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IN THE
Court of Appeal of the State of California

IN AND FOR THE
THIRD APPELLATE DISTRICT

MAILING LIST

Re: JUDE DALE vs. ,n
SIERRA PACIFIC POWER COMPANY
3 Civil CO19135

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JUDGE OF THE SUPERIOR COURT
PLACER COUNTY
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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE THIRD APPELLATE DISTRICT

(Placer)

JUDE DALE,

Plaintiff and Appellant,

v.

SIERRA PACIFIC POWER COMPANY,

Defendant and Respondent.

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(Super.Ct.No. 85979)

FILED

JUN 28 1995

COURT OF APPEAL-THIRD DISTRICT
ROBERT L. LISTON, Clerk

BY _____ Deputy

Defendant Sierra Pacific Power Company refused to open an account and provide electrical service in the name of plaintiff Jude Dale unless Dale arranged payments on a prior judgment and posted a deposit. Dale, an insulin dependent diabetic who receives disability benefits, sued the utility alleging: (1) breach of duty not to terminate electrical service on showing of medical necessity; (2) breach of duty to

propose reasonable amortization agreement; (3) intentional infliction of emotional distress; (4) negligence; and (5) unlawful business practices. She sought compensatory, "statutory," and exemplary damages in addition to injunctive relief. Dale appeals from a judgment in favor of Sierra Pacific following a ^{1?} trial.

Dale's appeal is limited to the first and fourth causes of action. With respect to the first cause of action, she contends the judgment is inconsistent with an earlier order granting her motion for summary adjudication based, in part, on Sierra Pacific's violation of its own tariff-1/ Dale also argues the violation constituted negligence per se and entitled her to recovery on the fourth cause of action. We reject these contentions and affirm **the** judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Because there is no dispute about the events surrounding this lawsuit, we adopt the trial court's findings of fact:

1/ "Tariff" is the generic name for documents utilities file with the Public Utilities Commission which include "schedules showing all rates, tolls, rentals, charges, and classifications collected or enforced, or to be collected or enforced, together with all rules, contracts, privileges, and facilities which in any manner affect or relate to rates, tolls, rentals, classifications or service." (Vila v. **Tahoe Southside Water Utility** (1965) 233 Cal.App.2d 469, 471.)

"1. Jude Dale . . . was the leasee **[sic]** of a condominium located at 36 Kings Run, Kings Beach, California. The condominium was owned by Judith Sarris Edson, [Dale's] landlady. Electric utility service to, he condominium was provided by the Sierra Pacific Power Company The utility account was in Edson's name pursuant to a service contract entered into between Sarris and [Sierra Pacific]. Edson was Sierra [Pacific's] customer on this account.

"2. In March, 1988, Ms. Edson wrote [Dale] and advised her that if [Dale] intended to renew the lease on the condominium in July, 1988, [Dale] would have to be responsible for the electric bill and would be required to open an account with [Sierra Pacific] in her name only.

"3 * On June 3, 1988, [Dale] went to [Sierra Pacific's] office to initiate service as a customer in her own name at the condominium. [Dale] was told that she had to pay off a prior judgment against her and in favor of [Sierra Pacific] resulting from a previous unpaid electric bill at different premises and[1 that[,1 in addition, she would be required to post a reasonable deposit before service could be initiated.

"4. On June 10, 1988, [Sierra Pacific] received a request from Ms. Edson, the customer on the account, to terminate the electric service to the condominium unit on June 30, 1988.

5. On June 28, 1988, [Dale] personally delivered to [Sierra Pacific's] office two notes from physicians concerning [Dale's] medical condition. These notes stated in general that termination of [Dale's] electrical service could adversely affect her health.

6. After receiving this notification, Mr. Anthony Ilardi, Sierra [Pacific]'s office manager checked with a customer representative from the California Public Utilities Commission, who told Mr. Ilardi that Sierra [Pacific] was within its rights in terminating service because [Dale] was not a customer and because the consumer representative had checked with [Dale's] physician who verified that [Dale] could sustain herself with a cooler, ice, and a barbecue and if necessary, to prepare heat.

[7.] Mr. Ilardi also checked with the doctor's office and ascertained from the doctor who was treating [Dale] that termination of service would not be life threatening for the same reasons previously expressed to the Public Utilities Commission. Ilardi also verified with attorneys for the company that service could be terminated.

8. On or about July 1, 1988, pursuant to the request of [Sierra Pacific's] customer, the electric service to the condominium unit occupied by [Dale] was shut off and remained off for the next twenty-six (26) days at which time service was reinstated in the name of Mr. Mathis, a good credit customer of Sierra Pacific Power Company.

"9. [Dale] ,sustained no damage or injury as a consequence of the conduct complained of. At most, [Dale] suffered minor inconvenience which was considerably ameliorated by regular, helpful visits from [Dale's] ¹ adult son who lived only a few miles away."

