2d Civil No. B249714

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

SIMONA WILSON,

Plaintiff and Respondent,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY,

Defendant and Appellant.

Appeal from Los Angeles Superior Court,
Case No. YC065545
Honorable Stuart M. Rice, Judge Presiding

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INTRODUCTION

Mirroring Wilson's trial tactics, the respondent's brief contains lots of heated rhetoric but essentially nothing in the way of specific evidence to support Wilson's claims.

It asserts facts without citation to the record—and often contrary to the record. It relies on evidence that the trial court excluded, or that Wilson never even offered at trial. It attributes statements to witnesses that they never made. It even invents a theory of liability never presented at trial. This, all in service of the narrative theme that Edison "doesn't get it."

Catchphrases and rhetoric are no substitute for evidence and reasoned argument. Once one gets past Wilson's purple prose, it becomes clear that her brief fails to rebut, and indeed often fails even to address, Edison's arguments demonstrating that the judgment must be reversed.

It is indisputable that the PUC has exclusive jurisdiction under Public Utilities Code section 1759(a) and the *Covalt* test, since all of Wilson's claims stem from low-level stray voltage caused by Edison's fully-compliant operation of the Topaz substation. The PUC itself has confirmed that it has exclusive jurisdiction concerning these claims. Wilson's response is a Hail Mary argument that Edison somehow "waived" the PUC's subject matter jurisdiction, relying on a pleading requirement that is unique to workers' compensation law and irrelevant to the PUC's subject matter jurisdiction under section 1759(a). As our Supreme Court has repeatedly recognized, subject matter jurisdiction goes to the very

power of a court to hear a matter. Parties can never confer it, whether by agreement or waiver. Section 1759(a) is not ambiguous—it expressly deprives courts of "jurisdiction" to hear matters within the PUC's exclusive province. The superior court had no power to resolve Wilson's claims, and that alone requires a reversal with directions to enter judgment for Edison.

Wilson doesn't even bother to respond to Edison's arguments concerning her nuisance, negligence, and intentional infliction claims. How can Edison's compliance with PUC grounding regulations constitute a nuisance? Just what duty did Edison breach by repeatedly attempting to ameliorate stray voltage on the property over a 14-year period and successfully doing so for the six years before Wilson remodeled her shower and encountered stray voltage—at a level far below what her own physician administered to her? How is such conduct "outrageous" for purposes of liability for intentional infliction of emotional distress? Wilson's brief doesn't say.

What can possibly support a million-dollar emotional distress award that was plainly based on Wilson's physical symptoms, given the complete absence of any medical evidence that Wilson's exposure to minimal levels of stray voltage—a "tingling sensation," as Wilson herself called it—caused any of those symptoms? Wilson's only response is that it's okay for jurors, using common experience, to pull a number out of thin air that is untethered to the settled requirements that injuries like those Wilson claimed must be proven to a reasonable medical certainty and that any other claimed emotional distress must stem from a reasonable fear of injury.

As for punitive damages: Which managing agents ratified acts of "malice or oppression" against Wilson, and what acts would constitute "malice or oppression" here? One cannot tell from Wilson's brief, which relies on generalities. And while the Supreme Court in *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686 held that the permissible ratio of punitive to compensatory damages in cases like this should not exceed 1:1, Wilson ignores that troublesome holding, instead just relying on her mantra that wealthy corporate defendant Edison "doesn't get it" and should be punished.

Empty exhortations and the verbal equivalent of table-thumping cannot change the fact that the governing law and the record mandate reversal.

SETTING THE RECORD STRAIGHT:

THE TRIAL WILSON DESCRIBES,

COMPARED WITH WHAT REALLY HAPPENED.

A. Wilson Relies On Supposed "Facts" For Which There Was No Evidence At Trial.

1. There Was No Evidence That Any Residents Were "Cut And Bruised." The Only Evidence Was That No One Suffered Any Injury.

No evidence supports Wilson's repeated claim that residents were "cut and bruised" from electrical shocks. (E.g. RB 1, 7, 40, 41.)

Wilson's only record citation is not testimony, but rather her counsel's question to Edison employee Tina Drebushenko asking whether she had heard of such a claim by prior resident Ms. Pantucci. Drebushenko said she had not. (See RB 7 ["'[T]he mother also claims that the daughter has a cut and bruise from a shock she received from the TV['}"]; 4RT2111 [same].) Wilson also refers to a November 28, 1995 memorandum, but offers no citation to the record for it—not surprising, because the trial court *excluded* the document.[1] (See RB 7.)

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[1] Before trial, the court ruled that this document, an internal Edison email from nontestifying employee Dana Bullock, contained double hearsay and

The actual evidence belies Wilson's unsupported assertion. Pantucci herself confirmed that "nobody got hurt." (4RT1934.) Wilson's trial counsel conspicuously never asked Pantucci about any purported cuts or bruises—no doubt because he knew what her answer would be. (4RT1930-1935.)

2. There Was No Evidence That Wilson Experienced Anything More Than A "Tingle."

Wilson chastises Edison for belittling her experience by saying that she only felt a "slight tingle." (RB 4-5.) But *"tingle" was Wilson's word*: Both Wilson herself and her trial counsel described what she felt as a "tingling sensation." (3RT1550-1551; 5RT2426, 2431-2432.) Her fiancé, Jason Stelle, likewise testified to feeling "a tingling sensation" that was hard to identify and so slight that he had to touch the showerhead "numerous times to kind of confirm there was a sensation." (5RT2481-2482). Wilson's expert, Bennett, confirmed that the current Wilson experienced as a "tingling sensation" corresponded to between 0.7 and 1.2 milliamps—the range in which electrical current just begins to be perceptible. (5RT2432; 4AA1146 [Ex. 1094].)

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hence could be neither referred to in opening statement nor admitted for its truth. (2RT918-921.) The court later sustained Edison's hearsay objection when Wilson's counsel tried to publish the email while questioning Drebushenko. (4RT2110.)

3. There Was No Evidence That Edison Was Careless, Let Alone Indifferent, In Addressing Stray Voltage On The Property.

The only support for Wilson's claim that Edison was grossly indifferent to stray voltage is a fabrication: Wilson attributes to Drebushenko multiple inflammatory statements that neither Drebushenko nor anyone else—except maybe Wilson's trial counsel—ever made.

Wilson quotes Drebushenko as saying that "'[n]o one had safety concerns'" (RB 3), and states that Drebushenko testified "that Edison's own personnel recommended replacing the pipes with plastic but the recommendation was ignored; that the gas company fought with Edison for years to get electricity off the lines but was always told 'We're investigating'; that Edison has no stray voltage standard; that 'Muscles contracting, hands tingling' is okay with Edison; and that Edison hid the details of its history with stray voltage" (RB 3-4).

Again, no record citations. Again, not surprising: Drebushenko's brief testimony (4RT2103-2130) contains nothing about the Gas Company, pipe replacement, stray voltage standards, or the physiological effects of current. Indeed, when Wilson's trial counsel described Drebushenko's testimony as being that she "never had any concerns" about safety, the trial court sustained Edison's objection that counsel was mischaracterizing her testimony. (4RT2116.)

Why the mischaracterization of Drebushenko's testimony and disdain for the actual trial record? Because the actual evidence was that every time Edison learned of any problem attributable to stray voltage, it took steps—sometimes very expensive steps—to address and ameliorate the situation. (See AOB 9-19.) The result of these targeted, thorough efforts was that *no one* reported feeling electrical current during the six years before Wilson completed her remodel. (*Ibid.*)[2]

4. There Was No Evidence That Wilson's Immediate Predecessors Got "Shocked." The Only Evidence Was That When A Predecessor Reported Feeling Current in 2004, Edison Took Measures That Eliminated Problems For The Next Six Years.

Wilson asserts that "plaintiff's immediate predecessor [got] shocked." (See RB 41, see also RB 2.) Yet again, there is no record citation. Yet again, the assertion is false.

The evidence is that Wilson's immediate predecessors were the Boekers, who never reported feeling any shocks or current. (AOB 15.)

