

**IN THE
INDIANA COURT OF APPEALS
CASE NO. 25A-CT-00866**

CARLA MILLER,	)	
	)	
Appellant	)	Appeal from the Clark Circuit Court
(Plaintiff below)	)	No. 2
	)	
	)	
vs.	)	Trial Court Cause No.
	)	10C02-2005-CT-067
	)	
	)	
INDIANA GAS COMPANY, INC.,	)	The Honorable William A. Dawkins,
	)	Magistrate Judge
	)	
Appellee,	)	
(Defendant below)	)	

APPELLANT'S AMENDED BRIEF

/s/ Ashton Rose Smith

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STATEMENT OF ISSUES

1. Whether the trial court erred when it weighed conflicting testimony and evidence, made credibility determinations, and drew inferences from disputed facts in favor of the summary judgment movant thereby usurping the role of the jury;
2. Whether trial court erred when it relied on inadmissible, unauthenticated documents and information, including hearsay, giving that evidence more weight than other evidence and sworn testimony, when ruling on a motion for summary judgment in favor of movant; and
3. Whether the trial court erred when it failed to apply the elements of the Indiana Product Liability Act (IPLA), including strict products liability, and held the IURC and Indiana Gas Tariff (Tariff) govern negligence and products liability cases in the state of Indiana thereby superseding the IPLA (Ind. Code § 34-20-2-1).

STATEMENT OF THE CASE

I. Nature of the Case

On May 19, 2019, a devastating gas explosion at 904 Assembly Road, Jeffersonville, Indiana destroyed the home of William “Billy” Phillips and Janet Phillips, and that of their next-door neighbor, Appellant, Carla Miller. Billy Phillips was killed in the explosion and Janet Phillips and Ms. Miller were severely injured. (Vol. II, Miller-ROA-000062-75; Miller-ROA-000105-118.) Ms. Miller awoke around 5:00a.m. that Sunday morning May 19th trapped inside her home as it collapsed around her; a neighbor heard her screams for help, and shattered a window so that Ms. Miller and her dog, Luke, could crawl out. Ms. Miller was severely and permanently injured due to the explosion. (Vol. II, Miller-ROA-000116-120.) Ms. Miller did nothing to cause or contribute to the explosion that upended her life and permanently injured her.

Natural gas is a widely used energy source that indisputably poses several inherent dangers due to its volatile propensities and the fact that it is colorless, odorless, highly flammable and explosive when mixed with air. (Vol. IV, Miller-ROA-000084-86 (Deposition of Indiana Gas' employee, Shane Jenkins).) Because of this, federal laws and regulations (49 CFR § 192.625, *et seq.*) require the addition of odorants to natural gas to give it a noxious smell making leaks detectable by consumers. (*Id.*; Vol. V, Miller-ROA-000017-19 (Deposition of Indiana Gas' corporate representative, Shane Alexander).) Put simply, the purpose is to protect consumers, who rely on Indiana Gas to properly odorize the gas it sells to them. (Vol. V, Miller-ROA-000049.)

Data pulled from the gas meter after the deadly explosion revealed an increased gas flow through the meter into the Phillips' home for *over* thirteen (13) hours beginning Saturday afternoon while Janet and Billy Phillips were home and then sleeping through the night. (Vol. VI, Miller-ROA-000140-141.) When Janet woke up to go to work on Sunday morning around 5:00a.m., she flipped the light switch to let her cat and dog into the basement, and a deadly and devastating explosion leveled the Phillips' home, as well as Ms. Miller's home, and numerous others on Assembly Drive. (*Id.*; Vol. II, Miller-ROA-000115-116.)



(Vol. II, Miller-ROA-000116.)

In those thirteen hours *before* the explosion, **no one** smelled gas. Ms. Miller did not; Janet Phillips testified under oath that she, nor her husband smelled gas during the thirteen hours that the odorless, colorless killer was flooding their home. (Vol. IX, Miller-ROA-000063.)

49 CFR § 192.625 requires odorant be added so that at a concentration in air of one-fifth the lower explosive limit (LEL), the gas is readily detectable by a person with a normal sense of smell. This means the odorant/gas must be readily detectable by a person with a normal sense of smell at no more than one percent (1%) gas in the air. (*Id.* at Miller-ROA-000225-226.)

Indiana Gas relied on three odorator readings taken *after* the explosion to argue the odorant was within limits (less than 1%) and that it should be completely absolved of liability. (Vol. VII, Miller-ROA-000118, Miller-ROA-000121.) Indiana Gas' corporate representative testified that natural gas becomes explosive when anywhere between 5-15% of the concentration in the air. (Vol. IX, Miller-ROA-000226.) Post-explosion, Appellee alleges (without affidavits from the employees who performed the odorator readings) that its odorator readings were 0.21%, 0.21%, and 0.28%.

(Vol. VIII, Miller-ROA-000129; Vol. VII, Miller-ROA-000121.) The times these readings were taken by these different individuals are unknown, though based upon Indiana Gas' own Investigate Report, it was over seventy-six (76) minutes after the explosion occurred. (*Id.*) Moreover, no affidavits from the individuals who performed these readings were supplied in support of Indiana Gas' Motion for Summary Judgment, and therefore, no information about the methods used and the various relevant readings has been provided; the individuals were not deposed before the trial court granted summary judgment. (Vol. VIII, Miller-ROA-000123.) The IURC's Report relied upon these three odorator readings, as did Indiana Gas' experts. (Vol. VII, Miller-ROA-000132-136; Vol. VIII, Miller-ROA-000129.) All other evidence Appellee identified in support of its summary judgment motion – namely, the IURC Report and Appellee's experts' opinions – is based on these three *post*-explosion odorator readings, for which there is no firsthand evidence of record. (*Id.*)

In response to the summary judgment motion, Ms. Miller disputed that the gas was properly odorized and that the odorant was functioning as required relying on (i) the testimony of Janet Phillips, who testified she and her husband did not smell gas in the thirteen plus hours prior to the explosion, (ii) the Jeffersonville Fire Department Report, authored by Captain Jason Sharp, who immediately after the explosion recorded that “the valve was still intact and actively open providing gas to the residence. . . It should also be noted that I did not hear or smell gas coming from the line at the time that I shut it off,” and (iii) the testimony of Indiana Gas' employee, Jeff Higdon, one of the first employees to arrive on-scene after the explosion, who testified that he did not smell natural gas at the location of the explosion. (Vol. IX, Miller-ROA-000063; Miller-ROA-000081-84; Miller-ROA-000145; Vol. VIII, Miller-ROA-000127-130.) Ms. Miller also relied, among other evidence, on the testimony of Indiana Gas' corporate representative, who alleged he

did smell gas at the scene of the explosion (unlike Mr. Higdon or Captain Sharp) and whose sworn testimony established that based on the amount of natural gas within the Phillips' home in the hours before the explosion, a person with a normal sense of smell should have been able to identify a readily detectable odorant in the gas. (Vol. X, Miller-ROA-000098; Miller-ROA-000101.)