Dale filed a complaint against Sierra Pacific with the California Public Utilities Commission. She requested an order directing the utility to: (1) establish electrical service in her name; (2) provide her with documentation on the past-due bill; and (3) establish an affordable payment schedule for the past-due bill within the maximum period allowed under Public Utilities Code section 779, subdivision (e).

Following a public hearing in November 1988, the administrative law judge (ALJ) issued a written opinion. The ALJ acknowledged that Dale "may not technically be a customer of defendant, because the service is not in her name," but found she was a full-time resident of the household to which Sierra Pacific provided electrical service. For this reason, the ALJ determined Sierra Pacific could not terminate Dale's electrical service "as long as [she] reside [d] there and as long as [she had] medical problems which could become life threatening if her utilities were turned off." The ALJ denied all other relief sought by Dale in the administrative proceeding.

Dale filed her civil action against Sierra Pacific in June 1989. She based her first cause of action for breach of

duty not to terminate service on showing of medical necessity on allegations Sierra Pacific violated 16 United States Code section 262!5(g),z/ Public Utilities Code section 779, subdivision (b) (3) (all lstatutpry refernces are to the Public Utilities Code unless otiherwise specified),L/ and Sierra

a/ The federal statute provides: "The procedures for termination of service eferred to in section 2623(b) (4) of this title are procedures prescribed by the State regulatory authority (with respect to electric utilities for which it has ratemaking authority) or by the nonregulated electric utility which provide that --

"(1) no electric service to an electric consumer may be terminated unless re sonable prior notice (including notice of rights and remedies) iis given to such consumer and such consumer has a reasonable opportunity to dispute the reasons for such termination, and

"(2) during any period when termination of service to an electric consumer would be especially dangerous to health, as determined by the State regulatory authority (with respect to an electric utility for which it has ratemaking authority) or nonregulated electric utility, and such consumer establishes that --

"(A) he is una le to pay for such service in accordance with the req irements of the utility's billing, or

'l(B) he is abl to pay for such service but only in installments, such serv'ce may not be terminated.

"Such procedur s shall take into account the need to include reasonable prov:sions for elderly and handicapped consumers."

1/ Section 779, subdivision (b), reads: "No electrical, gas, heat, or water corporation may terminate residential service for nonpayment in any **of** the following situations: **III** - - -

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Pacific Power Company Rule No. 11.41 Dale immediately moved for summary adjudication on the first, second, and fifth causes

[(I (3) On the certification of a licensed physician and surgeon that to do so will be life threatening to the customer and the customer is financially unable to pay for service within the normal payment period and is willing to enter into an amortization agreement with the corporation pursuant to subdivision (e) with respect to all charges that the customer is unable to pay prior to delinquency.]

Subdivision (e) states: "Any customer meeting the requirements of paragraph (3) of subdivision (b) shall, upon request, be permitted to amortize, over a period not to exceed 12 months, the unpaid balance of any bill asserted to be beyond the means of the customer to pay within the normal period for payment."

A/ Rule No. 11 reads in relevant part: "Electric Service to a domestic customer will not be terminated for nonpayment when the customer has established to the satisfaction of the company that:

"a. Such termination would be especially dangerous to the health of the customer or a full time resident of the customer's household*; or

"b. The customer or a full time resident of the customer's household is among the elderly (age 62 or older) or handicapped*; and

"c. He or she is temporarily unable to pay for such service in accordance with the provisions of the Company's Tariffs; and

"d. The customer is willing to arrange installment payments, satisfactory to the company, including arrangements for prompt payment of subsequent bills.

"The company shall make available to customers, upon request, information regarding agencies and/or organizations that may provide financial assistance.

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of action. She argued the court was bound by the Public Utilities Commission (PUC) order which she read as finding Sierra Pacific failed to comply with its own rules and state law.

The court rejected Dale's argument regarding the effect of the PUC order. However, it found Dale established each necessary element of the first cause of action and Sierra Pacific "proffered no evidence sufficient to raise a triable issue of fact" The court granted summary adjudication on Dale's claim Sierra Pacific breached its duty not to terminate electrical service, but denied relief on the remaining causes of action. We summarily denied Sierra Pacific's petition for writ of mandate. Dale dismissed the second cause of action before trial.

The court held a bench trial on the third, fourth, and fifth causes of action, and the question of damages in the first cause of action. It ruled in favor of Sierra Pacific. With respect to the first cause of action, the court determined Dale was not entitled to recover "statutory penalties or any

"However, service may be terminated to any customer who does not comply with an installment payment agreement or keep current his account for electric service as charges accrue in each subsequent billing period.

"* Certification from a licensed physician, public health nurse, or a social worker may be required by the company."

other damages" for Sierra Pacific's violation of its own rules or applicable statutes. It entered judgment against Dale on all causes of action. This appeal ensued.z-/

DISCUSSION

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I

***Dale Was Not Entitled to Recover Damages
In the First Cause of Action***

We begin by rejecting Dale's argument the judgment is inconsistent with the ruling in her favor on the motion for summary adjudication. The order on Dale's motion for summary adjudication established Sierra Pacific's liability in the first cause of action. As Dale outlined in her trial brief, the question of damages was left to the trial judge.⁶¹ The court resolved that question in favor of Sierra Pacific.