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[2] Wilson also refers to an August 25, 2008 e-mail and "Message of January 17, 2005" (RB 9) that were never admitted as trial exhibits (and hence lack record citations), as well as a December 1995 Edison internal memo that was only submitted as an exhibit in opposition to summary judgment and never admitted at trial (RB 7). Consistent with this disregard for the *trial* record, Wilson's appendix contains over 170 pages of other summary judgment exhibits, including deposition testimony and declarations from witnesses who never appeared at trial. (See 2RA317-496 [Tab 16].)

And while the Boekers' predecessors, the Ozerans, did report shocks at the property in 2004, to all appearances Edison solved the problem in 2004-2005 by installing a common neutral. (AOB 12-15.) Some six years then passed before any resident of 904 Knob Hill reported feeling any current—Wilson, after she remodeled her shower. (See AOB 14-15, 19-20.)

5. As Wilson's Own Expert Conceded, There Was No Evidence That There Was Ever More Than Minimal Stray Voltage—Under 10 Volts—At Wilson's Property.

Claiming that she was exposed to dangerous levels of stray voltage, Wilson asserts that the Gas Company's investigation found "the highest voltage was at 904" and that "[v]oltages range from 30-90 volts." (RB 10.) Wilson cites only Gas Company witness William Perry's initial testimony that he believed that the highest voltages were found at 904 Knob Hill. (RB 10, citing 4RT1912-1913.) She omits that counsel later used Gas Company documents to refresh Perry's recollection that this high reading was actually taken at 920 Knob Hill, not the Wilson residence at 904. (4RT1947-1948.) More important, Wilson's expert Bennett confirmed that at her house, "we're talking about voltages less than 10 volts." (4RT2170-2171; see 6RT2750, 2753 [voltage on Wilson's shower fixtures less than 2.5 volts]; 4AA1170 [Ex. 1159] [2.9 volts at shower].)

B. No "Stream Of Commerce" Theory Appeared In Wilson's Complaint Or In Any Jury Instruction She Proposed.

Here is how Wilson describes the issues on appeal: "Edison has been knowingly shocking residents of homes Edison built, originally occupied, and eventually sold to an unsuspecting public" (RB 1) through "Edison's policy, pattern and practice to build, occupy, rent sell, misrepresent and conceal a home plagued with stray electricity, injury and fear" (RB 41; see also RB 30 [accusing Edison of a "30-year campaign to build occupy, rent and sell homes it *knew* were filthy with stray electricity"; RB 31 [referring to "plaintiff's allegations of building, occupying, renting and selling homes with serious and unrelenting stray voltage problems"]).

This is a products liability concept that never appeared in the complaint or in any jury instruction as a relevant legal theory.[3] Wilson presented, and the jury decided, her IIED, negligence, and nuisance claims. These sought recovery for injury solely to her, allegedly caused by the existence of current at her property while she lived there, and Edison's failure to adequately control it. (See 1AA19-44.) Wilson cannot now

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[3] Although Wilson's counsel punctuated the trial and post-trial motions with inflammatory accusations about Edison's supposed malfeasance—years before Wilson arrived on the scene—in selling the property when it purportedly knew the property was subject to stray voltage (e.g. 3RT1553; 4RT2122; 7RT4257), Wilson never presented this as a theory of liability.

respond to Edison's appeal with a "stream of commerce" theory. (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1350, fn. 12 ["'"The rule is well settled that the theory upon which a case is tried must be adhered to on appeal'"].)

Edison's prior ownership and sale of 904 Knob Hill to a predecessor of Wilson's is irrelevant to Wilson's claim that she suffered harm from exposure to stray voltage during the time she lived at 904 Knob Hill. (See 1AA20-29.) The trial court understood this distinction. Although one would never know this from Wilson's brief, the court's "stream of commerce" comments that Wilson highlights (RB 5, fn. 2 & RB 42, quoting 7RT4273-4276) did not address liability, but rather whether the jury could have concluded that there was deceit for the purpose of assessing punitive damages. Wilson cannot now use these statements to support a *liability* theory.

Here again, Wilson shifts focus in an effort to escape the limitations of the case she tried. On this issue, she's trying to avoid the PUC's exclusive jurisdiction, on the theory that the PUC supposedly doesn't regulate "the building, occupying, renting or selling of homes loaded with stray electricity." (RB 30, capitalization normalized.) But Wilson cannot overcome the unavoidable fact that if stray voltage is subject to exclusive PUC jurisdiction—and it surely is—then anything having to do with

"homes loaded with stray electricity" is necessarily subject to exclusive PUC jurisdiction. (See § I.B.3., *post.*)

ARGUMENT

I. THE TRIAL COURT DID NOT HAVE SUBJECT MATTER JURISDICTION OVER WILSON'S CLAIMS.

A. Edison Has Not Waived—And Indeed *Cannot* Waive—The Absence Of Subject Matter Jurisdiction.

Edison's opening brief demonstrates that Wilson's claims are subject to the PUC's exclusive jurisdiction under Public Utilities Code section 1759, subdivision (a), under which "*[n]o court of this state*, except the Supreme Court and the court of appeal, to the extent specified in this article, *shall have jurisdiction*" over matters within the PUC's exclusive purview. (Pub. Util. Code, § 1759, subd. (a), emphasis added (section 1759(a)).)

In her zeal to show that Edison purportedly "waived" this argument by not pleading it as an affirmative defense, Wilson relies on cases involving the inapposite "exclusive remedy rule" of California workers' compensation law. She ignores that the issue Edison has raised is the trial court's lack of subject matter jurisdiction under section 1759(a), in which the Legislature expressly withheld from trial courts *any* power to adjudicate claims that would interfere with the PUC's regulation of public utilities.

It is long settled that a party can raise a court's lack of subject matter jurisdiction at any time, even on appeal—it *cannot* be "'given, enlarged, or waived by the parties.'" (*In re Marriage of Jensen* (2003) 114 Cal.App.4th 587, 593.)

1. When section 1759(a) applies, the PUC has exclusive subject matter jurisdiction.

"'Jurisdiction in any proceeding is conferred by law; that is, by the Constitution or by statute.'" (*In re Marriage of Jensen, supra*, 114 Cal.App.4th at p. 593.) "A court has no jurisdiction to hear or determine a case where the type of proceeding or the amount in controversy is beyond the jurisdiction defined for that particular court by statute or constitutional provision." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288.)

In section 1759(a), the Legislature has defined the circumstances in which the PUC has exclusive jurisdiction in terms classically descriptive of subject matter jurisdiction:

> "*No court of this state*, except the Supreme Court and the court of appeal, to the extent specified in this article, *shall have jurisdiction* to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or

interfere with the commission in the performance of its official duties, as provided by law and the rules of court."

(Emphasis added.) This restriction speaks to whether a court has power to act. It would be hard to find a clearer expression that in the trial courts, there is "an entire absence of power to hear or determine the case, an absence of authority over the subject matter . . . ." (*Jensen, supra,* 114 Cal.App.4th at p. 593, internal quotation marks omitted, original ellipsis.)

Courts therefore uniformly characterize the question of whether section 1759(a) applies as an inquiry about subject matter jurisdiction. (E.g., *Elder v. Pac. Bell Tel. Co.* (2012) 205 Cal.App.4th 841, 849 ["Our Supreme Court has harmonized sections 1759 and 2106, by using a three-part test to determine *whether a superior court has subject matter jurisdiction* to hear a private action against a public utility, or whether such an action would be barred by section 1759(a)," italics added]; *Ford v. Pacific Gas & Electric Co.* (1997) 60 Cal.App.4th 696, 699 [applying test from *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893 (*Covalt*), "the trial court correctly determined *it lacked subject matter jurisdiction*" under section 1759(a), italics added]; *Pink Dot, Inc. v. Teleport Communications Group* (2001) 89 Cal.App.4th 407, 417 [where section 1759(a) did not apply, "[t]he superior court had *subject matter jurisdiction* to award damages," text normalized and italics added].)

Our Supreme Court also has recognized the fundamental subject matter nature of the PUC's jurisdiction by describing section 1759(a) as a field preemption statute—one that precludes any encroachment on an entire area of regulation (here, the PUC's well-established authority to regulate electrical distribution facilities).[4] It is well established that "preemption implicates subject matter jurisdiction." (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 956; *DeTomaso v. Pan American World Airways, Inc.* (1987) 43 Cal.3d 517, 520, fn. 1 (*DeTomaso*) [whether tort claims are preempted "is a question of subject matter jurisdiction"].)