A genuine issue of material fact exists as to whether the gas was properly odorized, whether the odorant performed as intended, and the Phillips' ability to detect the smell of the gas – those issues must be decided by the trier of fact. *Pierson v. Serv. Am. Corp.*, 9 N.E.3d 712, 719 (Ind. Ct. App. 2014) (It is **the role of the factfinder, not the trial court, in summary judgment proceedings to determine issues of credibility or relative weight of the evidence.**) (emphasis added). Despite this, the trial court improperly weighed the facts and evidence presented, substituted its own opinion for that of the factfinder, and held in favor of Indiana Gas.

II. Course of Proceedings

On May 28, 2020, a Complaint was filed on behalf of the Phillips against Centerpoint Energy, Inc., Centerpoint Energy Services, Inc., Vectren Corporation, Southern Indiana Gas and Electric Company, and Miller Pipeline, LLC. (Vol. II, Miller-ROA-000059.) On March 19, 2021, Carla Miller filed a Motion to Intervene, which was granted by the trial court on April 12, 2021. (Vol. II, Miller-ROA-000102, Miller-ROA-000105.)

Ms. Miller's Complaint asserted causes of action for strict products liability under the Indiana Product Liability Act (IPLA) (*id.* at ¶¶ 98-119), negligence (*id.* ¶¶ 120-129), negligent hiring (*id.* ¶¶ 130-133), negligent training (*id.* ¶¶ 134-137), negligent supervision (*id.* ¶¶ 138-142), negligent retention (*id.* ¶¶ 143-146), negligent failure to warn (*id.* ¶¶ 147-149), negligent product liability (*id.* ¶¶ 150-153) and damages (*id.* ¶ 154, *et seq.*) Ms. Miller's Complaint alleges, among other things, that Indiana Gas failed to (i) properly odorize the gas in compliance with federal

regulations; (ii) failed to properly warn of the odorant fading and not performing as intended; and (iii) is strictly liable for these failures pursuant to the IPLA. (*Id.* at ¶¶ 88, 89, 103, 104, 108, 109, 110, 111, 115, 116, 117, 122 (a-m), 123, 124, 125 (a-e).)

Her Complaint sets forth Indiana Gas' history of "unsafe and aging pipeline distribution network, which is inaccurately mapped, poorly maintained, and predisposed to corrosion, leaks and system failures." (Vol. II, Miller-ROA-000108.) Importantly, Ms. Miller's Complaint alleges the lack of detectable odorant prevented the Phillips and anyone else from smelling the copious amounts of gas pouring into the Phillips' home from May 18 to May 19, 2019, until the explosion occurred. (Vol. II, Miller-ROA-000115-116 ¶¶ 84-89.) Ms. Miller also cited and relied upon federal regulation 49 CFR § 192.625, which places the responsibility and requirement to add odorant squarely on the gas company – Indiana Gas – to protect consumers, like the Phillips and Ms. Miller. Had the natural gas been properly odorized, the Phillips, and likely others, including Ms. Miller, would have smelled the noxious odor at some point during the thirteen plus hours it was pouring into their home and could have taken action, including alerting authorities to prevent the explosion or at least evacuate the area. In support of her allegations, Miller identified numerous prior instances of failed odorization, including Appellee's own public acknowledgment just one year prior to the explosion that it failed to follow its own written procedures and failed to maintain accurate maps and records of its pipeline facilities. (Vol. II, Miller-ROA-000108-109 ¶¶ 17-27, 28.)

Other neighbors to the explosion and their insurers also intervened and the trial court consolidated all claims. (Vol. VI, Miller-ROA-000063-65.) The trial court bifurcated Ms. Miller's and others' claims allowing the Phillips' case to proceed first, effectively staying the remaining consolidated claims until the conclusion of the Phillips' case, but applying the requirements and

outcome in the Phillips' case (should there be a jury trial) to all of the consolidated cases. (*Id.*; Vol. VI, Miller-ROA-000068) Specifically, the trial court's order stated that in "the trial of the bifurcated claims, all parties will accept the jury's determination and apportionment of liability and fault in the trial of the Mangan Claims,¹ which *will be applied to the verdict in the trial of the bifurcated claims.*" (*Id.*) Said Order also substituted Indiana Gas Company, Inc. as the proper party in the case. (*Id.*) On December 14, 2023, Indiana Gas filed its first Motion for Summary Judgment against the Phillips alleging (i) Indiana Gas' responsibility ends at the outlet side of the gas meter; (ii) the explosion was caused by an opening on the piping inside the Phillips' residence due to Billy Phillips intentionally removing it; and (iii) the natural gas supplied to the residence was properly odorized. (Vol. III, Miller-ROA-000082.)

Report of mediation between Appellee and the Phillips was filed on March 22, 2024, stating the Phillips' claims resolved at mediation (Vol. VII, Miller-ROA-000014) and the pending scheduling order was vacated (Vol. VI, Miller-ROA-000068). A new case management plan was entered by the court on May 8, 2024 setting pretrial deadlines for the remaining claims, including that Motions for Summary Judgment shall be filed no later than February 14, 2025. On June 27, 2024, Ms. Miller timely filed her Preliminary Witness and Exhibit List, which also identified all experts previously identified by the Phillips (Vol. VI, Miller-ROA-000072; Miller-ROA-000116).

On July 30, 2024, Ms. Miller's attorney, Damon Blake Willis, unexpectedly passed away. (Vol. VIII, Miller-ROA-000121-123, fn 2.) Ms. Miller retained Moore Law Group to represent her going forward. (*Id.*)

On November 26, 2024, Indiana Gas filed its second Motion for Summary Judgment making similar arguments: (i) Indiana Gas' responsibilities end at the outlet side of the gas meter;

¹ The "Mangan Claims" refers to the claims brought on behalf of the Phillips; specifically, Billy Phillips' Estate, by his sister, Kimberly Mangan, and Janet Phillips, by Karen Schneider. (Vol. II, Miller-ROA-000059.)

(ii) that the explosion was caused by an opening on the gas piping inside the Phillips' residence; and (iii) that Indiana Gas was not the proximate cause of the explosion because "the piping downstream of the gas meter (including the gas piping inside the house) is the responsibility of the homeowner, not Indiana Gas." (Vol. VI, Miller-ROA-000139.) Appellee's Motion also argued that the IURC approved the Tariff, which states that "Company shall not be liable for damages caused by defective piping or appliances on Customer's Premises," and that because the IURC and Tariff govern the resolution of Appellant's claims, Appellee is absolved of any liability for the explosion. (*Id.*) On December 6, 2024, the trial court set the summary judgment hearing for February 3, 2025. (Vol. VIII, Miller-ROA-000114.)

Mediation occurred with all parties on December 11, 2024. (Vol. VIII, Miller-ROA-000118.) On December 13, 2024, Appellant and Appellee submitted a Proposed Agreed Order extending Miller's deadline to file her Opposition to Appellee's Motion for Summary Judgment through January 10, 2025, and extending Appellee's Reply deadline through January 24, 2025, which the trial court entered. (Vol. VIII, Miller-ROA-000116.) The Mediation Status Report was filed December 30, 2024 stating that Appellee resolved all claims with all parties, including Ms. Miller's insurer's subrogation claim, but not with Ms. Miller. (Vol. VIII, Miller-ROA-000118.)

