

**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 REPLY BRIEF

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SUMMARY OF ARGUMENT

Indiana Gas and only Indiana Gas has an *undisputed, non-delegable duty* to ensure the gas it provides to Indiana citizens is properly odorized. Without proper odorization, Indiana citizens unknowingly sit on a ticking time bomb until a deadly explosion occurs. This is exactly what happened here. An explosion occurred because *no one* smelled the noxious odorant required to be added to natural gas in the thirteen plus hours while massive amounts of undetectable natural gas leaked into the Phillips' home. These Indiana citizens¹ were deprived of the choice to seek help or evacuate because they did not know, and could not have known, there was a gas leak. Under-odorized gas is a defective product with deadly consequences. It is undisputed that Carla Miller was severely injured due to no fault of her own.

This is a case about accountability and safety. Indiana Gas' corporate representative conceded that the required added odorant is about safety (Miller Br. at 15; Vol. X, Miller-ROA-000101-102) – it is about protecting consumers like Ms. Miller and the community from an odorless, colorless killer. And, Ms. Miller has a claim under product liability law in Indiana, as well as a negligence claim. (Vol. II, Miller-ROA-000105.) The Indiana Gas Tariff is not a shield for Indiana Gas' liability; the tariff argument is a red herring because the tariff does not govern product liability law or negligence actions like this one when a *defective product*—the under-odorized natural gas—is sold to Indiana consumers. Nor should Indiana Gas get a pass for this devastating explosion because its own testing *after* this deadly explosion at different locations purported to show properly odorized gas.

Indiana Gas makes much of the fact that Ms. Miller did not designate her expert, Tim Dunn's report in response to the summary judgment motion; however, Indiana Gas agreed Ms.

¹ The Estate of Billy Phillips and Janet Phillips settled with Indiana Gas prior to the Court ruling on summary judgment. (Vol. VI, Miller-ROA-000062.)

Miller would disclose her expert at a later date. In fact, based upon agreement of the parties and the court-entered deadlines, Ms. Miller was not yet required to disclose an expert.² While the expert's opinion clearly creates a disputed fact, the evidence that Ms. Miller designated in response to the summary judgment motion also clearly established a dispute as to whether the gas was properly odorized. (Vol. VIII, Miller-ROA-000153.) The disputed issue of fact is whether the gas was properly odorized - Indiana Gas' experts provided no information pertinent to this inquiry - they simply regurgitated Indiana Gas' own testing results after the explosion from different locations.³ Their regurgitation of the testing results did not warrant summary judgment. Ms. Miller presented contrary evidence and, thus, disputed issues of fact should have precluded summary judgment.

Specifically, whether the gas sold by Indiana Gas *was properly odorized*, whether the *odorant performed as intended*, and the Phillips' *ability to detect the smell of gas* are the disputed issues of fact that the trial court is prohibited from deciding at the summary judgment stage. *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.").

² This is another reason why summary judgment was improper and premature. Expert discovery had not yet taken place at the trial court level. At a minimum, this Court should remand for further proceedings.

³ The explosion occurred at 904 Assembly Rd. After the explosion, Indiana Gas performed odorator readings at 902 Assembly Rd., 903 Assembly Rd., and 906 Assembly Rd., that were purportedly properly odorized.

Here, the trial court exceeded its role by improperly weighing the evidence as to the disputed facts in this case and chose to give more weight to that proffered by Indiana Gas and ignore the evidence presented by Ms. Miller. *Beta Steel v. Rust*, 830 N.E.2d 62, 68 (Ind. Ct. App. 2005) (“We also give no deference to a trial court’s ability to weigh evidence and judge witness credibility because no such weighing or judging is permitted when considering a summary judgment motion.”). Disputed issues of fact exist that preclude summary judgment:

Disputed Issues of Fact	
Indiana Gas Evidence	Carla Miller Evidence⁴
Indiana Gas argues the gas it sold that leaked into the Phillips’ home at 904 Assembly Rd. from May 18, 2019 – May 19, 2019 was properly odorized based on odorator readings performed by Indiana Gas <i>after</i> the explosion on May 19, 2019 at locations at 902, 903, and 906 Assembly Road that were purportedly properly odorized.	• The testimony of Indiana Gas’ corporate representative that properly odorized gas should have been detectable by someone with a normal sense of smell in the thirteen plus hours gas leaked into the Phillips’ home. • The testimony of Janet Phillips that she did not smell gas in the thirteen hours prior to the explosion. She also confirmed her husband did not mention smelling gas to her. • The testimony of Jeff Higdon that he did not smell gas at the scene of the explosion upon arrival. • Capt. Sharp’s Fire Department Report states that he did not hear or smell gas at the scene after the explosion.
Dan Novak reported smelling the odor of gas at the valve at 908 Assembly Road <i>after</i> the explosion, which Indiana Gas argues indicates the gas leaking the day <i>before</i> was properly odorized.	Same as above.
Indiana Gas implies that because Billy Phillips may have smoked marijuana and the Phillips had a dog and a cat, this may have	Janet Phillips testified she did not smell gas; there is no testimony from Janet or any witness that she had anything but a normal sense of smell.

⁴ Upon remand, the parties would engage in continued fact and expert discovery. Ms. Miller was deposed after the summary judgment hearing and discovery requests propounded on Defendant were outstanding, in addition to other fact witness depositions and expert discovery that Ms. Miller is entitled to conduct in pursuing her claims.

masked the odor making Janet Phillips unable to smell it or affected her sense of smell.	
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An issue of material fact is genuine if a trier of fact is required to resolve the parties' differing accounts of the truth. *Hughley v. State*, 15 N.E.3d 1000, 1004 (Ind. 2014). Contrary to its duties, this trial court did not “**liberally construe** all designated evidentiary material **in the light most favorable to the nonmoving party**” as it is required to do. *Estate of Pflanz v. Davis*, 678 N.E.2d 1148, 1150 (Ind. Ct. App. 1997) (emphasis added). The trial court's failure to do so requires reversal.

ARGUMENT

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

If there is any question of state of mind, credibility of witnesses, or weight to be given to testimony, **summary judgment should be denied**. *American States Ins. Co. v. State*, 152 Ind. App. 422 (Ind. Ct. App. 1972). Indeed, the trial court **must** resolve all factual inferences and all doubts as to the existence of a material issue in favor of the nonmovant, Ms. Miller. “In doing so, we give careful scrutiny to make sure the non-movant's day in court is not improperly denied.” *Caccavale V. Ranger Team Bldg., LLC*, 246 N.E.3d 292, 299 (Ind. Ct. App. 2024) Here, among other evidence, Ms. Miller identified the sworn testimony of unrelated, objective witnesses (including Indiana Gas' own corporate representative) supporting Ms. Miller's position that the natural gas that caused the explosion was under-odorized. Despite this, the trial court summarily concluded because Indiana Gas says the gas was properly odorized, then it was. But this ignores the evidence presented by Ms. Miller and the trial court cannot weigh the evidence presented and certainly should not ignore it. *Franklin v. Benock*, 722 N.E.2d 874, 880 (Ind. Ct. App. 2000). Contrary to Indiana law, the trial court took as true only those facts set forth by the movant/Indiana

Gas and ignored the non-moving party's evidence. 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 immediately 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 as it is required to do at this stage, 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 57:1-58:25.) This finding alone requires reversal.⁵ Ms. Miller designated the testimony of Indiana Gas' corporate representative, who conceded at the levels of gas pouring into the Phillips' home, if the gas was properly odorized, someone with a normal sense of smell should have been able to smell it. (Miller Br. at 15-16; Vol. X, Miller-ROA-000101-102.) This is **critical** because (i) Janet Phillips' – the survivor closest to the leak for thirteen plus hours – sworn testimony establishes she did not smell gas and (ii) there is no evidence of record that she had anything but a normal sense of smell. That creates a factual dispute that precludes summary judgment because the jury – not the trial court – gets to weigh that evidence and decide who it believes. Those two pieces of evidence – both designated at the trial court – create a genuine issue of material fact that should have precluded summary judgment here because at the summary judgment stage the trial court must liberally construe all designated evidentiary material in the light most favorable to Ms. Miller. *Estate of Pflanz v. Davis*, 678 N.E.2d 1148, 1150 (Ind. Ct. App. 1997). It failed to do so, which requires reversal.