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[4] See *Hartwell v. Superior Ct.* (2004) 27 Cal.4th 256, 279 (*Hartwell*) ("preemption of court proceedings applies to issues or subject matter before the PUC, not just to actions against regulated companies, if 'an award of damages would simply have the effect of undermining a general supervisory or regulatory policy of the commission'"); *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 944 (*Covalt*) ("the *Legislature* has declared such preemption by enacting section 1759," italics in original); *id.* at p. 944, fn. 30 [citing *Re Rules, Procedures and Practices Applicable to Transmission Lines Not Exceeding 200 Kilovolts* (1994) 55 Cal.P.U.C.2d 87, 96, 99 (*200 Kilovolts*) (in which "the commission made the point crystal clear: 'we herein declare our intent to exercise exclusive jurisdiction over all privately owned utility electric facilities in California (i.e., over all the electric utilities it regulates), and all local agencies are pre-empted,'" and "expressly reaffirmed its exclusive jurisdiction over distribution lines," "'which may not be pre-empted'"); cf. PUC General Order (G.O.) 131-D, § XIV.B ("local jurisdictions acting pursuant to local authority are preempted from regulating electric power line projects, distribution lines, substations, or electric facilities constructed by public utilities subject to the Commission's jurisdiction").

Indeed, section 1759(a) could not serve its basic purpose *unless* it involved subject matter jurisdiction. The statute is not designed to protect litigants or the courts—it protects *the PUC* from court interference with "the performance of its official duties." That protection cannot be meaningful unless it is both absolute and uniform. Allowing courts to intrude on the PUC's core regulatory functions depending upon the vagaries of litigation—whether in a given case a party happens to raise the PUC's exclusive jurisdiction—would virtually guarantee an unpredictable, patchwork combination of PUC action and ad hoc trial court decisions that would undermine the very purpose of a uniform regulatory scheme and single supervising authority. (See *Sarale v. Pacific Gas & Electric Co.* (2010) 189 Cal.App.4th 225, 242 (*Sarale*) [warning that allowing plaintiffs to seek individualized judicial determinations "would cause a regulatory nightmare for the commission"].)

We are aware of no authority suggesting that section 1759(a) involves anything but fundamental, nonwaiveable subject matter jurisdiction. Nothing in the statute suggests that a court may take action that would supplant the PUC's authority based on *when* a party invokes the PUC's exclusive jurisdiction. Rather, the statute's language, the case law, and logic all compel the conclusion that the PUC's exclusive jurisdiction is classic subject matter jurisdiction that cannot be waived.

2. The lack of subject matter jurisdiction under section 1759(a) may be raised at any time and cannot be waived.

It has long been settled that lack of subject matter jurisdiction "is such a basic defect that it can be raised at any time by any available procedure" (*Barnick v. Longs Drug Stores, Inc.* (1988) 203 Cal.App.3d 377, 379) and that "'[s]ubject matter jurisdiction may not be conferred by consent, waiver, agreement, acquiescence or estoppel" (*Saffer v. JP Morgan Chase Bank* (2014) 225 Cal.App.4th 1239, 1246, internal quotation marks and citations omitted (*Saffer*); see also *DeTomaso, supra*, 43 Cal.3d at p. 520, fn. 1 [whether tort claims were preempted "is a question of subject matter jurisdiction, which cannot be waived"]). A court must address the adequacy of subject matter jurisdiction "whenever that issue comes to the court's attention. [Citations.] Thus, it may be considered for the first time on appeal [citation], and requires no particular procedural vehicle." (*Saffer, supra,* 225 Cal.App.4th at p. 1248, internal quotation marks omitted.) "The fundamental nature of subject matter jurisdiction also is recognized by statute, which provides the issue will not be waived if it is not raised in the pleadings." (*Barnick v. Longs Drug Stores, Inc.*, *supra*, 203 Cal.App.3d at p. 379, quoting Code Civ. Proc., § 430.80, subd. (a).)

Edison therefore did not, and could not, waive the trial court's lack of subject matter jurisdiction under section 1759(a), whether by failing to allege it as an affirmative defense or otherwise.

3. Wilson's workers' compensation exclusivity cases have nothing to do with the trial court's lack of subject matter jurisdiction here.

Instead of responding to Edison's argument that only the PUC has the power to hear and determine Wilson's claims, Wilson tries to shift the focus. Relying entirely on law developed in the context of the California Workers' Compensation Act and its "exclusive remedy rule," Wilson argues that "[e]xclusivity is an affirmative defense [that] must be pled in the defendant's Answer—or it is waived." (RB 18-26, citing *Doney v. Tambouratgis* (1979) 23 Cal.3d 91 (*Doney*) and other workers' compensation cases.)[5] *Doney* and the other workers' compensation cases Wilson cites address a special pleading requirement under workers' compensation law that has nothing to do with this case.

Doney's holding that workers' compensation exclusivity is an affirmative defense that must be asserted or waived was nothing new.

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[5] Wilson's only non-worker's compensation case, *Crookall v. Davis, Punelli, Keathley & Willard* (1998) 65 Cal.App.4th 1048, 1056 (RB 26, fn. 13), had nothing to do with a court's jurisdiction. It involved a legal malpractice defendant's failure to raise the defense of the anti-deficiency statute in a foreclosure action.

As the cases *Doney* cites demonstrate, the rule has been around for many years. (*Doney, supra*, 23 Cal.3d at pp. 96-97, citing *Popejoy v. Hannon* (1951) 37 Cal.2d 159, 173, which in turn cites *Butler v. Wyman* (1933) 128 Cal.App. 736, 739.) Wilson latches on to the fact that *Doney* speaks of subject matter jurisdiction, but she fails to recognize the unusual role exclusivity plays in workers' compensation law.

The Workers' Compensation Act (Lab. Code, § 3600 et seq.) "provide[s] the exclusive remedy available to plaintiff" where an employee's injury satisfies the act's conditions for compensation benefits for work-related injuries. (*Doney, supra,* 23 Cal.3d at p. 96.) "[I]f the complaint 'affirmatively alleges facts indicating coverage by the act,' then unless it states additional facts which negate application of the exclusive remedy provision, 'no civil action will lie . . . .'" (*Iverson v. Atlas Pac. Eng'g* (1983) 143 Cal.App.3d 219, 224, quoting *Doney, supra*, 23 Cal.3d at p. 97; *Lowman v. Stafford* (1964) 226 Cal.App.2d 31, 35.)

But workers' compensation exclusivity is unlike those situations in which the Legislature has decreed that courts *never* have *any* power to act—as in section 1759(a), which decrees that "[n]o court of this state . . . shall have jurisdiction . . . ." Under workers' compensation law, if the alleged facts do not indicate coverage by the Act, "the trial court initially ha[s] the usual subject matter jurisdiction that any superior court would have over a common law personal injury lawsuit" (*Brown v. Desert*

Christian Center (2011) 193 Cal.App.4th 733, 741), "unless and until it [is] properly demonstrated that the case was one 'covered by the statute'" (*Doney, supra,* 23 Cal.3d at p. 98). Consistent with many cases preceding it, *Doney* holds that under workers' compensation law the defendant bears the burden of pleading and proving that the case is covered by the statute. (*Id.* at pp. 96-97.) Contrary to Wilson's assertions, this rule in *Doney* does not involve a "waiver" of a court's lack of subject matter jurisdiction, because that's contrary to the Court's explicit language: "We do not believe that the conclusion we here reach results in the improper 'conferral' of subject matter jurisdiction by means of consent, waiver, or estoppel." (*Id.* at p. 98.) Instead, the plaintiff is simply "'pursuing a common law remedy which existed before the enactment of the [workers' compensation] statute and which continues to exist in cases not covered by the statute.'" (*Ibid.*, quoting *Popejoy v. Hannon, supra,* 37 Cal.2d at pp. 173-174.)