On January 2, 2025, Appellant and Appellee jointly submitted a Proposed Amended Case Management Plan extending Ms. Miller's deadline to disclose her expert witnesses through January 24, 2025, extending Appellee's deadline to disclose its damages expert witnesses until March 28, 2025, and extending fact and expert discovery deadlines through May 9, 2025. (Vol. VIII, Miller-ROA-000119.)

On January 20, 2025, Miller timely filed her Response In Opposition to Appellee's Motion for Summary Judgment arguing (i) summary judgment was premature as the case was still in fact

discovery, Ms. Miller had yet to depose, experts had yet to be disclosed or deposed by agreement of the parties and the court's recent order, and that Indiana Gas only thirty (30) days prior produced over 61,000 pages of discovery; (ii) that this is a strict products liability and negligence case about under-odorized gas, not about the control or maintenance of gas pipes and therefore, it is unrelated to IURC and the Tariff, and importantly, that pursuant to federal regulation, Appellee and only Appellee, has an undisputed, non-delegable duty to ensure that the gas it provides to consumers is properly odorized; (iii) that without properly odorized gas, consumers effectively sit on a ticking time bomb until a deadly explosion occurs just as it did here; (iv) that the IPLA governs product liability claims in the state of Indiana, not the IURC or Tariff; (v) that the IURC's Report is inadmissible under Trial Rule 56(E) and Rule of Evidence 803; and (vi) that a genuine issues of material fact are disputed in this case, including importantly, whether or not the gas was properly odorized precluding summary judgment. (Vol. VIII, Miller-ROA-000121.)

On January 24, 2025, Appellant timely served her expert disclosures and filed Notice of same with the trial court. (Vol. X, Miller-ROA-000168.) Appellant identified five experts in addition to treating physicians, one of which was Tim G. Dunn, P.E., a chemical engineer identified by the Phillips previously, already deposed by Indiana Gas in this litigation, and identified in Ms. Miller's preliminary witness and exhibit list filed in June 2024. (Vol. VI, Miller-ROA-000116.) Mr. Dunn's report was identical to that previously served in the Phillips case (with the only changes being the date and header of the report). (Vol. VI, Miller-ROA-000044.) On February 3, 2025, the summary judgment hearing occurred, eleven days prior to the deadline for summary judgment filings pursuant to the Case Management Order and three months and six days prior to the agreed-upon and court-entered deadline for the close of expert and fact discovery. (Vol. VIII, Miller-ROA-000119.)

On February 11, 2025, Ms. Miller was deposed. On February 14, 2025, the summary judgment deadline expired. (Vol. VIII, Miller-ROA-00119; Vol. VI, Miller-ROA-000072-73.)

III. Disposition at the Trial Court

On March 14, 2025, the trial court granted summary judgment in favor of Indiana Gas. (Vol. II, Miller-ROA-000036.) In so holding, the trial court relied on Appellee's assertion that its three post-explosion odorator reading values (without indication of who took each of them, the times they were taken, the values recorded and required to reach the percentage, and a host of other missing, disputed information), meant the gas was properly odorized beyond question or reproach. (Vol. II, Miller-ROA-000045 ¶¶ 50-51.) This despite evidence pre and post-explosion weighing in favor of Ms. Miller's position.

The trial court improperly weighed the evidence and chose to give more weight to that proffered by Indiana Gas in contravention of the law. Summary judgment was inappropriate here as disputed issues of fact exist, including whether the gas was properly odorized, whether the odorant performed as intended, and the Phillips' ability to detect the smell of gas. *State v. American Motorists Ins. Co.*, 463 N.E.2d 1142 (Ind. Ct. App. 1984) ("Any doubt about the existence of a genuine issue of material fact **must be resolved against the moving party**. [E]ven if the facts are undisputed, summary judgment is inappropriate when the evidence before the court reveals a good faith dispute as to the information to be drawn from those facts.") (emphasis added); *Johnson v. Wabash County*, 181 Ind. App. 281 (Ind. Ct. App. 1979) ("A judge may not use summary judgment procedure to weigh the evidence to determine where the preponderance lies in advance of its being presented.").

STATEMENT OF FACTS

In May 2019, Ms. Miller was a successful, hardworking 60-year-old woman who lived alone with her dog. That morning Ms. Miller was asleep in her bed when she was awakened by an explosion and the ceiling of her home collapsing on top of her. The ceiling blade fan lacerated her face and lip and she immediately felt pain in her left arm and wrist. Unbeknownst to Ms. Miller at the time, the home of Billy and Janet Phillips, her long-time friends and next-door neighbors, had just been blown off its foundation and completely destroyed by a devastating gas explosion. Ms. Miller was barricaded in her bedroom by the debris and rubble and screamed for help until a neighbor heard her and shattered the bedroom window so Ms. Miller and her dog could crawl out of her collapsing home. Ms. Miller was homeless and displaced for approximately one year after this tragedy. Her home was condemned and she was never allowed back inside it – everything she owned and had accumulated over the course of her life was gone. (Vol. VIII, Miller-ROA-00124-126.)

Ms. Miller suffered injuries to her face, specifically embedded glass in her lip that ultimately scarred her face, glass embedded in her arm that resulted in a 4-5 inch scar, a fractured left wrist that required months of physical therapy and left her unable to continue her job at Humana. Ms. Miller is left-handed and was unable to return to work; because of this, she now only works part-time at a substantially reduced rate – making approximately 75% less than what she earned before the explosion. Ms. Miller was also diagnosed with anxiety and posttraumatic stress disorder (PTSD) as a result of this explosion that devastated her home and life. While Appellee callously blames Mr. Phillips for the alleged “intentional removal” of the cap that it contends caused the gas leak, it is undisputed that Ms. Miller did nothing to cause or contribute to the explosion that caused the injuries she suffered. (*Id.*)

Dangers of Natural Gas. Natural gas is colorless, odorless, and highly flammable and explosive when mixed with air. Because of this, leaks can cause devastating explosions and fires. (Vol. IX, Miller-ROA-000224-226.) To prevent deadly explosions, odorants are added for safety and so that gas leaks are more easily detectable to people by the noxious smelling odor. (*Id.* at Miller-ROA-00226.) Critical risks of natural gas leaks are suffocation as high concentrations of natural gas can displace oxygen in the air, particularly in poorly ventilated areas, and explosion. (Vol. IV, Miller-ROA-000086-87.)

Odorization is required for the safety of consumers. Indiana Gas is a public utility that is privately owned and provided natural gas service to the Phillips' home for essential appliances such as the hot water heater and furnace. Federal regulations mandate that odorants be added to natural gas by the gas company – *not* the customer – in order to *protect* the customer. Appellee's own corporate representative agreed odor is a customer's leak detector. (Vol. V, Miller-ROA-000075-79.) The gas company is required to add odorants for safety purposes so that gas can be detected by smell in the event of a leak. 49 CFR § 192.625. An investigation of the Phillips' home following the explosion revealed a ¾-inch section of gas pipeline that was no longer connected to a fitting; these pipes were *concealed within* the Phillips' basement ceiling. Archived natural gas usage data for the Phillips' home provided by the Defendant showed a spike of 3580 cubic feet on Saturday, May 18, the day before the explosion, and 1994 cubic feet early Sunday morning before the explosion. (Vol. VII, Miller-ROA-000015-17.) If odorant had been properly added as required by federal law, the smell at these levels should have been overwhelming. Indiana Gas, through its corporate representative, conceded that with the amount of gas inside the home prior to the explosion, someone should have been able to smell it if it were properly odorized.

