jurisdiction over this issue, the OSC held:

> Public utility tariffs are books or compilations of printed materials filed by public utilities with, and approved by, the commission that contain schedules of rates and charges, rules and regulations, and standards for service. Because Reynoldsburg's ordinance is in direct contravention of a previously existing, duly adopted tariff, which was approved by the commission following notice, hearing, and the intervention of other municipalities, the commission has the exclusive, initial jurisdiction over the city's claim, and we have jurisdiction over any appeal from the commission's final order.

Id. at 6.

Our case involves nearly an identical issue where Plaintiff is challenging Aqua Ohio's compliance with its PUCO-approved tariff and the costs associated with the required ductile iron pipe in its water divisions. Plaintiff's challenges to Aqua Ohio's industry practices and engineering standards are a matter reserved exclusively for PUCO jurisdiction.

III. CONCLUSION

Wherefore, for the foregoing reasons, Defendants respectfully request that this Honorable Court dismiss Plaintiff's Complaint against them for lack of subject matter jurisdiction.

Respectfully Submitted,

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A copy of the *foregoing* was sent via email on this 17th day of March 2020, to:

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IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

K. HOVNANIAN FOREST LAKES, LLC, Plaintiff, vs. AQUA OHIO, INC., et al. Defendants.	CASE NO. CV-2020-02-0740 JUDGE ALISON BREAUX **PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' MOTION FOR LEAVE TO FILE INSTANTER A REPLY IN SUPPORT OF THEIR MOTION TO DISMISS**

NOW COMES Plaintiff, K. Hovnanian Forest Lakes, LLC (hereinafter referred to as "Plaintiff"), by and through undersigned counsel, and hereby moves this Court to Strike Defendants' Motion for Leave to File Instanter a Reply in Support of their Motion to Dismiss, states as follows:

I. INTRODUCTION

On March 17, 2020, Defendants filed a Motion for Leave Instanter seeking to reply to Plaintiff's validly filed March 11, 2020 Response in Opposition to Defendant's Motion to Dismiss. However, in doing so, there simply is no mechanism for such a pleading. Accordingly, for the reasons stated herein, Defendants' Motion for Leave should be denied.

II. LAW AND ARGUMENT

A motion to strike is governed by Civ R 12(F) which provides that a court may order stricken from any pleading any insufficient claim or defense or any redundant, immaterial, impertinent or scandalous matter. The standard of review on the granting or denying of such a

motion is for an abuse of discretion. *Fed. Home Loan Mtge. Corp. v. Zuga*, 11th Dist. Trumbull No. 2012–T–0038, 2013-Ohio-2838, 2013 WL 3367060, ¶ 13, citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). With this noted, nothing in the Local Rules allow for the filing of a sur-reply. Instead, Local Rule 7.14(A) provides:

> Every motion filed shall be accompanied by a brief stating the grounds upon which it is based, and a citation of authorities relied upon to support the motion. Within ten (10) days after receipt of a copy of a motion, except a motion for summary judgment, opposing counsel shall prepare and file a response to the motion setting forth statements relied upon in opposition. Every motion so filed shall be deemed submitted and shall be determined upon the written statements of reasons in support or opposition, as well as the citation of authorities. At any time after fourteen (14) days from the date of filing of the motion, the assigned judge may rule upon the motion. In the interest of justice, the assigned judge may enter a ruling at an earlier date if so required.

Accordingly, there simply is no provision allowing for the submission of the 9-page sur-reply brief. This is especially true and should be upheld where all that Defendants are doing is taking a second bite at the apple when they know their motion to dismiss lacks the ability to be granted. In fact, even a cursory review of the proposed pleading reveals that nothing new is added and all that Defendants are doing is regurgitating the same arguments presented in their motion to dismiss with more conjecture being added from their attorneys—something that does not give rise to a motion being granted. *Hooks v. Ciccolini*, 9th Dist. No. 20745, 2002 Ohio 2322, ¶12; *Lucas v. Perciak*, 8th Dist. No. 96962, 2012 Ohio 88, ¶ 16. Accordingly, because such a pleading is not contemplated for by the local rules, the same should be denied and stricken pursuant to Civ R 12(F).