⁵ Not only did the trial court disregard the evidence of Janet Phillips' sworn testimony, but it improperly inserted its own conclusions as to why Higdon and Sharp did not smell gas, which is discussed in Section III, *infra*.

Indiana Gas calling into question the evidence that is Janet Phillips' testimony, specifically whether Janet Phillips did or did not smell the odor and whether she was able to smell it, inherently involves judging her credibility and the weight given to her testimony. That is not a decision the trial court can make on a motion for summary judgment because **“[s]ummary 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, 307 (Ind. Ct. App. 1981) (emphasis added) (internal citations omitted). Likewise, if the inference Indiana Gas intends to make is that Billy Phillips smoked marijuana in the home and that combined with the Phillips' pets masked the noxious odor the Phillips should have smelled from the natural gas leak (Response at 47 fn. 12), then that is a conflicting inference the jury must weigh and decide; put simply, these questions of disputed fact involve the jury deciding what it believes to be true – not the trial court at the summary judgment stage. *See Caccavale v. Ranger Team Bldg., LLC*, 246 N.E.3d 292, 298 (Ind. Ct. App. 2024) (An “issue is genuine if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences.”) (internal citations omitted).

Similarly, Ms. Miller provided examples of a history of inconsistent and improper odorization, which was designated at the trial court, (Vol. VIII, Miller-ROA-000154; Vol. IX, Miller-ROA-000162; Vol. X, Miller-ROA-000136), in combination with the testimony of Indiana Gas' corporate representative, which confirmed despite concerning sniff tests at potentially dangerous levels just a month prior to the explosion, no further investigations were conducted. (Miller Br. at 18; Vol. X, Miller-ROA-000040-42.) Indiana Gas further conceded via its corporate representative that a reading of one or higher *needs* to be investigated because it is dangerous. (Vol. V, Miller-ROA-000072.) Whether its lack of investigation constitutes negligence is a

question for the jury. *Jackson v. Warrum*, 535 N.E.2d 1207, 1210 (Ind. Ct. App. 1989) (The general rule is that negligence cases are not appropriate for summary judgment. “Summary judgment should not be used as an abbreviated trial and rarely is appropriate in negligence actions.”) (internal citations omitted). While Indiana Gas calls this “speculation,” it was confirmed by its own corporate representative’s testimony (Vol. X, Miller-ROA-000041-42), which was designated at the trial court level, and at the summary judgment stage, the inferences from this evidence are required to be weighed **in favor of** Ms. Miller. *Any* doubt about the existence of a genuine issue of material fact *must be resolved against* the moving party – Indiana Gas. *State v. American Motorists Inc. Co.*, 463 N.E.2d at 1146 (Ind. Ct. App. 1984) (internal citations omitted). The trial court disregarded that designated evidence and instead relied entirely on Indiana Gas’ testing *after* the explosion – making Indiana Gas the judge, jury, and executioner. This complete lack of abiding by the summary judgment standard and improper weighing of the evidence deprived Ms. Miller of her day in court and requires reversal under Indiana law.

II. Regardless of the IURC and the Indiana Gas Tariff, Indiana citizens like Ms. Miller still have rights and recourse under the Indiana Product Liability Act (IPLA), which the trial court wholly failed to consider.