Q: Would you expect, based on the amount of natural gas that was in the

home, someone with a normally functioning sense of smell to be able to smell it?

A: A person with a normal sense of smell should have been able to identify a readily detectable odorant in the -- in the gas that we delivered to them.

(Vol. X, Miller-ROA-000101-102.)

Despite these levels, Ms. Phillips testified under oath that she never smelled natural gas in her home prior to the explosion even though tremendous levels of natural gas began leaking into the Phillips' home thirteen hours prior. (Vol. IX, Miller-ROA-00063-64.) Not only did Janet, who miraculously survived the explosion, not smell gas in the thirteen hours prior to the explosion, neither did her husband. (*Id.*)

No odorant was detected by those at the scene of the explosion. Similarly, others who arrived at the scene immediately after the explosion also confirmed they did not smell natural gas. In their official report, the Jeffersonville Fire Department, authored by Captain Jason Sharp, noted that the gas pipe to the house was open and they did not smell any gas when they shut it off:

Fire Marshal Johnson arrived on scene and we proceeded to shut off the gas main at the primary involved structure. We located the gas meter which was laying down on the ground detached from the line. The valve was still intact and actively open providing gas to the residence. I requested a wrench from safety to use to turn the valve to the off position. Photographs by Fire Marshal Johnson were taken of the valve both before and after the closing. It should also be noted that I did not hear or smell gas coming from the line at the time that I shut it off.

(Vol. IX, Miller-ROA-00081-84.)

Additionally, one of the first Indiana Gas employees who arrived on the scene, Jeff Higdon, testified that he did not smell gas at the location of the explosion.

Q. Whenever you arrived at the scene, did you smell natural gas?

A. No.

(Vol. IX, Miller-ROA-000145.)

The explosion occurred at approximately 4:56 a.m. The fire department was on the scene by 5:03 a.m. (Vol. IX, Miller-ROA-000081-84.) There are no reports, from anyone, at or near the scene prior to, nor at the time of the explosion stating that they smelled odorant from natural gas. Further, the type of valves that provide gas to end users allow a small amount of flow to continue even after this explosion. That small flow should have carried odorant alerting the people at the scene of the presence of natural gas even after the explosion. (*Id.*; Vol. VI, Miller-ROA-000049.)

History of inconsistent and improper odorization. In addition to 49 CFR § 192.625(a), which requires a distribution line contain a natural odorant or be odorized so that at a concentration in air of one-fifth of the lower explosive limit, the gas is readily detectable by a person with a normal sense of smell, 49 CFR § 192.625(e) requires odorization be introduced without wide variations in the level of odorant. Importantly, prior to this explosion, Indiana Gas had notice of many odorant tests that were outside of industry standards, but it chose to ignore them and take no action. (Vol. X, Miller-ROA-000136-137; Vol. VIII, Miller-ROA-000128-129.)

Previously, Indiana Gas employees did a number of "sniff tests" from across the area where it was determined that the amount of odorant in the gas **did not become "readily apparent" to the employees until the gas concentration hit 1.2%**. That is at a minimum 20% higher than the legal limit. Indiana Gas conceded under oath that those numbers should be alarming, or at a minimum, "raise questions" about the levels of odorant in the gas.

Q. Would it be alarming to you if you were to receive an employee sniff test that had 1 percent at all these different locations?

A. I -- I would ask questions as to why it's 1 percent...

...

Q. So the rate itself of it being at 1 percent, that would be something that would raise a question in you, right?

A. Yep.

Q. And then having the exact same reading for all of these different locations, would that raise a question in you?

A. Yes.

(Vol. X, Miller-ROA-000040-41.)

Indiana Gas' corporate representative further conceded on behalf of Indiana Gas that where readings are 1 percent or above are an indication that something is wrong. "So it could be an indication that yes, the odorant level could be low, and we need to address that, or it could be the equipment they're utilizing is a problem." (Vol. IX, Miller-ROA-000243-244.) Accordingly, the equipment used for readings is not foolproof.

Despite the fact that Appellee conceded under oath via its corporate representative that identified 1% at various locations at the same time just one month prior to this explosion, Appellee confirmed under oath that no further testing or investigations were conducted.

Q. Have you seen any other employee sniff tests after this April 10, 2019 test before the explosion in May?

A. I don't recall.

Q. Do you know if anything was addressed with either Mr. Tharp or with someone else going to check the odorant levels after these readings were reported?

A. I do not.

(Vol. X, Miller-ROA-000041-42.)

This despite the fact that Appellee also conceded that a reading of one or higher needs to be investigated:

Q. And a reading of one or higher on a sniff test needs to be investigated

further because its potentially dangerous, or being a low level of odorant?

- A. That's correct. It's not dangerous, it's more of like – well, yeah, yeah, could be potentially, for sure.

(Vol. V, Miller-ROA-000072.)

During the summary judgment hearing, Indiana Gas argued that the standard for the natural gas company is not about the ambient air (Appeal Tr. Vol. II at 43), it's about what the gas company's employees with "certified noses" detect in the distribution line (Appeal Tr. Vol. II at 25). But its own corporate representative agreed under oath that the purpose is for the safety of the consumer as stated in the federal regulations.

- Q. Okay. That makes sense. And then kind of as an aside says, "Remember, odor is for the customer's use only. Odorization is the customer's leak detector and is their back line to safety." Did I read that correctly?

- A. You read that correctly, yes.

- Q. Do you agree that odor is for the customer's use only?

- A. No.

- Q. Why do you disagree with that?

- A. I think it's also for the use of the operator as well, right? All of us want to know that we can smell it, so for sure.

...

- Q. And then it says, "Odorization is the customer's leak detector." Do you agree with that?

- A. There are multiple things that are a customer's leak detector. Odorization is one of them, yes.

(Vol. V, Miller-ROA-000076-78.)

Mr. Alexander further reasoned in his affidavit that because he smelled gas (what turned out to be another gas leak) at 908 Assembly Road “while walking adjacent to 908 Assembly Road,” immediately after the explosion, his “ability to smell natural gas from this loose lock wing further confirmed to me that the natural gas was properly odorized.” (Vol. VII, Miller-ROA-000017.)

Attached as an exhibit to Mr. Alexander’s affidavit is a report authored by Indiana Gas employee, Adam Gilles, Director of Regional Operations. (Vol. VII, Miller-ROA-000130.) It does not indicate it is co-authored by Mr. Alexander, however, his affidavit does state that he was “personally involved in the preparation of [Mr. Gilles’] report,” though it does not describe to what extent he was involved. (*Id.* at Miller-ROA-000017.) No affidavit from Mr. Gilles was submitted to authenticate the report. The report states that fourteen (14) homes were evacuated due to the explosion and that a Class 3 leak was identified at 907 Assembly Drive at 2% LEL, above the legal limit. (*Id.* at Miller-ROA-00131.) A second leak at 908 Assembly was also found, but no reading is contained in the record. (*Id.*)

SUMMARY OF ARGUMENT

Simply put, the trial court misapplied the summary judgment standard and misapplied the law.