III. CONCLUSION

When Defendants' motion is reviewed, it is clear that they are simply trying to persuade the Court that their arguments for having the case dismissed are proper. However, the mere fact that Defendants do not agree with arguments advanced by Plaintiff in its March 11, 2020

opposition brief does not give Defendants the right to file another brief that is not contemplated for in the rules of civil procedure. Simply put, the briefing is done and Defendants offer nothing new to the arguments. Therefore, the motion should be stricken pursuant to Civ R 12(F) and the brief not considered by this Court.

WHEREFORE, Plaintiff respectfully requests that this Court deny Defendants' Motion for Leave to File a Reply in Support of their Motion to Dismiss and strike the same from this matter; award Plaintiff its attorney fees and costs in having to file this response pursuant to Civ R 11 and ORC 2323.51 and grant such additional relief this Court deems proper and just. In the alternative, if the Court does grant the motion, Plaintiff would request a period of 10 days to respond to the same—something that will likely cause Defendants to file yet another motion to address that filing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Plaintiff's Motion To Strike Defendants' Motion For Leave To File Instanter A Reply In Support Of Their Motion To Dismiss was served by email this 18th day of March, 2020, on the following:

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IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

K. HOVNANIAN FOREST LAKES, LLC	)	CASE NO. CV-2020-02-0740
	)	
Plaintiff,	)	JUDGE ALISON BREAUX
	)	
vs.	)	
	)	**DEFENDANTS' MOTION**
AQUA OHIO, INC., *et al.*	)	**TO STRIKE INADMISSIBLE**
	)	**HEARSAY PORTIONS OF**
Defendants.	)	**PLAINTIFF'S OPPOSITION AND**
	)	**PARAGRAPH 6 OF AFFIDAVIT OF**
	)	**MICHAEL MERCIER**

Now come Defendants, Aqua Ohio, Inc. and Jacob Flanary, by and through counsel, and respectfully requests that this Honorable Court strike Paragraph 6 of the Affidavit of Michael Mercier, submitted by Plaintiff in support of its Opposition to Defendants' Motion to Dismiss, as the statements made in Paragraph 6 constitute inadmissible hearsay, pursuant to Evid. R. 801 and 802. Defendants also request that any reference to said inadmissible hearsay be stricken from Plaintiff's Opposition Brief.

Defendants' Motion is further supported by the accompanying Memorandum in Support.

Respectfully Submitted,

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MEMORANDUM IN SUPPORT

I. BACKGROUND

On March 11, 2020, Plaintiff filed an Opposition to Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction. In their Opposition, Plaintiff argues that:

> Specifically, attached hereto and incorporated herein as Exhibit B is the Affidavit of Michael Mercier-authorized member and in-house counsel for Plaintiff-which clearly reveals this Court has jurisdiction over this matter. Even a cursory review of this affidavit reveals, among other things, that the PUCO was contacted by Mr. Mercier regarding Defendant Aqua, Inc.'s mandate of requiring the sole use of ductile iron on the Project and he was informed that the PUCO 'had no control or authority over the specifications required by Aqua Ohio, Inc.'

(Plt's Opp. p. 6, citing to Mercier Aff., ¶6.)

Paragraph 6 of Mr. Mercier's Affidavit states:

> In this regard, on February 6, 2020, I personally contacted the Public Utilities Commission of Ohio (hereinafter referred to as the "PUCO") about Aqua's mandate of only using ductile iron on a water project in Green, Ohio, and was informed by the PUCO that it (the PUCO) had no control or authority over the specifications required by Aqua.

(Plt's Opp., Ex. B., Mercier Aff., ¶6.)

For the following reasons, Paragraph 6 of Mr. Mercier's Affidavit (and Plaintiff's related arguments) should be stricken as the statements constitute inadmissible hearsay.

II. LAW AND ARGUMENT

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid. R. 801(C). Hearsay is generally not admissible as evidence. Evid. R. 802.

Unless it is subject to a recognized exception, hearsay evidence is not allowed in opposing a dispositive motion. *Mahvi v. Stanley Builders*, 11th Dist. No. 2004–G–2607, 2005-Ohio-6581, ¶ 30.

Plaintiff is relying on a vague, generic statement allegedly made by an unidentified employee at the Public Utilities Commission of Ohio ("PUCO"). Worse yet, Plaintiff is asserting that statement as legal authority to conclude that the PUCO lacks subject matter jurisdiction over this dispute. The admissibility problems with this statement are numerous. It is an improper legal opinion, from an unidentified person, offered through an out-of-court statement, made on a cold call over the phone, to prove the truth of the matter asserted. This is the very definition of inadmissible hearsay and the reason that the Ohio Rules of Evidence exist to prevent such types of statements from being introduced as evidence.