What this means is that under workers' compensation law—and perhaps unique to that law—a court can initially have, but then upon a showing by the defendant lose, subject matter jurisdiction: "The trial court has jurisdiction 'unless and until' the defendant proves otherwise." (*Ventura v. ABM Industries, Inc.* (2012) 212 Cal.App.4th 258, 265-66, citing *Doney, supra,* 23 Cal.3d at p. 98.) In contrast, a superior court *never* has subject matter jurisdiction over a claim that satisfies the *Covalt* test. *Doney* and its progeny thus have nothing to do with the issue of whether

a party can waive the PUC's exclusive subject matter jurisdiction under section 1759(a).

Wilson provides no rationale for extending *Doney*'s affirmative-defense pleading requirement in workers' compensation cases beyond that context, much less why the requirement should affect the settled rule that parties cannot waive a lack of subject matter jurisdiction. Nor does anything in the narrow line of cases following *Doney* support a broader reading. Indeed, one of Wilson's own authorities refers to *Doney*'s pleading requirement as a "separate issue" from whether a plaintiff met the definition of an employee for purposes of subject matter jurisdiction, reiterating that "lack of subject matter jurisdiction can be attacked at any time." (*Rowland v. County of Sonoma* (1990) 220 Cal.App.3d 331, 335, cited at RB 19, 25, 26, 27.) And the only reported non-workers' compensation decision that even mentions *Doney* cites it as an example of the waiver of a "nonjurisdictional legal defense[]." (*Palm v. Schilling* (1988) 199 Cal.App.3d 63, 67, fn. 3.)

As for the Supreme Court, in the 35 years since *Doney* it has repeatedly reaffirmed the settled rule that subject matter jurisdiction cannot be waived.[6]

The purposes of the workers' compensation system underscore why one cannot read *Doney* to suggest that subject matter jurisdiction can ever be waived. The system is based on the employment relationship and is designed to protect workers and employers. Workers receive a speedy means of obtaining compensation for work-related injuries with no need to prove the employer's fault. (2 Witkin, Summary of Cal. Law (10th ed. 2005) Workers' Compensation, § 24, pp. 564-565.) In exchange, employers receive insulation from tort liability. (*Ibid.*) So, it was hardly anomalous for *Doney* to state that that "a defendant in a civil action who

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[6] E.g., *People v. Simon* (2001) 25 Cal.4th 1082, 1096-1097 (because venue may be validly conferred, modern courts recognize that "venue statutes do not involve a court's jurisdiction in the fundamental sense of subject matter jurisdiction" because "'subject matter jurisdiction cannot be conferred on a court'"); *Kingston Constructors, Inc. v. Washington Metropolitan Area Transit Authority* (1997) 14 Cal.4th 939, 952 ("Under California law, a party simply cannot waive such a challenge"); *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 372 (it is a "fundamental principle of our law that 'the power of the courts to proceed'—i.e., their jurisdiction over the subject matter—cannot be conferred by the mere act of a litigant, whether it amount to consent, waiver, or estoppel [citations], and hence that the lack of such jurisdiction may be raised for the first time on appeal"); *In re Harris* (1993) 5 Cal.4th 813, 837 ("a lack of fundamental jurisdiction may not be waived"); *DeTomaso*, *supra*, 43 Cal.3d at p. 520, fn. 1 (whether tort claims are preempted "is a question of subject matter jurisdiction, which cannot be waived," citations omitted).

claims to be one of that class of persons protected from an action at law by the provisions of the Workers' Compensation Act" bears the burden of establishing the act's application. (23 Cal.3d at p. 96.) If the employer chooses not to assert the employment relationship, the claim remains within the superior court's jurisdiction.

In contrast, as noted above, on its face section 1759(a) is not designed to protect *parties'* interests, but rather to protect *a regulatory agency's* ability to regulate. That means that the parties' acts cannot control whether the agency or a court has jurisdiction over a matter.

Wilson's assertion that a defendant can waive the superior court's lack of subject matter jurisdiction under section 1759(a) by failing to assert it as an affirmative defense both ignores *Doney*'s underpinnings and conflicts with settled California law that *Doney* itself acknowledges: The lack of subject matter jurisdiction may be asserted at any time, including for the first time on appeal, and it "may not be conferred by consent, waiver, agreement, acquiescence, or estoppel." (*Saffer*, *supra*, 225 Cal.App.4th at p. 1248, internal quotation marks omitted.) So if section 1759(a) means what it says—"[n]o court . . . shall have jurisdiction . . . "—then under this long-settled law there could be no waiver.

B. Wilson Offers No Basis For Concluding That The Trial Court Had Subject Matter Jurisdiction.

1. The absence of a specific reference to stray voltage in the PUC's regulations does not preclude the PUC's exclusive jurisdiction.

Wilson concedes the extraordinary breadth of the PUC's regulatory power, acknowledging as "[a]ll true" Edison's descriptions of the countless detailed aspects of electrical distribution systems that the PUC regulates. (RB 31; see AOB 34-39.) But, she argues, the comprehensiveness of the regulatory scheme doesn't matter because nothing in the PUC's regulations expressly regulates stray voltage. (RB 31, 33, 35-36.)

That's not the law. The cases are clear that absence of a specific reference to an activity does not mean that the activity falls outside the PUC's exclusive regulatory power.

Covalt, *supra*, 13 Cal.4th 893, and its progeny are alone sufficient to defeat Wilson's argument. They confirm that section 1759(a) bars claims for damages against a public utility not only when a damages award would directly contravene a *specific* PUC order or decision, but also when it would undermine a *general* supervisory or regulatory policy of the commission—that is, when it would "hinder" or "frustrate" or "interfere with" or "obstruct" that policy. (*Covalt, supra,* 13 Cal.4th at p. 918.)

That the PUC may not have expressly regulated a particular aspect of a utility's operation does not limit the reach of this principle. (See AOB 43-47; *Sarale, supra*, 189 Cal.App.4th 225, 239 [court rejected plaintiffs' argument that the PUC did not have exclusive jurisdiction over their claims of excessive tree-trimming because its regulations only addressed "'minimum trimming clearances'" around power lines and did not specifically address "'maximum allowable trimming'"].)

In addition, *San Diego Gas & Electric Co. v. City of Carlsbad* (1998) 64 Cal.App.4th 785 (*City of Carlsbad*) rejected exactly the argument Wilson makes here in the essentially identical context of public entities, which like courts lack power to interfere with the PUC's regulation of public utilities.[7] In *City of Carlsbad*, San Diego Gas & Electric, as part of its maintenance operations, dredged sand from a lagoon next to a power plant and deposited it on the adjacent coastline. (*Id.* at pp. 789-790.) The

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[7] Section 1759(a) restricts superior courts from interfering with the PUC's jurisdiction. Public entities are restricted by the California Constitution, article XII, section 8, which "establishes, in pertinent part, the permissible scope of local regulation: 'A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the [PUC].'" (*City of Carlsbad, supra*, 64 Cal.App.4th at p. 794.) The scope of the PUC's jurisdiction is essentially identical in both contexts: *Covalt* recognized that the PUC "'has plainly asserted its jurisdiction over all regulated electric utilities vis-à-vis local *agencies*'"; therefore "[a]n effort by those [*Covalt*] plaintiffs to say that a separate rule should apply to local *courts* than to local *agencies* as to preemption was thus rejected by the Supreme Court." (*City of Carlsbad, supra,* 64 Cal.App.4th at p. 796, italics in original, quoting *Covalt*, 13 Cal.4th at pp. 943-944.)

City of Carlsbad sought to regulate these deposits through its floodplain management ordinance. (*Id.* at p. 790.) In litigation over the City's power to impose these regulations on the utility, the trial court granted summary judgment for the utility on the ground that the city's effort "was invalid as preempted by the constitutional and statutory scheme applicable to the State Public Utilities Commission." (*Id.* at p. 789.)

The Court of Appeal affirmed, rejecting the City's argument that the PUC did not have exclusive jurisdiction because, among other things, "the PUC has not taken any action to regulate this specific activity." (*City of Carlsbad, supra*, 64 Cal.App.4th at p. 789.) The court explained that although it was "not disputed that the PUC has not specifically regulated the activity of disposing of the spoils of dredging," the PUC *did* have broad general regulatory powers over utility health, safety, and operations measures under the Public Utility Code (citing sections 701, 761, 762, 768) and had "expressed an intent to exercise exclusive jurisdiction over '[a]ll utility-owned electric transmission lines, power lines, distribution lines, substations, and facilities.'" (*Id.* at p. 800-802, quoting *200 Kilovolts, supra,* 55 Cal.P.U.C.2d at p. 112.)