First, the trial court improperly weighed the facts and evidence. *Collins v. Dunifon*, 163 Ind. App. 201 (Ind. Ct. App. 1975) (“If a court must weigh conflicting evidence to reach a decision, summary judgment is not appropriate.”). The weight of the evidence is a question for the factfinder because “summary judgment is not an appropriate means of resolving questions of credibility of evidence or its weight, or even conflicting inferences which may be drawn from undisputed facts.” *English Coal Co. v. Durcholz*, 422 N.E.2d 302 (Ind. Ct. App. 1981); *American States Ins. Co. v. State*, 152 Ind. App. 422 (Ind. Ct. App. 1972) (“If there is a question of state of mind, credibility

of witnesses, or weight of testimony, summary judgment should be denied.”). Here, among other evidence, Ms. Miller identified the sworn testimony of four unrelated, objective witnesses (including the Indiana Gas’ own corporate representative) supporting Ms. Miller’s position that the natural gas that caused the explosion was under-odorized. The trial court held because Indiana Gas says the gas was properly odorized, then it was. But the trial court cannot weigh the facts presented. *Franklin v. Benock*, 722 N.E.2d 874, 880 (Ind. Ct. App. 2000) (Weighing disputed facts is the role of the jury precluding summary judgment.) This reason alone requires reversal of the trial court.

Second, the trial court failed to properly apply the summary judgment standard. When ruling on a motion for summary judgment, Indiana law requires that all facts set forth by the nonmovant, Ms. Miller, be taken as true, the depositions, admissions and other factual matters be liberally construed in her favor, and any doubts as to the existence of a genuine issue of material fact be resolved against the moving party – Indiana Gas. *Podgorny v. Great Cent. Ins. Co.*, 160 Ind. App. 244 (Ind. Ct. App. 1974). Instead, the trial court took only as true those facts set forth by the movant/Indiana Gas. For example, 49 CFR 192.625 requires odorant readily detectable by a person with a normal sense of smell. Janet Phillips, Indiana Gas’ employee Mr. Higdon, and Fire Chief Sharp each separately reported not smelling the noxious natural gas smell before (Ms. Phillips) and after (Capt. Sharp and Mr. Higdon) the explosion. (Vol. II, Miller-ROA-000036, Miller-ROA-000044 ¶¶ 44-46.) Instead of liberally construing this evidence in favor of Ms. Miller, the trial court disregarded this evidence completely and presumed in favor of Indiana Gas (despite no evidence to the contrary) that Janet Phillips did *not* have a normal sense of smell. (Vol. II, Miller-ROA-000046, 53-54 ¶¶ 54, 85; Appeal Tr. Vol. II at 57-58.)

Third, the trial court misapplied Indiana strict products liability law in two ways. The trial court held Appellee had no duty to exercise ordinary care outside of its own mains and service lines (Vol. II, Miller-ROA-000050-51 ¶ 76) but not only is this incorrect, it conflates two different products – the piping (which delivered the natural gas and is not at issue in this lawsuit) and the gas itself. Natural gas is a product sold by Indiana Gas to Indiana residents, including the Phillips and Ms. Miller. Under Indiana law, Indiana Gas, the product manufacturer who sells to the consumer, is liable for the gas itself under the following statutory terms:

- (a) One who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to his property is subject to liability for physical harm caused by that product to the user or consumer or to his property if that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition...

Ind. Code § 33-1-1.5-3(a).

Additionally, under the circumstances present here, product manufacturers have a duty under Indiana law to warn of latent dangerous characteristics, including odorant fade. *Natural Gas Odorizing v. Downs*, 685 N.E.2d 155, 161-163 (Ind. Ct. App. 1997) (“A manufacturer has a duty to warn with respect to latent dangerous characteristics of the product, even if there is no defect in the product itself.”). Indeed, the law imposes strict liability upon a manufacturer who puts into the stream of commerce any product without a reasonably adequate warning thereby leaving it in an unreasonably dangerous condition. *Id.* at 162 (“The manufacturer has a duty to warn the ultimate user of a product when the ultimate user is a party the manufacturer should expect to use the product.”). This is a nondelegable duty under Indiana law. *Id.* at 163. Whether Indiana Gas satisfied that duty is a question of fact for the jury. *Id.* at 164.

Fourth, the trial court relied on the IURC’s report to find that “the odorant levels are within the acceptable range” (Vol. II, Miller-ROA-000046 ¶ 55) without engaging in the proper analysis

under the IPLA as discussed above (*i.e.*, whether Indiana Gas satisfied its duties under the IPLA). As Ms. Miller argued at the trial level, the IURC and the Indiana Gas Tariff are not the governing law for product liability cases in Indiana. Regardless of the existence of the IURC and Tariff, Indiana citizens still have rights and recourse under the IPLA. *Downs*, 685 N.E.2d at 160 (“Strict product liability actions in Indiana are governed by the [IPLA]. Ind. Code §§ 33-1-1.5-1 to 33-1-1.5-8.”).

Fifth, the trial court improperly relied on inadmissible hearsay and unauthenticated documents that contain conflicting statements. The trial court accepted without question Indiana Gas’ odorator readings post-explosion for the proposition that the gas was properly odorized and detectable pre-explosion (Vol. II, Miller-ROA-000045 ¶ 51), but there are no affidavits from the men who performed these three odorator readings and therefore, no information on the process used for collecting these readings, which are deficient as they contain only one value as Indiana Gas’ corporate representative acknowledges a reading requires two values. (Vol. VII, Miller-ROA-000118; Vol. IX, Miller-ROA-000232 (a threshold value and readily detection level are required).) In fact, none of the individuals who performed post-explosion odorator readings, nor leak surveys, which the trial court primarily relied upon, submitted affidavits to corroborate their test methodology, results or authenticate the documents and information contained therein. (Vol. II, Miller-ROA-000045-46 ¶¶ 48-55). The affidavits of Dan Novak and Howard Friend generically state they “observed representatives...complete a gas leak survey” and “pressure tests,” but do not identify any specific information, nor any odorator read that was performed. Mr. Novak and Mr. Friend authored the IURC report, which is simply a regurgitation of secondhand information from Indiana Gas’ Investigative Report without personal knowledge, but the trial court improperly relied on this report to grant Indiana Gas summary judgment. *McCutchan v. Blanck*, 846 N.E.2d 256

(Ind. Ct. App. 2006) (“Inadmissible statements and opinions in affidavits submitted were properly disregarded pursuant to T.R. 56(E)” as the opinions did not identify the information relied on to make the opinion and [instead] amounted to bald statements unsupported by any evidence, rendering the opinions inadmissible under Ind. Evidence Rule 702. Speculative or self-serving statements that were not rationally based on personal knowledge and perception were inadmissible under Ind. Evidence Rule 701.).