IURC and the Indiana Gas Tariff are not the governing law for product liability cases in Indiana. *Natural Gas Odorizing v. Downs (Downs I)*, 685 N.E.2d 155, 160 (Ind. Ct. App. 1997). Regardless of the existence of the IURC and Tariff, Indiana citizens still have separate rights and recourse under the IPLA. *Id.* 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.”). Here the relevant question involves who is responsible for odorization and whether it met its duty under the IPLA. Indisputably **only Indiana Gas is responsible for odorization**. There is a genuine dispute of material fact as to whether Indiana Gas satisfied its duties under the IPLA making summary judgment improper. But the trial

court failed to engage in the appropriate analysis. (Vol. II, Miller-ROA-000036 ¶ 81.) The IURC Report does not change the fact that this analysis is required.⁶

In *Downs I*, the Court of Appeals explained where “designated evidence leads us to conclude that a genuine issue of material fact exists as to whether the odorant performed as intended,” just like here where the “parties dispute the **Downs’ ability to detect the smell of natural gas. Those issues must be decided by the trier of fact.**” *Id.* at 161. The *Downs* Court then went on to undertake the appropriate duty to warn analysis, and specifically as to odorant and natural gas 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.* at 161-162 (emphasis added). The same is true here – this is a case about safety and accountability.

The *Downs* Court specifically held the IPLA serves to protect consumers like the *Downs* and like Ms. Miller: “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 adequacy of the warning or lack thereof is a question of fact for the jury. *Id.* at 161. The trial court here wholly failed to engage in this analysis, which requires reversal.

⁶ Indiana Gas alleges that Miller did not challenge the admissibility of the Investigative Report which was attached to an affidavit of its employee; however, this is incorrect as Ms. Miller’s Response In Opposition to Summary Judgment challenged the “findings” that were not based on personal knowledge. *See* Vol. VIII, Miller-ROA-000145-147. Ms. Miller further challenged the Investigative Report given the affidavits were based on secondhand information, i.e., “we observed others taking tests...” *See* Appeal Tr. Vol. II at 56.

III. Ms. Miller included the pleadings in her appendix for a full and complete record; her arguments are properly based on the materials designated in response to the motion for summary judgment.

Ms. Miller did not attempt to use her Appendix “as a vehicle for making arguments,” as Indiana Gas alleges repeatedly throughout its Motion to Strike (“Motion”) and Response Brief. As Indiana Gas acknowledges in footnote 2 to its Motion, items from the record need to be included in the Appendix for procedural context. (Motion at 8, fn. 2.) For example, the Mangan Complaint is the Complaint that initiated the lawsuit in which Carla Miller intervened and pursued her claims. All claims caused by and based on this devastating gas explosion proceeded as part of the same case with the same case number and included Ms. Miller’s claims. Indeed, 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 including Ms. Miller’s. (Miller Br. at pp. 9-10; Vol. VI, Miller-ROA-000063-68.) As detailed in Miller’s Response to Indiana Gas’ Motion filed simultaneously herewith, cites to these pleadings are included in the procedural history section of her brief, “Statement of the Case,” Section II, “Course of Proceedings” and are part of the procedural record of this case, which is why Miller included them. There is no basis to strike these pleadings as they are part of the trial court record.

Likewise, Ms. Miller is not attempting to “shoehorn” Mr. Dunn’s report into the designated evidence. It was not designated in response to the summary judgment motion because the parties agreed to extend Ms. Miller’s expert disclosure deadline and Indiana Gas’ damages expert witness deadline, as well as all fact and expert discovery deadlines. (Miller Br. at 11, “Course of Proceedings.”) The trial court entered the parties’ proposed order on January 2, 2025 extending these deadlines. (Vol. VIII, Miller-ROA-000119.) Indiana Gas’ designated materials includes the

report of Donald J. Hoffmann, which discusses and references Mr. Dunn's 2023 report at length and thus, prior briefing was included for a complete record.⁷ (Vol. VII, Miller-ROA-000164, Miller-ROA-000167-171.) Likewise, the trial court improperly substituted its opinion for the jury's as to why Captain Sharp and Jeff Higdon did not smell gas because of how the excess flow valve worked, but Miller designated the testimony of Shane Alexander, Indiana Gas' corporate representative, which included his testimony concerning the excess flow valve (Miller Br. at 28-29; Vol. II, Miller-ROA-000036 ¶ 56) and therefore, Miller's Appendix included all factual cites in the record related to the excess flow valve, which demonstrated how the trial court's error in cherry-picking the evidence it found persuasive and reaching its own conclusion. These pleadings were part of the trial court record and were not included in an attempt to shoehorn Mr. Dunn's 2024 report into the designated evidence. As stated above, Indiana Gas' experts' reports did not offer any new evidence related to the proper odorization of the gas flowing into the Phillips' house, they simply regurgitated the testing results from Indiana Gas' testing.