III. CONCLUSION

Wherefore, Defendants respectfully request that this Honorable Court strike Paragraph 6 of Mr. Mercier's Affidavit and any references thereto in Plaintiff's Opposition Brief.

Respectfully Submitted,

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IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

K. HOVNANIAN FOREST LAKES, LLC, Plaintiff, vs. AQUA OHIO, INC., et al. Defendants.	CASE NO. CV-2020-02-0740 JUDGE ALISON BREAUX **PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STRIKE**

NOW COMES Plaintiff, K. Hovnanian Forest Lakes, LLC (hereinafter referred to as "Plaintiff"), by and through undersigned counsel, and for its Response in Opposition to Defendants' Motion to Strike, states as follows:

I. INTRODUCTION

On February 25, 2020, Plaintiff filed this underlying action. In doing so, Plaintiff sought and was granted a temporary restraining Order against Defendants, temporarily restraining and enjoining them from forcing Plaintiff to use ductile iron in its projects in Ohio and Ordering that Plaintiff had the right to use PVC piping in its construction projects in Ohio unless otherwise Ordered by this Court. Further, Defendants were restrained from taking any action in retaliation against Plaintiff.[1] In response, Defendants filed a motion to dismiss, claiming this Court lacks jurisdiction over this matter. Plaintiff timely filed its response in opposition to the motion to dismiss which prompted Defendants to file the underlying Motion to Strike as well as a motion to allow a sur-reply which will be addressed in a separate motion to strike. However, for the reasons

[1]The Temporary Retraining Order was slightly modified by agreement of the parties on March 10, 2020, and remains in effect until further Order of this Court.

more fully explained below, Defendants' Motion to Strike must be denied as it simply is not legally sound and misleading.

II. RELEVANT FACTS

Plaintiff relies on the statement of facts contained in its March 11, 2020 Response in Opposition to Defendants' Motion to Dismiss.

III. LAW AND ARGUMENT

While Defendants are correct in their definition of "hearsay," that is about all they are correct about in filing their motion to strike. Specifically, in filing their motion to strike, Defendants rely solely on attorney conjecture as the authority for striking one paragraph from the Affidavit submitted by Plaintiff. Clearly, such conjecture cannot be used as grounds for granting the motion. *Hooks v. Ciccolini*, 9th Dist. No. 20745, 2002 Ohio 2322, ¶12; *Lucas v. Perciak*, 8th Dist. No. 96962, 2012 Ohio 88, ¶ 16. Even so, there is no support for their argument for two very important reasons.

First, the evidence being attacked cannot be stricken as hearsay. Specifically, Evidence Rule 803(1) provides a present sense impression--a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness apply--is not hearsay. Further, Evidence Rule 804(D), in pertinent part, provides:

> (D) Statements That Are Not Hearsay. A statement is not hearsay if:
>
> * * *
>
> (2) Admission by Party-Opponent. The statement is offered against a party and is (a) the party's own statement, in either an individual or a representative capacity, or (b) a statement of which the party has manifested an adoption or belief in its truth, or (c) ***a statement by a person authorized by the party to make a statement concerning the subject***, or (d) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy. (Emphasis provided).

Here, the statement being attacked is one by Michael Mercier—in-house counsel for Plaintiff—wherein he states he contacted the PUCO and learned that the PUCO does not regulate or have

control over the material specifications required by Aqua Ohio, Inc.[2] Arguably, under Defendants' own position, if the PUCO retains sole jurisdiction over this matter—which Plaintiff argues it does not for the reasons stated in its March 11, 2020 opposition brief—it is able to speak about its role over materials to Mr. Mercier as an authorized party to make a statement on this issue. As a result of that determination, it was discovered that the material required in the project is not something that the PUCO has any "control or authority over." Therefore, this is outside the scope of hearsay and admissible under Evidence Rule 803(1) and Evidence Rule 804(D). In this regard, as soon as practicable, the deposition of the proper member(s) of the PUCO will be conducted to solidify this issue. However, for the purpose of this motion, the statement is not hearsay and should be considered by this Court. This is especially true where the remainder of the Affidavit is not attacked.