ARGUMENT

I. Standard of Review

“On appeal from grant of summary judgment, the only issues are whether the trial court correctly applied the law and whether there was a genuine issue of material fact.” *Barr v. State*, 400 N.E.2d 1149 (Ind. Ct. App. 1980). Here, the trial court erred on both counts: it incorrectly applied the summary judgment standard, misapplied Indiana law, and improperly weighed the evidence on disputed issues of material fact thereby improperly substituting its opinion for that of the factfinder. “The standard of review in an appeal from a summary judgment is *de novo*, and if the trial court has entered findings and conclusions, they are gratuitous. [T]he appellate court owes no deference to the trial court’s findings and conclusions.” *Steak N Shake Operations, Inc. v. Nat’l Waste Assocs., LLC*, 177 N.E. 3d 816, 829-830 (Ind. Ct. App. 2021).

II. The trial court improperly weighed the disputed facts and evidence and failed to properly apply the summary judgment standard.

Indiana Gas relies on its *post*-explosion odorator readings for the proposition that odorant levels were within the acceptable range *prior* to the explosion. Ms. Miller disputes this. Indiana Gas’ odorator readings are attached to Indiana Gas’ own Investigative Report, which is an exhibit to the Affidavit of Howard Friend. Mr. Friend did not perform the odorator readings himself. His affidavit lacks any specificity as to the testing protocol, how, when, where it was done, and who

actually performed the reads, and does not identify the two values that should be received (but are not included – only one value is identified); however, most importantly, these readings *do not* establish odorant levels at the Phillips' home *prior to the explosion* during the thirteen hours natural gas was flooding the Phillips home – what we now know was a ticking time bomb for over thirteen hours. Indiana Gas' experts rely on those post-explosion readings for their opinions. (Vol. VII, Miller-ROA-000146.) But Indiana Gas' post-explosion readings are but *one piece of evidence*.

In response, Ms. Miller identified other evidence that indicates the gas was under-odorized and unable to be detected pre-explosion and/or Indiana Gas' odorant was not functioning as intended. Ms. Miller identified the testimony of Janet Phillips, the fact that her husband did not smell gas prior to the explosion, the testimony of Jeff Higdon, Indiana Gas's employee, and the report of Captain Sharp of the Jeffersonville Fire Department. As to Ms. Phillips, Indiana Gas speculates that she may "not have a normal sense of smell," (Vol. X, Miller-ROA-000163); however, while Ms. Phillips' sworn testimony is evidence, Indiana Gas' speculative theory is *not* evidence. Ms. Phillips was deposed; there is no evidence of record that she had *anything but* a normal sense of smell. At the summary judgment stage, the trial court is required to construe all evidence in a light most favorable to Ms. Miller. *State v. American Motorists Inc. Co.*, 463 N.E.2d 1142, 1146 (Ind. Ct. App. 1984). The trial court did not do so, instead choosing to adopt Indiana Gas' speculative theory that Janet Phillips *may* not have had a normal sense of smell. (Vol. II, Miller-ROA-000036 ¶¶ 85-87; Appeal Tr. Vol II, at 57). Any doubt about the existence of a genuine issue of material fact *must be resolved against* the moving party – Indiana Gas. Moreover, even if the facts are undisputed (which is not the case here), summary judgment is inappropriate when the evidence before the court reveals a good faith dispute as to the inferences to be drawn from those

facts. *State v. American Motorists Inc. Co.*, 463 N.E.2d at 1146 (Ind. Ct. App. 1984) (internal citations omitted).

As to Captain Sharp and Mr. Higdon not smelling gas immediately after the explosion, Indiana Gas argues this is because the excess flow valve shut off all gas. Appeal Tr. Vol II at 40. But there are different types of excess flow valves, some that allow a small amount of gas to continue flowing, and when under oath, Indiana Gas' corporate representative explained the excess flow valve differently.

Q. Okay. We were told about a, I think it's called an excess flow valve, or something like that, that's inside the pipe actually leading into the house. Are you familiar with what I'm talking about?

A. Yes, I am.

Q. Do you know the type of valve that was in place at the time of the explosion at this house?

A. It was a low flow, excess flow valve. So, it's the lowest, the most sensitive excess flow valve we can put on our service. That's what was installed at the time.

Q. Do you know at what level that is supposed to shut off?

A. I believe it allows 400 standard cubic foot per hour. It might actually be 240 standard cubic per hour, now that I'm thinking about it. I'd have to see the sheet in front of me to tell you for sure.

Q. Sure. I'm going to share my screen again. This has been represented to be the hourly consumption, the cubic foot per hour for the I guess month, basically, leading up – a month and a half leading up to the explosion. And then we have the day of the explosion here where we go over four cubic feet. Is that –

A. I can't – I can't see it. Your – the video has you over there, so –
...

Q. Okay. Is this – so you said it was 400 before the valve was supposed to cut off, or 250?

- A. I would have to see it in front of me, but I – yeah. It's like – it's – it's recognizing the pressure between the distribution main and the meter. So we are delivering pressure to that meter. If that service line were to be cut, it would – it would – it would react to the differential in pressure up to that, which I – I would again have to see the paperwork, but I think it was 240. It might be 400 standard cubic per – per hour. Can't remember. But regardless –
- Q. Okay.
- A. -- that's what it does is identifies the variance between the two and – and will shut off.
- Q. Okay. So whether –
- A. You don't –
- Q. Whether it was 200 and – I'm sorry I cut you off.
- A. No, that's fine. You wouldn't size it. You're going to size it that it delivers what is necessary for the customer to have inside their home. So if I – if I sized it inappropriately, it wouldn't matter because the delivery – I mean, as far as like if I – let me restate this. The excess flow valve is installed to protect the service line. If the service line is cut or the meter set were to be knocked off per se, it's going to shut off and react to that.
- Q. Okay. And so whether it was 240 cubic feet per hour or 400, it would still be – if this is for – if the peak here is just over 4 cubic feet per hour, we're still talking many – many multipliers above that before the valve should shut off?
- A. That's correct.
- Q. Is that right? Okay. So based on this usage chart, the excess flow valve should not have shut off based on the amount of gas flowing into the home for the explosion?
- A. Right. That's not why it's designed. **It's not designed to affect the customer's fuel line.** The customer's usage, obviously you want the customer to be able to use service how they choose to use it. So it's designed to protect in case damage of our service line occurred.

(Vol. V, Miller-ROA-000123-126) (emphasis added).

Captain Sharp's report states, "The valve was still intact and actively open providing gas to the residence. I requested a wrench from safety to use to turn the valve to the off position . . . It should also be noted that I did not hear or smell gas coming from the line at the time that I shut it off." (Vol. IX, Miller-ROA-000083.) During the summary judgment hearing, Indiana Gas argued that Captain Sharp was simply "making an observation," because otherwise the investigation "would have taken a whole different, it's like, you know, you got to shut her off down there, you got to do something, let's got to, get these people evacuated. . ." (Appeal Tr. Vol II, at 40). But Indiana Gas employee Jeff Higdon confirmed the Fire Department had evacuated everyone by the time Mr. Higdon reached the scene of the explosion. (Vol. IX, Miller-ROA-000138.) Andrew Gilles report likewise states fourteen homes were evacuated. (Vol. VII, Miller-ROA-00131.)