5./ We grant Dale's request for judicial notice of PUC General Order No. 96-A and PUC Decision No. 91909, 011 No. 39. (Evid. Code, § 452, subds. (a) and (b).)

h/ Dale insists the ruling on her motion for summary adjudication "encompasses a finding that the element of damage existed for purposes of liability under plaintiff's first cause of action." She says the trial court "never made a finding pertaining to damages relating to the first cause of action, dismissing it on other grounds, but did make a general finding that Ms. Dale suffered inconvenience as a result of the seven day utility shut off." Dale also states that damages are not at issue on this appeal.

The court's order granting plaintiff's motion for partial summary adjudication, which supersedes the earlier "ruling," makes no mention of damages. In her trial brief Dale argues she is entitled to more than nominal damages under sections

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Dale's complain^t alleged she was entitled to damages under sections 2106, 210ⁿ, and 2108.1/ At trial she emphasized

2106, 2107 and 2108, con^tradicting the#rgument on appeal that damages were encompassed in the earlier order. Moreover, contrary to Dale's repreⁿentations in the reply brief, the trial court's findings oⁿ fact, conclusions of law, and judgment included factuaⁿl and legal determinations Dale suffered no actual damag^e.

2/ Section 2106 reads: "Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done, either by the Constitution, any law of this State, or any order or decision of the commission, shall be liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom. If the court finds that the act or omission was wilful, it may, in addition to the actual damages, award exemplary damages. An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person. [y] No recovery as provided in his section shall in any manner affect a recovery by the State f the penalties provided in this part or the exercise by the c^kmmission of its power to punish for contempt."

Section 2107 provides for a "residuary penalty," as follows: "Any public utility which violates or fails to comply with any provision of th^e Constitution of this state or of this part, or which fails or f^eglects to comply with any part or provision of any order, id^ecision, decree, rule, direction, demand, or requirement^o the commission, in a case in which a penalty has not otherwis^e been provided, is subject to a penalty of not less than five hundred dollars (\$500), nor more than twenty thousand dol^lars (\$20,000) for each offense."

Section 2108 define^s separate offenses: "Every violation of the provisions of thi^s part or of any part of any order, decision, decree, rule, irection, demand, or requirement of the commission, by any c^rporation or person is a separate and distinct offense, and in case of a continuing violation each

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the "statutory damages." We conclude the court did not err in rejecting these damage claims.

Section 2104 makes clear there is no private right of action to collect the penalties authorized in sections 2107 and 2108. 1'[A]ctions to recover penalties under this part shall be brought in the name of the people of the State of California," (§ 2104.)

Moreover, the remedy authorized in section 2106 is limited to cases in which an individual or corporate plaintiff demonstrates **actual** damage resulted from the utility's violation of a statute or PUC rule. Here, the court found Dale "sustained no damage or injury as a consequence of the conduct complained of." Dale does not challenge that factual finding on appeal.

The court set forth other legal conclusions in support of its judgment on the cause of action for breach of duty not to terminate electrical service. Some of those conclusions of law suggest the trial court had difficulty reconciling the earlier order granting summary adjudication with the legal issues presented at trial. Although Dale's complaint alleged the utility violated section 779, subdivision (b) (31, the trial court did not agree. After noting the ruling on the motion for summary adjudication did not specify which "applicable statute"

day's continuance thereof shall be a separate and distinct offense."

defendant violated, the court ruled Sierra Pacific did not violate section 779 because the utility "did not terminate service to a customer" but "declined to initiate service to an applicant." In addition, the parties devote a large portion of their briefs to the question whether Sierra Pacific's Rule No. 11 was an enforceable PUC order for purposes of obtaining damages under section 21106.

Having concluded the court correctly determined Dale was not entitled to damages of any kind, we need not, and do not, address these interesting questions. If the judgment is "right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." (*Davey v. Southern Pacific Co.* (18197) 116 Cal. 325, 329.)

II

Dale Did Not Establish Negligence Per Se

Under Evidence Code section 669, failure to exercise due care is presumed if the following conditions are established: "(1) [The person] violated a statute, ordinance, or regulation of a public entity; [II] (2) The violation proximately caused death or injury to person or property; **MI** (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and [I] (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or

regulation was adopted." Dale maintains the finding on summary adjudication that Sierra Pacific violated its own tariff establishes negligence per se. We conclude the trial court's finding of no actual damage bars invocation of the Evidence Code section 669 presumption. p'

DISPOSITION

The judgment is affirmed.

_____ BROWN, J.

We concur:

_____ PUGLIA, P.J.

_____ RAYE, J.

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