Secondly, and more devastating to Defendants, the Tenth District Court of Appeals in *Benjamin v. KPMG Barbados*, 2005-Ohio-1959, noted that no court in Ohio has specifically held that hearsay evidence ***cannot*** be considered by courts when considering a motion to dismiss on jurisdictional grounds. *Id.*, at ¶¶ 17-20. (A copy of this opinion is attached hereto and incorporated herein as **Exhibit A**). In this regard, the *Benjamin Court* noted that where a court does not hold an evidentiary hearing on a motion to dismiss, it is "required to view allegations in the pleadings and the documentary evidence in a light most favorable to the plaintiffs, resolving all reasonable competing inferences in their favor." *Goldstein v. Christiansen*, 70 Ohio St.3d 232, 236, 1994-Ohio-229 (1994). However, unlike a summary judgment motion, the *Benjamin Court* noted that no Ohio case holds that the trial court must only consider "admissible" evidence when ruling on a motion to dismiss. *Benjamin, supra* at ¶¶ 17-20. To this end, Defendants cite to no case holding otherwise. This is largely because none exist.

Instead, as the *Benjamin court* noted, federal courts have construed the identical federal rule--Fed. R. Civ. P. 12(b)--to permit the consideration of hearsay evidence when ruling on a jurisdictional issue. Specifically, the *Benjamin Court* considered *Beverly Hills Fan Co. v. Royal Sovereign Corp.*[3], 21 F.3d 1558, 1562 (Fed. Cir. 1994)[holding there is no rule banning hearsay evidence when considering a motion to dismiss, either in the Federal Rules of Civil Procedure or

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[2]Curiously, Defendants do not complain about the phone calls testified to by Mr. Mercier in the same affidavit with Aqua personnel. Instead, Defendants focus solely on the aspect of the Affidavit that clearly shows Aqua Ohio, Inc.'s argument that the PUCO regulates this matter is false.

[3]A copy of this opinion is attached hereto and incorporated herein as **Exhibit B.**

elsewhere, and that the same can be considered as it would be "particularly inappropriate under the circumstances of this case since the evidence bears circumstantial indicia of reliability so that it very well could be admissible at trial notwithstanding its hearsay nature"] as well as *Dawson v. Pepin*, 2001 WL 822346 (W.D. Mich. 2001)[holding a court may consider hearsay evidence when ruling on a jurisdictional motion to dismiss].[4] *See also Akro Corp. v. Luker*, 45 F.3d 1541, 1546-47[holding hearsay "may be admitted for purposes of determining whether personal jurisdiction obtains"); *Voysys Corp. v. Elk Inds.*, 1996 WL 119473, at *3 (N.D. Cal. 1996)[holding "the Court may consider affidavits when determining whether or not Plaintiff has established a prima facie showing of jurisdiction even if the affidavits contain hearsay evidence"]. Accordingly, Defendants' motion simply fails on its face. This is especially true when the admission of evidence is within the discretion of the trial court. *State ex rel. Sartini v. Yost*, 96 Ohio St.3d 37, 2002–Ohio–3317, 770 N.E.2d 584, ¶ 21.

IV. CONCLUSION

Once the foregoing is applied to the pleadings and evidence filed in this, it is clear that Defendants' Motion to Strike must be denied. The evidence being offered is not hearsay and even if it is construed as being such, this Court can and should consider it for the reasons stated herein. Evidence Rule 803(1); Evidence Rule 804(D); *Benjamin, supra.* To rule otherwise would create a situation where the PUCO ultimately will testify it does not govern this issue and send the matter back to this Court for final resolution. This is especially true where Ohio Administrative Code 4901:1-15-30, in pertinent part, provides:

> ***If*** a waterworks company and/or sewage disposal system company enters into a main extension agreement, **the following provisions shall constitute the standards for the extension of water mains and sewer mains and related facilities by a company.** These provisions are not intended to prohibit the extension of water mains and sewer mains and related facilities at the initiative of the waterworks company and/or sewage disposal system company.

Here, while Defendants are dictating terms of the contract—ductile iron--by their own admissions in the pleadings filed to date, no written contract has yet been entered into. Therefore, the materials to be used cannot be said to be under the direction of the PUCO, making this issue proper before this Court.

[4]A copy of this opinion is attached hereto and incorporated herein as **Exhibit C.**

WHEREFORE, Plaintiff respectfully requests that this Honorable Court deny Defendants' Motion to Strike; award Plaintiff its attorney fees and costs incurred in having to defend against this motion and award Plaintiff such further and additional relief this Court deems appropriate and just.

Respectfully submitted,

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