Regardless of when the gas to the residence was shut off, these factual determinations that relate directly to a material fact – whether Indiana Gas properly odorized the gas such that it was detectable by a person with a normal sense of smell – are for the jury to consider and resolve, not the court. And not at the summary judgment stage. *English Coal Co. v. Durcholz*, 422 N.E.2d 302, 307 (Ind. App. 1981) ("The test for the granting of summary judgment requires, first, that there be no genuine issue, or dispute, as to material facts in the case. To determine whether such issue exists, **the court will accept as true all facts alleged by the nonmoving party and resolve all doubts against the moving party.**") (internal citations omitted) (emphasis added). Here, the trial court did not accept as true all facts alleged by Ms. Miller, but rather, resolved all doubts against Ms. Miller.

By way of example, the Court made a factual determination that the reason Captain Sharp did not hear or smell gas and the reason Jeff Higdon didn't smell gas was because the excess flow valve "was triggered by the explosion and immediately cut off all gas flow to the Phillips

residence.” (Vol. II, Miller-ROA-000036 ¶ 56.) The trial court improperly expressed its opinion as to why Capt. Sharp and Higdon did not smell gas operating under the assumption that it was properly odorized and detectable and that their testimony (that they did not smell gas) is meaningless. (*Id.*) Yet simultaneously, Indiana Gas relies on the affidavit of its corporate representative, which specifically states that he *did smell gas* in the ambient air *just while walking by* 908 Assembly, and that is how he alleges he knew the gas was properly odorized. (Vol. VII, Miller-ROA-000017.) The trial court discounted the fact that Sharp and Higdon did not smell gas (Vol. II, Miller-ROA-000039 ¶ 56), but then gave weight to the fact that Dan Novak and Shane Alexander did smell gas (*id.* at 52, 53) – these credibility determinations and weighing of witness testimony against one another is a function of the factfinder, not the trial court. Similarly, the trial court held “all testing conducted showed that the gas was odorized sufficiently within federal limits” (*id.* at 82) but ignores testing on Assembly Drive immediately after the explosion at 2% LEL. (Vol. VII, Miller-ROA-000131.) These disputed facts and interpretations of the evidence highlight that summary judgment “is not an appropriate means of resolving questions of credibility of evidence or weight, or even conflicting inferences which may be drawn from undisputed facts.” *English Coal Co.*, 422 N.E.2d at 307. It is a function of the jury to hear conflicting evidence and interpretation of the evidence and weigh it to reach a verdict, not the trial court at the summary judgment stage.

III. The trial court misapplied Indiana products liability law requiring reversal.

It is undisputed that a supplier of natural gas has a duty to ensure that it provides properly odorized gas to consumers. 49 CFR § 192.625(a). It is likewise undisputed that one who sells or otherwise puts into the stream of commerce any product has a duty to consumers; if the product is in a defective condition unreasonably dangerous to any user or consumer, the seller is subject to

liability for physical harm caused by that product to the user or consumer if the user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition, and if (1) the seller is engaged in the business of selling such a product; and (2) the product is expected to and does reach the user or consumer without substantial alteration in the condition in which it is sold by the person sought to be held liable under this chapter. Ind. Code 33-1-1.5-3(a). *See Heritage Operating, L.P. v. Mauck*, 37 N.E.3d 514, 522 (Ind. Ct. App. 2015) (“As a distributor of gas, we hold that Empire Gas **owed a general duty of reasonable care to any persons who might be injured by its propane**, which includes the tenants occupying the property.”) (emphasis added).

Here, the trial court failed to undertake the requisite analysis under I.C. § 33-1-1.5-3(a) and simply accepted the Appellee’s position that “it is clear that Indiana Gas is not responsible for the leak. . .” (Vol. II, Miller-ROA-000036 ¶ 70) because Indiana Gas is not responsible for gas lines that it does not own (*id.* at 76). But this analysis falls short – Ms. Miller alleges the gas itself was defective because it was under-odorized and/or the odorant did not function as intended – she does not allege the gas lines were defective.

The IPLA recognizes three ways a product can be defective: (i) a manufacturing defect, (ii) a defective design, or (iii) the manufacturer failed to give adequate information about the product, such as the failure to warn of dangers while using the product or inadequate instructions. Ind. Code § 34-20-2-3. *See Bayer Corp. v. Leach*, 153 N.E.3d 1168, 1179 (Ind. Ct. App. 2020) (internal citations omitted). Unlike a design defect or failure to warn claim, in an action based on a manufacturing defect, “the IPLA imposes liability although the manufacturer exercised all reasonable care in the manufacture and preparation of the product.” *Id.* at 1179 (internal citations omitted). “Therefore, a strict-liability standard applies to manufacturing-defect claims.” *Id.*

(internal citations omitted). “A product is in a defective condition ... if, at the time [the product] is conveyed by the seller to another party, it is in a condition: (1) not contemplated by reasonable persons among those considered expected users of the product; and (2) that will be unreasonably dangerous to the expected user or consumer . . .”. *Id.* at 1179-80.

Here, the Phillips and Ms. Miller were unknowingly sitting on a ticking time bomb. They had no way to know this though because of the defective under-odorized gas. They should have smelled the rotten egg smell of odorant that is required by law to be added and certainly they should have smelled it based on the amounts of gas pouring into the Phillips’ home for over thirteen hours. Indiana Gas concedes that large amounts of natural gas were pouring into the Phillips’ home for those thirteen hours. And yet, the testimony from Ms. Phillips, the (only living) person closest to the leak, reported never smelling the gas. The trial court improperly focused on an inconsequential (and incorrect) conclusion – that Indiana Gas has no duty for customer-owned gas lines (Vol. II, Miller-ROA-000036 ¶ 81) but the relevant question involves who is responsible for odorization and whether its duty was met. Indisputably **only Indiana Gas is responsible for odorization**. Here, there is a genuine dispute of material fact as to whether Indiana Gas satisfied its duties under the IPLA making summary judgment improper.

The trial court also misapplied the IPLA when it held Indiana Gas has no duty to warn of odor fade in these circumstances based solely on the affidavit of Erickson stating that the American Petroleum Institute doesn’t require this. (Vol. II, Miller-ROA-000036 ¶¶ 88-90.) But Miller did not allege a federal regulation required a duty to warn, Miller relied on the IPLA for this proposition, which the trial court failed to properly apply. A comparison with *Natural Gas Odorizing, Inc. v. Downs* is helpful in illustrating. 685 N.E.2d 155 (Ind. App. 1997). The *Downs* court held the first step is for Downs to “demonstrate that a genuine issue of material fact exists as

to whether the odorant failed to perform as intended, thereby proximately causing their injuries.” *Id.* at 160. Downs did so by relying on testimony that, “if the odorant added by Montezuma to their gas system was functioning as it should have, the odor of gas should have been startling.” *Id.* at 161. Similarly here, testimony from Indiana Gas’ own corporate representative establishes unequivocally that “a person with a normal sense of smell should have been able to identify a readily detectable odorant in the – in the gas that we delivered to them.” (Vol. X, Miller-ROA-000101.) Similarly here, it is undisputed that large amounts of gas flooded the home for over thirteen hours before the explosion occurred. Accordingly, as the court explained in *Downs*, “it is reasonable to assume that [the Phillips] were in a position to detect the smell of natural gas prior to the explosion.” *Downs*, 85 N.E.2d at 161. Accordingly, the Downs court held “designated evidence leads us to conclude that a genuine issue of material fact exists as to whether the odorant performed as intended.” *Id.*

