

APPELLEE'S BRIEF

IN THE
INDIANA COURT OF APPEALS

Case No. 25A-CT-00866

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

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STATEMENT OF ISSUE

Appellant Carla Miller (“Miller”) presents several issues on appeal, which Appellee Indiana Gas Company, Inc. (“Indiana Gas”) restates as follows:

Whether the trial court correctly entered summary judgment in favor of Indiana Gas and against Miller on her product liability and negligence-based claims.

STATEMENT OF CASE¹

This appeal stems from Miller’s action for personal injury and property damage arising out a natural gas explosion that occurred at the home of Billy and Janet Phillips in Jeffersonville, Indiana (“Phillips Residence”) on May 19, 2019 (“Incident”). (App. Vol. II, pp. 116, 127-128.) Miller lived next door to the Phillips Residence. (App. Vol. II, p. 113.) The Incident generated litigation involving multiple plaintiffs and defendants. (App. Vol. II, p. 36.) This appeal is limited to Miller’s lawsuit against Indiana Gas and the trial court’s summary judgment ruling as to her claims. (App. Vol. II, p. 36.) Miller’s claims against Indiana Gas are presented in the operative Intervening Complaint filed on March 19, 2021. (App. Vol. II, pp. 105-130.)

¹ A statement of case “shall briefly describe the nature of the case, the course of the proceedings relevant to the issues presented for review, and the disposition of these issues by the trial court” Ind. App. R. 46(A)(5). Miller’s Statement of Case is improperly argumentative and includes aspects of the procedural history that are irrelevant to the disposition of her appeal, while omitting other critical information for this Court’s review. The bulk of Miller’s ten-volume Appendix likewise contains irrelevant information, making it unnecessarily burdensome for the parties and the Court to sift through numerous filings that have no bearing on the trial court’s summary judgment ruling. *Cf.* Ind. App. R. 50(A)(1). Moreover, the majority of Miller’s Appendix contains materials that were never designated in connection with her claims and thus not part of the summary judgment record under Trial Rule 56(C). *See* Statement of Facts, n.2 and Argument, Section II, *infra*.

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Specifically, Miller brought claims alleging product liability under the Indiana Product Liability Act, Ind. Code § 34-20-1, *et seq.* (“IPLA”), negligent product liability, negligence, negligent hiring, negligent training, negligent supervision, negligent retention, and negligent failure to warn in connection with the Incident. (App. Vol. II, pp. 105-130.) Miller’s product liability claim under the IPLA alleged that Indiana Gas’s “natural gas distribution system” was defective and that the natural gas Indiana Gas supplied to its customers was also defective because it purportedly “lacked the required odorant.” (App. Vol. II, pp. 118, 120.) Miller’s negligence-based theories identified a number of supposed breaches, including Indiana Gas’s purported failure to “properly perform tests on its natural gas lines”; “inspect the gas lines” and other facilities; and supply its customers with natural gas containing “levels of odorant consistent with the requirements of any and all applicable Local, State, and/or Federal laws and/or Administrative regulations[.]” (App. Vol. II, pp. 120-121.)

On November 26, 2024, Indiana Gas filed its Motion for Summary Judgment on Miller’s claims. (App. Vol. VI, p. 134.) Indiana Gas argued that a gas utility only has a duty for gas lines that it owns and does not owe a duty for customer-owned gas lines. (App. Vol. VI, pp. 148-150.) Indiana Gas thus asserted that its duty ended at the outlet side of the gas meter and did not extend inside the Phillips Residence. (App. Vol. VI, pp. 150-152.) In support of this assertion, Indiana Gas designated evidence that the cause of the Incident was “non-jurisdictional” – meaning the cause of the Incident was not a leak on the gas lines that Indiana Gas owned or was responsible for. (App. Vol. VII, pp. 16-18, 131, 133, 135-136, 138, 140-141, 147-148, 157, 167-168,

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172; Vol. VIII, p. 14.) Indiana Gas’s designated evidence included the Indiana Utility Regulatory Commission’s (“IURC”) determination that the “cause of this [I]ncident [was] not jurisdictional.” (App. Vol. VII, pp. 133, 135-136, 138, 140-141.)

Further, Indiana Gas contended that the natural gas supplied to the Phillips Residence was not defective and had been properly odorized as required by federal regulation. (App. Vol. X, pp. 156-164.) Indiana Gas’s designated evidence in support of this contention included odorator readings, which found natural gas odorant levels in the area to be well within the regulatory standard, and the IURC’s determination that “the odorant levels [were] within the acceptable range.” (App. Vol. VII, pp. 17, 121, 135-136, 138, 140-141.)