In language that could have been written for the present case, the Court of Appeal concluded: "That the PUC 'may' supervise and regulate every public utility in the state in a manner that is 'necessary and convenient' (§ 701) does not mean that if it does not expressly do so,

a local entity may fill the breach with legislation that places a burden on the operation of utility facilities." (*Id.* at p. 802, citing *200 Kilovolts, supra,* 55 Cal.P.U.C.2d at pp. 95-97.) The Court explained that under *Covalt,* "California courts will find concurrent jurisdiction in controversies between utilities and others only if such a result is not inimical to the purposes of the Public Utility Act," and that "[t]he broad language of section 701 indicates that such purposes include statewide uniformity of regulation over utility facility operations." (*Id.* at p. 803, citing *Covalt, supra,* 13 Cal.4th at p. 944 and *Southern Cal. Gas Co. v. City of Vernon* (1995) 41 Cal. App.4th 209, 215-217.) Thus, "even if such regulatory power has not been expressly exercised, the power still resides in the PUC, not a local entity, due to the essential nature of the maintenance operation" of dredging. (*Ibid.*) "[I]f City continues to believe the PUC's standards are inadequate, it may direct its concerns to that entity." (*Id.* at p. 804, citing *Southern Cal. Gas Co. v. City of Vernon, supra,* 41 Cal. App.4th at p. 217.)

The same is true here. The PUC's comprehensive regulation of every aspect of the design, siting, operation, and safety of electrical distribution systems means that stray voltage issues come within its

exclusive jurisdiction, regardless of whether its regulations contain the words "stray voltage."[8]

2. Whether Edison's electrical distribution system violated Rule 31 despite its full compliance with all PUC regulations is a question that only the PUC can decide.

As the opening brief shows, it is for the PUC, and only the PUC, to determine whether Edison's electrical distribution system violated the requirements of G.O. 95, Rule 31.1—the only PUC rule that Wilson's

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[8] Wilson agrees with Edison that the decision in *Mata v. Pacific Gas & Elec. Co.* (2014) 224 Cal.App.4th 309 is "distinguishable" from this case. (RB 35.) Edison's opening brief shows why *Mata* was wrongly decided. (AOB 54-56.)

Wilson cites *People ex rel. Orloff v. Pacific Bell* (2003) 31 Cal.4th 1132 without explaining why it might apply here. (RB 39.) It plainly doesn't. It addressed whether district attorneys could sue a public utility for violating the Unfair Competition Law. In holding that section 1759(a) did not bar the action, our Supreme Court deemed it "significant" that "a number of statutory provisions expressly authorize public law enforcement officials (in addition to the PUC) to initiate civil enforcement actions against public utilities." (31 Cal.4th at pp. 1138, 1149-1150.) In addition, the PUC had already addressed the same conduct of the public utility and had expressly stated that its disposition was limited to Public Utility Code issues—"*we do not adjudicate the Unfair Competition Law claims*." (*Id.* at p. 1143, italics in original.) In sharp contrast, the present action is brought by a private plaintiff and, as shown below (§ I.C., *post*), the PUC Brief, addressing claims nearly identical to Wilson's, states that the PUC *does* have exclusive jurisdiction over the claims.

expert Bennett testified he believed Edison had violated.[9] That is because the PUC has exclusive jurisdiction to interpret the meaning of its own rules.

Bennett's accusation raises the question of whether Edison's distribution system at the Topaz substation was, as Rule 31.1 requires, "designed, constructed, and maintained" for its "intended use," given "the conditions under which" it was to be operated, "to enable the furnishing of safe, proper, and adequate service." One cannot answer this question without knowing what these phrases mean—and only the PUC can decide what they mean. (See AOB 48-51; *Sarale, supra,* 189 Cal.App.4th at pp. 238-39, 243 [whether defendant utility complied with PUC regulation providing that "wires may clear branches and foliage by a reasonable distance" "is a factual issue that is within the exclusive jurisdiction of the commission to decide," citing *Covalt.*)

Wilson oversimplifies Edison's arguments when she states that Edison's argument for why the trial court lacked jurisdiction is simply that the PUC "regulates 'safety.'" (See RB 31, fns. 18 & 19.) The PUC does indeed regulate safety, but Edison's argument goes well beyond that: Exclusive jurisdiction exists because the PUC regulates all aspects of the

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[9] Rule 31.1 provides: "Electrical supply and communication systems shall be designed, constructed, and maintained for their intended use, regard being given to the conditions under which they are to be operated, to enable the furnishing of safe, proper, and adequate service."

design, construction, operation, and safety of Edison's system, specifically including grounding. (AOB 42; see also AOB 47 ["The design, construction, operation, and safety of Edison's electrical distribution system—including what steps, if any, Edison was required to take to address stray voltage—are within the PUC's exclusive jurisdiction"].) That comprehensive regulation is what has led courts to find exclusive jurisdiction in every comparable situation.

Wilson also erroneously relies on *Covalt*'s citation of *Pierce v. PG&E* (1985) 166 Cal.App.3d 68, noting *Pierce*'s rejection of a claim of exclusive PUC jurisdiction based on general regulatory authority. (RB 32, citing *Covalt*, *supra*, 13 Cal.4th at p. 945.) *Pierce* is nothing like the present case. There, the plaintiff identified "a mechanical failure in an electric utility transformer" that caused it to explode. (166 Cal.App.3d at pp. 73-74.) The Supreme Court appropriately noted that the existence of general PUC regulations did not mean that manifestly defective transformers should not be repaired, or that exploding transformers posed no danger to the public. (*Covalt*, 13 Cal.4th at 945.) Here, in contrast, Wilson's expert Bennett testified that stray voltage is an inevitable byproduct of Edison's compliance with the PUC's grounding regulations, and he could not identify any defect in Edison's electrical distribution system or equipment or a violation of any of the PUC's technical requirements. (See AOB 5-7, 43-44, 56-57, 61.)

3. Even under Wilson's revisionist "stream of commerce" theory, the trial court would not have subject matter jurisdiction over Wilson's claims.

As shown above (p. 9, *ante*), Wilson cannot properly recast her theory of liability to assert that Edison was somehow found liable for putting the home that Wilson eventually purchased into the "stream of commerce"—"the building, occupying, renting or selling of homes loaded with stray electricity." (RB 30, capitalization normalized; see RB 31, 36, 41.) But even if this had been Wilson's theory, her claims would still be within the PUC's exclusive jurisdiction.

Wilson's "stream of commerce" legal theory does not affect the core reason that the PUC has exclusive jurisdiction: It regulates *electrical distribution systems*. As Wilson's own expert conceded (see AOB 6-7) and her brief does not dispute, stray voltage is an inevitable byproduct of the grounding of electrical distribution systems, and the grounding of Edison's system is both required by and fully compliant with PUC regulations. (E.g., AOB 42-43; see § II.A., *post.*) A jury basing liability on a determination that Edison should not have sold the home that Wilson later purchased because it was subject to low-level stray voltage would have to conclude that *no* level of stray voltage is *ever* permissible. At the most basic level, that result would contravene the PUC's grounding regulations by imposing liability on Edison for stray voltage that results from

compliance with those regulations. Beyond that, it would directly interfere with the PUC's regulations governing the siting, design, construction, operation and maintenance of electrical distribution systems by prohibiting Edison (and all other electrical utilities) from selling property they own in the vicinity of a substation, even though PUC regulations impose no such restriction.

No matter how Wilson tries to characterize (or recharacterize) her claims, the trial court did not have subject matter jurisdiction. The PUC's exclusive jurisdiction bars this lawsuit.

C. The PUC, Addressing The Very Claims Before The Court Here—Claims Based On Stray Voltage From The Topaz Substation—Has Concluded That It Has Exclusive Jurisdiction Over Those Claims.