IV. Indiana Gas proximately caused the explosion by failing to properly odorize its natural gas and the trial court's improper weighing of the evidence deprived Ms. Miller of her day in court.

How the gas began to leak into the Phillips' home is inconsequential to this Court's analysis, because regardless of how, had it been properly odorized, the Phillips and Ms. Miller would have been given a fighting chance because the leak would have been discovered by the smell in the thirteen plus hours during which undisputed excessive flow permeated the Phillips' home causing the explosion. It is undisputed that only Indiana Gas has *non-delegable duty* to ensure the gas it provides to Indiana citizens is properly odorized. 49 CFR § 192.625, *et seq.*;

⁷ The 2023 Dunn report is identical to the 2024 Dunn report served in Ms. Miller's case on the agreed-upon and court-entered deadline of January 24, 2025, which was before the summary judgment hearing. (Vol. X, Miller-ROA-000168.) As stated above, it was not designated as it was not yet required to be disclosed and other evidence refuted Indiana Gas' position that the gas was properly odorized.

Downs I, 685 N.E.2d at 163. That is to protect the citizens of Indiana. Thus, whether Indiana Gas breached its duty to Ms. Miller and the community and thereby proximately caused injury are factual questions generally inappropriate for summary disposition. *Williams v. Ind. Dep't of Corr.*, 142 N.E.3d 986, 1008, (Ind. Ct. App. 2020). Here, there is a genuine issue of material fact as to whether the gas sold by Indiana Gas ***was properly odorized***, whether the ***odorant performed as intended***, and the Phillips' ***ability to detect the smell of gas***. There is evidence on both sides which means it is a factual issue the jury must decide. *Hughley v. State*, 15 N.E.3d 1000, 1004 (Ind. 2014) (Indiana "consciously errs on the side" of letting cases proceed to trial on the merits rather than risk short-circuiting meritorious claims."). The trial court improperly weighed the evidence and substituted its opinion for the jury's. Defeating summary judgment requires only a genuine issue of material fact, not necessarily one the trial court finds to be persuasive. *Id.* Contrary to its duties, the trial court failed to "**liberally construe all designated evidentiary material in the light most favorable to the nonmoving party**" as it is required to do. *Estate of Pflanz v. Davis*, 678 N.E.2d 1148, 1150 (Ind. Ct. App. 1997) (emphasis added). The trial court's failure deprived Ms. Miller of her day in court. Reversal is required.

CONCLUSION

Ms. Miller was indisputably injured through no fault of her own. She waited patiently while the Phillips case proceeded and resolved. While discovery was ongoing and before she was even deposed or produced her expert report, the trial court prematurely granted summary judgment. By doing so, the trial court failed to properly apply the summary judgment standard and failed to liberally construe the evidence in Ms. Miller's favor, and instead improperly weighed the evidence deciding where it believed the preponderance of evidence lied, which is a function of the jury. This error requires reversal. *Beta Steel v. Rust*, 830 N.E.2d 62, 70 (Ind. Ct. App. 2005)

("Summary judgment is rarely appropriate in negligence cases. This is because negligence cases are particularly fact sensitive and are governed by a standard of the objective reasonable person – one best applied by a jury after hearing all of the evidence."). Thus, Ms. Miller respectfully requests this Court reverse the trial court and remand the case for further proceedings so that Ms. Miller has her day in court.

Respectfully submitted,

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WORD COUNT CERTIFICATE

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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on August 25, 2025, a copy of the foregoing was served electronically upon the following by operation of the Indiana e-filing system (IEFS):

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