The *Downs* court then moved to the question of duty to warn, “which consists of two duties: (1) to provide adequate instructions for safe use, and (2) to provide a warning as to dangers inherent in improper use.” *Id.* (internal citations omitted). “A manufacturer has a duty to warn with respect to latent dangerous characteristics of the product, even if there is no “defect” in the product itself.” *Id.* citing 63A AM. JUR. 2D, Products Liability 1123 (1997). Failure to warn “of a latent danger will, without more, cause the product to be unreasonably dangerous. . .” *Id.* Indeed, the “[IPLA] imposes liability upon a manufacturer who puts into the stream of commerce any product without a reasonably adequate warning thereby leaving it in an unreasonably dangerous condition to any user, if such warning could be given in the existence of reasonable diligence.” *Id.* at 161-162.

Specifically as to odorant and natural gas, the *Downs* court explained: “Odorant is **specifically manufactured to serve as a warning agent for natural gas leaks**. Although odorant

is not flammable or explosive on its own, it is intended to be commingled with natural gas, an inherently dangerous product. The safe use of natural gas requires the safe use of an odorant.” *Id.* (emphasis added). The court went on to explain that under the IPLA, “the duty to warn extends to any user or consumer in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition. Stated differently, the manufacturer, seller or distributor of a product has a duty to warn those persons it should reasonably foresee would be likely to use its product or who are likely to come into contact with the danger inherent in the product’s use.” *Id.* at 162. The *Downs* court specifically held the IPLA serves to protect consumers like the *Downs* and like Ms. Miller here: “Natural gas **consumers are the intended beneficiaries of an odorant’s cautionary warning.** It stands to reason, then, that **the [IPLA] serves to protect those consumers if the manufacturer fails to provide adequate warnings or if the product fails to perform as intended.** *Id.* at 162 (emphasis added). The consumer is the intended beneficiary and “[c]onsequently, the duty to warn is non-delegable.” *Id.* at 163. The adequacy of the warning (or lack thereof) is a question of fact for the jury. *Id.* at 161. *Heritage Operating*, 37 N.E.3d at 522 (whether the defendant gas company “exercised the reasonable degree of care and caution in light of all the particular circumstances is a question that is best suited for a jury or factfinder to decide.”). The trial court misapplied the IPLA and failed to undertake the requisite analysis depriving Ms. Miller of her rights under Indiana law requiring reversal.

IV. The trial court improperly relied on inadmissible hearsay and unauthenticated documents when granting summary judgment in violation of TR 56(E).

Indiana Gas relies heavily, if not entirely, on the IURC Report and the affidavits of Dan Novak and Howard Friend. The affidavits state that “representatives” of Indiana Gas completed a gas leak survey, odorant readings, and two pressure tests; no further details are provided. The names of the individuals who actually performed the test, their qualifications, the methodology

used, the devices used, the times of the tests, and information concerning each specific result are all omitted. Mr. Novak and Mr. Friend did not perform any of the tests based upon the reading of the affidavits, at most they “observed representatives” of Indiana Gas performing some testing. The IURC report is attached as an exhibit to both Mr. Novak and Mr. Friend’s affidavits. The IURC report is a regurgitation of the test results without any additional specific information as to qualifications or methodology of any IURC employees who participated in the investigation. Likewise, the affidavit of corporate representative Shane Alexander attaches Indiana Gas’ Investigative Report, which also does not contain details as to who performed which tests, the methodologies used, the qualifications of any individuals who performed testing, nor the times and devices used. Indiana Gas’ Investigate Report does identify the names of four (4) individuals – three Indiana Gas employees (Tyler Episcipo, Greg Alexander, James Jones) and one Jeffersonville Fire Dept. employee (Chad Ogden) who performed the testing, but no affidavits from any of those four individuals are provided. None of these individuals have been deposed yet. There are similarly no references to the qualifications or methodology of anyone who performed the test.

TR 56(E) requires supporting affidavits be made on personal knowledge setting forth facts as would be admissible in evidence and shall demonstrate that the affiant is competent to testify to the matters contained therein. In ruling on a motion for summary judgment, the trial court will consider only properly designated evidence which would be admissible at trial. *Broadway Co. v Robinson*, 147 N.E.3d 347, 353 (Ind. Ct. App. 2020). The majority of the information contained the affidavits and IURC report is too vague to be reliable and is inconsequential given the IURC investigation was primarily to determine if a service line maintained by Indiana Gas had leaked. But Ms. Miller’s case isn’t about defective piping, it is about defective gas. Mr. Novak and Mr. Friend’s regurgitation of secondhand information from the individuals who did perform odorator

readings and testing is inadmissible hearsay and lacks any specificity or relevant information. It certainly does not establish the odorant level at the Phillips' home prior to the explosion. Speculative or self-serving statements that were not rationally based on personal knowledge and perception are properly excluded as inadmissible under Evid. R. 701. *McCutchan*, 846 N.E.2d at 259. While the individuals who actually performed the testing could certainly submit an affidavit detailing information concerning the test results and odorator readings, that was not done here. Moreover, no qualifications or experience of Howard Friend or Dan Novak have been provided to raise their affidavits to the level of an expert witness, and the statements included in the affidavit certainly do not form a valid basis for their opinions, nor for summary judgment. Rule 702 requires expert evidence rest on a reliable foundation, which has not been established here.

Similarly the IURC findings are inadmissible as Rule 803 does not allow the admissibility of public records in civil cases. *Duncan v. Duncan*, 764 N.E.2d 763 (Ind. Ct. App. 2002) (police reports and other public records are inadmissible hearsay and do not fall into the public records exception). Evid. R. 803(8)(B) specifically does not exempt factual findings – like the IURC report – that arise from the special investigation of a particular complaint. The contents of the IURC report cannot be authenticated by Mr. Novak and Mr. Friend because they did not perform the testing that they referenced – their regurgitation of the contents of Indiana Gas' Investigative Report (which is also not authenticated by the individuals who performed the testing) was simply an attempt to backdoor this unauthenticated information and hearsay – which the trial court improperly relied upon. *See Hagerman Const., Inc. v. Copeland*, 697 N.E.2d 948, 955 (Ind. Ct. App. 1998), opinion amended on reh'g (Oct. 6, 1998) (report of OSHA investigation after construction injury properly excluded under Evid. R. 803(8)(B)).

CONCLUSION

In conclusion, the trial court misapplied the summary judgment standard, improperly weighed the evidence, made credibility determinations, and substituted its opinion in place of the factfinder. This is not the function of the trial court. The trial court misapplied the law as to the IPLA and relied upon unauthenticated and inadmissible evidence and affidavits. Accordingly, the trial court should be reversed and this case remanded.

WORD COUNT CERTIFICATE

I verify that this brief contains no more than 14,000 words.

/s/ Ashton Rose Smith

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