When a court is "faced with the question whether [a] civil action is barred by section 1759(a)," the court "may deem it appropriate to solicit the views of the PUC regarding whether the action is likely to interfere with the PUC's performance of its duties." (*People ex rel. Orloff v. Pacific Bell*, *supra*, 31 Cal.4th at p. 1155, fn. 12; see *PG&E Corp. v. P.U.C.* (2004) 118 Cal.App.4th 1174, 1195 [the PUC's interpretation "is one of 'among several tools available to the court' in determining the meaning and legal effect of a statute"].)

That is what the trial court did in the *Richmond/Barber* cases filed by several of Wilson's neighbors. The result was the PUC's amicus brief filed in those cases. (Edison's Motion To Take Judicial Notice, Ex. A (PUC Brief), pp. 1-2.) In it, the PUC unequivocally and unqualifiedly concludes that it has exclusive jurisdiction over claims that, exactly like Wilson's, are based on alleged injury caused by stray voltage from Edison's Topaz substation.

1. The claims are the same.

In the PUC's words, in *Richmond/Barber* "[t]he Complaints challenge the design, construction, maintenance, operation and safety of SCE's Topaz substation in Redondo Beach. Among other things, the Complaints allege that SCE violated Commission General Order ('GO') 95, Rule 33.2 by allowing electric current to escape from its confines using the ground as a conductor." (PUC Brief, pp. 2-3.)

In opposing Edison's Motion To Take Judicial Notice, Wilson sought to discount the relevance of the PUC Brief by arguing that it related only to the PUC's jurisdiction over exposure to "EMF," or electromagnetic fields. (E.g., Opposition at pp. 5, 7.) Not so. Only section D of the PUC Brief addresses EMF. The remainder addresses the PUC's jurisdiction over the *Richmond/Barber* plaintiffs' claims of injury allegedly caused by exposure to stray voltage—exactly Wilson's claim here.

2. The PUC concludes that it has exclusive jurisdiction over those claims.

The PUC Brief concludes that the PUC has exclusive jurisdiction over the *Richmond/Barber* plaintiffs' claims involving stray voltage, notwithstanding that no PUC regulation specifically uses the words "stray electricity" or "stray voltage."[10] Applying the three-prong test required by *Covalt*, the PUC Brief states—exactly as Edison urges in this appeal—that:

> Court adjudication at this juncture would interfere with the Commission's authority to interpret and apply its own orders, decisions, rules and regulations regarding the design, construction, operation, maintenance and safety of utility equipment and facilities.

(PUC Brief, pp. 13-14; see AOB 34-47.) "Accordingly," the PUC concludes, "the Commission respectfully submits that the [*sic*] section 1759 bars this court's adjudication of the dispute." (PUC Brief, p. 14.)

On every point, the PUC's explanations of the bases for its conclusion confirm the correctness of Edison's arguments, both in its

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[10] Wilson uses the terms "stray electricity" and "stray voltage" to refer to the same phenomenon. For simplicity, as in the opening brief we use only "stray voltage."

opening brief and in its JNOV motion below (1AA 164-166), that the trial court lacked subject matter jurisdiction over Wilson's claims:

- "The inquiry for a court in determining whether to exercise its authority to award damages is whether doing so would conflict with the limitation imposed by Section 1759." (PUC Brief, p. 7; see AOB 31-32.)
- Section 1759 bars adjudicating any action for damages against a public utility "if it would have the effect of undermining a general supervisory or regulatory policy or program of the Commission, i.e., when it would hinder, frustrate, interfere with, second-guess, or obstruct the Commission's authority in carrying out its own policies and programs." (PUC Brief, p. 8; see AOB 31-44.)
- "If this court were to award damages based on a violation of GO 95, Rule 33.2, it would not be enforcing Commission standards and policies. The court would instead be rendering the underlying determination that the Rule had been violated. That is a factual determination squarely within the Commission's authority, competence, and expertise to make. Thus, any determination by the court would interfere with and prevent the Commission from addressing the issue." (PUC Brief, p. 15; see AOB 37, 48-52.)

- Such a court determination "would also second-guess what conclusion the Commission might reach based on the same facts. It is also possible that a Court determination would unintentionally result in new or inconsistent requirements regarding the design, construction, operation, maintenance, and safety of utility equipment and facilities." (PUC Brief, pp. 15-16; see AOB 37, 48-52.)

- "The Commission is the proper entity to determine whether a public utility has violated the Public Utilities Code, or any order, decision, rule, requirement or regulatory policy adopted by the Commission." (PUC Brief, p. 19.) If the Commission determines that a public utility has done so, any aggrieved party can then file a court action seeking damages based on the violation. (PUC Brief, pp. 21, 23; see AOB 37, 48-52.)

In sum, the PUC's own assessment of its jurisdiction—regarding substantively identical stray voltage claims arising from the identical substation—shows that the PUC has exclusive jurisdiction over Wilson's claims. It fully supports Edison's position that the trial court lacked subject matter jurisdiction.

II. WILSON'S FAILURE TO ADDRESS KEY ASPECTS OF EDISON'S FACTUAL AND LEGAL ARGUMENTS DEMONSTRATES THE ABSENCE OF ANY BASIS FOR HER LIABILITY THEORIES.

A. Wilson's Failure To Address Edison's Argument That She Failed To Prove A Breach Of Any Duty Tacitly Concedes That There Was No Basis For Her Negligence Claim.

Edison's opening brief demonstrates that Wilson never identified, and could not identify, any duty of care that Edison might have owed her and breached. (AOB § II.A.) It shows that, according to the undisputed evidence, to all appearances Edison had eliminated touch potential at the property in 2005; that for six years after that no one felt current, until Wilson's remodel; and that Edison fully discharged whatever duty might have arisen at that point. (*Ibid.*)

Wilson's response?

Silence.

No argument heading in Wilson's brief addresses this point. (*City of Oakland Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 51 ["The failure to head an argument results in a waiver"].) Indeed, Wilson's brief doesn't even use the words "breach" or "duty."

"Negligence" appears only in descriptions of the claims she asserted (RB 18, 25, 42) and in her discussion of jurisdiction.

Ignoring Edison's arguments won't make them go away. Since it is undisputed that stray voltage cannot be eliminated, the reappearance of touch potential at the property in 2011, after six years with no reports of current, might have imposed on Edison a duty to help Wilson find a way to eliminate the touch potential. But the evidence is undisputed that Edison did so: It offered suggestions on how to lower conductivity at the house; it explained to Stelle that bonding (i.e., connecting) the shower pipe and drain would prevent any touch potential; and at some point it offered to pay to install plastic insulators on Wilson's plumbing. (AOB 8, 24-25; 5RT2493.)[11] Wilson's personal opinions that plastic plumbing was "substandard" and that Edison's undisputed mitigation offer would just be a "bandaid" (4RT1893-1894) cannot establish a breach of any duty.

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[11] The only dispute is whether Edison made its mitigation offer in May or October. (See AOB 24.) Wilson testified that she would not have accepted the offer regardless of when made. (4RT1903.)

B. Wilson's Failure To Address Edison's Argument On Nuisance Tacitly Concedes That There Was No Basis For The Claim.

Undisputed evidence—including the testimony of Wilson's expert, Bennett—established that (1) the low-level current at Wilson's property is an inevitable byproduct of a properly-operating grounded distribution system (see AOB 5; 4RT2170 [Bennett]) and (2) PUC regulations require grounding of the Topaz substation and its common neutral system (G.O. 95, Rules 21.4(A)(2), 58.2(A), 59.4; 6RT2726 [Norwalk]; ART24 [Loud]; 4RT2154 [Bennett]; see 4AA916 [Wilson JNOV opposition: "It is true that '(g)rounding is required by the PUC . . . .,'" ellipsis in original]; RB 31 [characterizing Edison's catalog of relevant regulations as "(a)ll true"]).

Edison's opening brief demonstrates that this undisputed evidence negates Wilson's nuisance claim as a matter of law, because "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance." (Civ. Code, § 3482; see AOB 59-60.)

Wilson's response?

Again, silence.

Again, no argument heading addresses the point. And, as with "negligence," the word "nuisance" appears only as a description of the claim that went to trial and in a discussion about the claim asserted in *Covalt*. (RB 18, 25 & fn. 12, 28, fn. 14, 30, 42.)

Wilson might contend that she has addressed a nuisance claim under Civil Code section 3482 by arguing, in connection with the jurisdiction issue, that the PUC's regulations do not specifically address the phenomenon of stray voltage. (RB 30-32; see § I.B.1., *ante.*) That would be no answer. As Edison shows in its opening brief, the statutory bar to a nuisance claim exists regardless of whether the PUC expressly authorized the existence of stray voltage near a utility's electrical distribution substation, and the PUC need not even have predicted whether homeowners might experience low levels of stray current. It need only—as it did—have imposed the design, siting, operation, and safety requirements for Edison's electrical distribution system, including grounding, with which Wilson concedes Edison complied. (See *Farmers Ins. Exchange v. State of California* (1985) 175 Cal.App.3d 494, 503 ["The authorizing statute need not predict the precise nature of the damages. It need only authorize the governmental action."].)

C. Wilson's Failure To Identify Any Substantial Evidence Of Improper Conduct *Toward Her*, Much Less Extreme And Outrageous Conduct, Tacitly Concedes That There Is No Merit To Her IIED Claim.

Yet again, Wilson offers no argument explicitly directed to this subject. Nor, despite all the breathless hyperbole in her statement of facts, does she identify evidence of any extreme and outrageous conduct directed *toward her*.

In 1998 Edison fixed a ground connection that appeared to be the source of current in the house. (AOB 11-12.) In 2005, after concerns about current reemerged, it installed the common neutral. (AOB 14-15.) In neither situation was there any evidence suggesting that Edison had any reason to believe that it had not fully eliminated touch potential at the property, especially since both times there was no report of current for the next six years.

Wilson's overheated rhetoric and unsupported allegations of cuts and bruises notwithstanding (see pp. 4-5, *ante*), the record is clear and undisputed that Edison successfully reduced stray voltage levels in 2005. The record is likewise clear and undisputed that Edison had every reason to believe it had eliminated touch potential at the property preceding Wilson's remodel. And Wilson's own expert testified that Edison took appropriate steps. (4RT2168; see 5RT2419-2420.)

That Edison's mitigation efforts lasted six years each after 1998 and 2005, rather than indefinitely, cannot suffice as evidence of outrageous conduct, or even of ordinary negligence—and certainly not as evidence of outrageous conduct *toward Wilson*. Nothing in Wilson's brief suggests otherwise.

III. WILSON'S FAILURE TO IDENTIFY ANY SUBSTANTIAL EVIDENCE LINKING HER PHYSICAL SYMPTOMS TO ELECTRICAL CURRENT TACITLY CONCEDES THAT THE MILLION-DOLLAR AWARD FOR EMOTIONAL DISTRESS IS EXCESSIVE.

A. Wilson's Brief Confirms That Her Physical Symptoms Were The Principal Cause Of Her Emotional Distress.

Far from disputing that the jury relied on her physical symptoms in awarding damages, Wilson revels in the connection.

The catalogue of "Simona Wilson's complaints" to which Edison supposedly gives "zero weight" (RB 41) consists almost entirely of descriptions of her physical symptoms and visits to doctors.[12] Indeed, she identifies only one non-physical complaint: her daily worry about her and her children's safety. (RB 41).

Wilson's claimed physical symptoms unquestionably caught the jury's attention: Its sole read-back request during deliberations was for

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[12] See RB 41-42 ("she saw multiple doctors for her children and for herself," "she saw a neurologist who performed numerous tests ('*felt like I was at the doctor all the time*'), who told her she 'had severed nerve endings,'" "she had '*numbness and tingling in both hands and feet, migrating up to [her] elbows and knees . . . had numbness* [*sic*; RT says "nauseousness"], *fatigue, muscle spasms*' and '*her symptoms actually started to get worse*' and that the neurologist '*prescribed pain . . . meds*,'" ellipses and italics in original, citing RT1836-38).

Wilson's direct testimony "regarding her symptoms and dates of symptoms, Dr.'s visits, etc." (1AA117; 7RT3601.)

B. Wilson Fails To Identify Any Substantial Evidence Of A Causal Relationship Between The Current She Felt And Her Physical Symptoms.

This brings us to the heart of the matter.

Let's say that one accepts, as the jury obviously did—just as Wilson urged it to—that Wilson's physical symptoms caused her to suffer emotional distress. Let's also say that one accepts—despite the absence of support for it—that Edison is liable on some legal theory for whatever harm its current caused. These assumptions reveal a gaping hole in Wilson's case that her brief does not even attempt to fill.

For Wilson to prevail on her claim to recover for emotional distress based on her alleged physical symptoms, her proof had to include all of these causal connections:

1. Edison caused current;
2. Current caused physical symptoms; and
3. Physical symptoms caused emotional distress.

As Edison's opening brief shows, and as Wilson's silence on the subject tacitly concedes, no substantial evidence supports the second connection—nothing connects the current Wilson experienced with her physical symptoms. (AOB 65-71.) And if exposure to current didn't cause her

physical symptoms, then no matter how distressing the symptoms may have been, *Edison cannot be responsible for the emotional distress resulting from them.*

But the jury plainly *did* consider Wilson's physical symptoms in its assessment of damages for emotional distress. As a result, the compensatory award cannot stand.[13]

Instead of addressing this fatal omission from her proof, Wilson asks rhetorically, "Did everyone who got shocked, cut and bruised at 904 Knob Hill 'suffer from an extraordinary array of physical and emotional problems'?" (RB 40.) Apart from the absence of any evidence that people got "cut and bruised," the question underscores Edison's point: There is no evidence that *anyone* besides Wilson *ever* reported *any* physical symptoms that they attributed to current—much less anything like the symptoms Wilson claimed to have suffered. Wilson's asking this question does nothing to establish the indispensable causal link between current and symptoms.

Wilson also ignores undisputed expert testimony, including that of her own physician, Dr. Beydoun, negating the possibility that current could have caused her physical symptoms—not the least of which was

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[13] Wilson never urged any theory that exposure to current indirectly caused her physical symptoms—that is, current caused emotional distress, which in turn caused physical symptoms. And even if she had, the causation of physical symptoms from distress would also require expert medical testimony that this was the cause of her symptoms to a reasonable medical probability, and there was none. (See AOB 71.)

Dr. Beydoun's testimony that he administered far more current while testing Wilson than she ever experienced at the property.

It is certainly true, as Wilson argues, that "'expert testimony is not required in all cases.'" (RB 44, italics and capitalization omitted.) But her quoted authority on this point addresses future emotional distress, not medical causation of physical symptoms. That's nothing at all like Wilson's claim that her distress flowed, in substantial part, from her physical symptoms. *That* claim requires evidence of the cause of physical injury—a medical question that, under long-settled law, unquestionably *does* require expert testimony. (*Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1384, 1387-1388.) It is not a situation in which the jury could permissibly base a finding "'upon its own experiences and common knowledge.'" (RB 44, italics omitted.)

This is why the trial court was required to instruct the jury on the requirement of proof to a reasonable medical probability. Given Wilson's heavy emphasis on her physical symptoms at trial, it is not just probable but virtually certain that the absence of this instruction improperly allowed the jury to resort to "its own experiences and common knowledge" (*ibid.*) in finding—as it must have—that electrical current caused Wilson's physical symptoms, and on that basis awarding a million dollars for what it must

have concluded was emotional distress resulting from the physical symptoms.[14]

C. Wilson's Only Evidence Of Distress That Was Not Based On Physical Symptoms Was Her Unreasonable Fear Of Perception-Level Current. That Is Not Compensable At All; It Certainly Cannot Justify A Million-Dollar Award.

In the absence of substantial evidence that electrical current caused Wilson's physical symptoms, and given that Wilson disclaimed any fear of future harm (see ART56-63, AOB 72-73), the only possible remaining basis for emotional distress damages was the worry she felt during the five months she remained in her home after April 2011, based on her knowledge that low-level stray voltage was present at the property. However, the undisputed evidence uniformly negated the possibility that this low-level current threatened any kind of injury or illness. (See AOB 67-71.)

Wilson was aware from Edison's and her own electrician's readings that the voltage levels on her master shower fixtures were very low—less than 3 volts (see AOB 23; 4AA1170 [Ex. 1159])—and she never felt current anywhere on the property except on her new shower fixtures

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[14] With her trademark rhetorical flourish and disregard for accuracy, Wilson claims that "Edison seeks reversal based on an instruction *it dare not quote from*." (RB 44 [emphasis in original].) In fact, the opening brief quotes the requested medical probability instruction in full. (AOB 28.)

installed in March 2011. This is not surprising, since Edison's installation of the common neutral in 2005 successfully reduced voltage levels to 3.5 volts, and Wilson's other plumbing fixtures contained nonconductive plastic piping. (See AOB 14-15, 21.) Wilson's own neurologist, Dr. Beydoun, found that Wilson had no identifiable nerve injury. Not only that, but he tested her nerves by administering current of 20 to 40 or 50 milliamps for around two minutes—levels and durations many times greater than Wilson ever experienced at home—and testified that he had never seen any patient injured by such levels. (6RT3017; see AOB 26-27.) And there was no evidence that any resident, even before the 2005 common neutral installation, ever experienced any sensation stronger than tingling or mild shocks. As Pantucci testified, nobody got hurt. (4RT1934).

Our Supreme Court has held in an analogous context—claimed emotional distress from a fear that exposure to toxins would cause cancer—that unreasonable fear cannot support an award of damages for emotional distress. (See *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1004 [absent evidence of physical harm, a plaintiff who seeks to recover for emotional distress based on fear of developing cancer must show "that the fear is based upon medically or scientifically corroborated knowledge that the defendant's conduct has significantly increased the plaintiff's risk of cancer and that the plaintiff's actual risk of the threatened cancer is significant"].) Here, unreasonable fear is all there was.

The Dalkon Shield case Wilson cites (RB 43) is inapposite, because there "the jury could infer great mental anguish, pain, and suffering" precisely because of the significant physical injuries that the plaintiff suffered, specifically "the damage that [defendant's flawed IUD] had caused to her female reproductive system and to other organs in her pelvic cavity. These injuries continued to cause her severe problems even after the IUD was removed." (*Hilliard v. A.H. Robins Co.* (1983) 148 Cal.App.3d 374, 413.) As we have shown, no such connection exists here. There is only Wilson's irrational fear of harm.

Even if the jury could properly have concluded that Wilson's non-physical complaints constituted compensable suffering, the fact that she claimed that she worried about her and her family's safety in the house (RB 41) cannot support a million-dollar compensatory verdict. It must be set aside.

IV. WILSON PROVIDES NO JUSTIFICATION FOR ANY PUNITIVE DAMAGES AWARD, MUCH LESS $3 MILLION.

A. Wilson Fails To Identify Any *Clear And Convincing* Evidence Of Knowledge Or Ratification By A Managing Agent.

Wilson does not dispute that for the Court to affirm the punitive damages award there must have been clear and convincing evidence that any punitive damages conduct was authorized or ratified by a director, officer or managing agent. (Civ. Code, § 3294; AOB 77-78.) The evidence she cites cannot meet this standard.

Wilson relies entirely on two pieces of evidence: (1) Drebushenko's comment that recipients of her 1997 email "perhaps" or "should have" had some influence on corporate policy, and (2) unspecific testimony by the Gas Company's Perry that conversations between the Gas Company and Edison went up to the "vice-presidential level." (RB 46, citing 4RT1923, 1941.) From the latter, Wilson argues that the Edison/Gas Company deal was "negotiated between Vice Presidents from both Edison and the Gas Company" (RB 46) and that "an Action Plan reached the Vice President of SCE" (RB 10). But even if one accepts that this is a permissible inference, it's not nearly enough.

It would not be enough even if the relevant conduct involved some fraud, oppression or malice directed *toward Wilson*, since that's what an award of punitive damages requires. But it doesn't—Drebushenko's

testimony relates to events that preceded Wilson's experience by 14 years, and the Gas Company events concerned conduct to *remediate* stray voltage, not fraudulent, oppressive, or malicious conduct *toward Wilson.* Here, too, Wilson fails to acknowledge the need to connect the dots. Proving managerial capacity is only one step. She must show, by clear and convincing evidence, that (1) a person who was a managing agent (2) authorized or ratified (3) oppression, fraud or malice (4) in conduct by Edison employees (5) that was directed toward her. Suppose one accepts that some managing agent knew something about the subjects with which the evidence connects him or her. As far as the record reveals, even with all inferences favoring Wilson, the only information that that this speculated managing agent would have learned from the Gas Company conversations was that Edison was cooperating with the Gas Company in mitigation efforts that proved successful. All the managing agent would have learned from Debrushenko's 1997 emails was that there was a report of current at the time that Drebushenko thought should be solved—and that *was* apparently solved from 1998 until the Ozerans reported feeling current in 2004.

It is therefore hardly surprising that Wilson never states what it was that Edison actually *did* that the supposed managing agent supposedly knew about. There's just nothing there, and Wilson's brief utterly fails even to try to show otherwise.

B. Wilson Ignores The Most Recent California Supreme Court Authority, Which Under Facts Comparable To Those Here Bars Recovery Greater Than A One-To-One Ratio Of Punitive To Compensatory Damages.

Although Wilson cites *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686 (*Roby*) (RB 47), she ignores its central holding: Where substantial emotional distress damages already reflect a punitive component and reprehensibility is low, the constitutionally permissible ratio of punitive to compensatory damages is no more than 1:1. (*Roby*, *supra*, 47 Cal.4th at pp. 717-720; see also *State Farm Mut. Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, 425-426 (*Campbell*).) *Roby* also rejected the argument that a higher 2:1 ratio was appropriate because of the defendant's wealth (*Roby*, *supra*, 47 Cal.4th at pp. 717-720), an argument to which Wilson erroneously clings in hopes of justifying the jury's even higher ratio here (see RB 49).

In *Boeken v. Phillip Morris* (2005) 127 Cal.App.4th 1640, the tobacco case Wilson cites (RB 48), this Court allowed a 9:1 ratio. But the decision both predates *Roby* and is distinguishable on the basis of Philip Morris's "'exceptionally extreme'" reprehensibility: "40 years of fraud and its *continuing* conscious disregard for the safety and lives of the consumers," including "increasing addictiveness by manipulating additives, gaining smokers by fraud, and marketing a product that is more dangerous than ordinary consumers expect, knowing that serious physical injury and

death will result in many smokers." (127 Cal.App.4th at pp. 1700, 1703, italics in original.)

Roby and *Campbell* dictate a 1:1 ratio here because (1) the compensatory award is *entirely* for emotional distress and (2) reprehensibility is low, considering the relevant factors: no substantial evidence of physical harm caused by Edison; no substantial evidence of Edison's reckless disregard of the health or safety of others; Bennett's testimony that Edison's responses to stray voltage were appropriate; no repeated actions as to Wilson; effective responses before Wilson's experiences that apparently eliminated touch potential for most of the prior 12 years; and no substantial evidence of "intentional malice, trickery, or deceit." (*Campbell, supra,* 538 U.S. at p. 419; *Roby, supra,* 47 Cal.4th at p. 713; see AOB 15, 61, 80-81.)

C. Any Substantial Reduction In The Compensatory Award Requires Reconsideration Of The Punitive Award.

Wilson doesn't challenge the rule that "punitive damages must be proportional to recoverable compensatory damages." *(Auerbach v. Great Western Bank* (1999) 74 Cal.App.4th 1172, 1190.) Thus, if the Court rules that the compensatory award is excessive, the punitive award must likewise be reconsidered. (*Ibid*; see AOB 82-83.)

CONCLUSION

The Court should reverse with directions to dismiss the case for lack of subject matter jurisdiction.

If the Court finds that the trial court had jurisdiction, multiple components of the judgment should be stricken or at least remanded for a new trial.

Dated: September 26, 2014

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), the attached **APPELLANT'S REPLY BRIEF** was produced using 13-point Times New Roman type style and contains **11,151 words** not including the tables of contents and authorities, caption page, or this Certification page, as counted by the word processing program used to generate it.

Dated: September 26, 2014

Robin Meadow

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On September 16, 2014, I served the foregoing document described as: **APPELLANT'S REPLY BRIEF** on the parties in this action by serving:

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Executed on September 17, 2014, at Los Angeles, California.

(X) (State): I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Charice L. Lawrie