Finally, Indiana Gas designated evidence that the source of the natural gas involved in the Incident was an uncapped gas line inside the Phillips Residence that someone other than Indiana Gas had intentionally opened. (App. Vol. VII, pp. 18, 19, 131, 159, 168; Vol. VIII, pp. 9, 14.) Based on the foregoing evidence, Indiana Gas maintained that it could not be liable for the Incident absent a duty concerning the leak on a customer-owned gas line, because the gas was properly odorized, and because Indiana Gas did not proximately cause the Incident. (App. Vol. VI, pp. 148-155; Vol. X, pp. 156-164.)

On December 13, 2024, Miller and Indiana Gas submitted a Proposed Agreed Order, which the trial court approved, extending Miller’s deadline to respond to Indiana Gas’s Motion for Summary Judgment to January 10, 2025. (App. Vol. II, p. 32; Vol. VIII, p. 116.) Before Miller filed her opposition materials, the trial court also

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entered an Amended Case Management Plan establishing separate deadlines for Miller to disclose her expert witnesses by January 24, 2025, and for the parties to complete discovery by May 9, 2025. (App. Vol. VIII, p. 119.) Miller did not file a motion under Trial Rule 56(I) to extend the time within which to respond to Indiana Gas's Motion for Summary Judgment past the January 10, 2025 deadline. (App. Vol. II, pp. 32-35; Tr., pp. 49-51.) Nor did Miller submit any affidavits under Trial Rule 56(F) showing the need for a continuance of the January 10, 2025 deadline to obtain additional affidavits, take additional depositions, or conduct more discovery before responding to Indiana Gas's Motion for Summary Judgment. (App. Vol. II, pp. 32-35; Tr., pp. 49-51.)

Instead, Miller filed her Brief and Designation of Evidence in Opposition to Indiana Gas's Motion for Summary Judgment on January 10, 2025. (App. Vol. VIII, pp.121, 153.) Miller did not designate any expert reports or expert testimony in opposition to Indiana Gas's motion. (App. Vol. VIII, pp. 153-248; Vol. IX pp. 1-248; Vol. X pp. 1-138; Tr., pp. 49-51.) Indiana Gas filed its Reply in Support of Motion for Summary Judgment on January 24, 2025. (App. Vol. X, p. 149.)

At the summary judgment hearing on February 3, 2025, Miller's counsel attempted to raise for the first time the opinions of an expert witness, Tim G. Dunn ("Dunn"). (Tr., pp. 48-49.) Counsel for Indiana Gas objected to these arguments because Miller had not designated an expert report from Dunn in opposing Indiana Gas's Motion for Summary Judgment and, therefore, Dunn's opinions were not part of the summary judgment record as to Miller's claims. (Tr., p. 49.) In response to this

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objection, Miller’s counsel insisted that the case management deadlines for expert disclosures and the completion of discovery were “after this briefing” on Indiana Gas’s Motion for Summary Judgment and that Dunn’s expert report on Miller’s behalf “hadn’t been due yet” when Miller filed her opposition materials. (Tr. pp. 49-50). But, as the trial court explained to Miller’s counsel, the “[d]iscovery deadline and [the deadline under Trial Rule] 56(c) are different.” (Tr., p. 50.)

The trial court repeatedly admonished Miller’s counsel that she had “allowed the time period . . . to close” without designating any expert opinions. (Tr., p. 50.) The trial court further observed that Miller’s counsel had not moved to extend the time for Miller to respond to Indiana Gas’s Motion for Summary Judgment to allow for the designation of an expert report from Dunn, which Miller’s counsel apparently received after the response deadline. (Tr., pp. 49-51.) As the trial court put it, “you made no motion to continue your obligation to respond under Trial Rule 56(c). So you’re asking me to consider evidence that is excludable, that I cannot consider for purposes of your argument.” (Tr., p. 50). Miller’s counsel conceded, “I understand we have not made [Dunn’s opinions] a part of the record at this point.” (Tr., p. 50.) And the trial court confirmed, “The caselaw is legion. If you have not moved to extend your time for responding, I cannot consider [this evidence].” (Tr., p. 51).

On March 14, 2025, the trial court entered its Order Granting Summary Judgment (“Summary Judgment Order”) in favor of Indiana Gas and against Miller. (App. Vol. II, pp. 36-58.) Miller appeals the trial court’s Summary Judgment Order.

STATEMENT OF FACTS²

I. The Regulatory Framework in Which Indiana Gas Operates.

Indiana Gas is a public utility that provides natural gas service to retail customers through its pipelines subject to regulation by the IURC and the federal Pipeline and Hazardous Materials Safety Administration (“PHMSA”). (App. Vol. VII, pp. 16, 18, 143, 151-152.) At the time of the Incident, Indiana Gas provided natural gas service to the Phillips Residence pursuant to the terms and conditions of a Tariff for Gas Service approved by the IURC (“Indiana Gas Tariff”). (App. Vol. VII, p. 16.) The Indiana Gas Tariff defined the scope of Indiana Gas’s duty with respect to its pipelines as ending at the outlet side of the gas meter and not extending inside the Phillips Residence. (App. Vol. VII, p. 90.)

The Indiana Gas Tariff states that “[i]t shall not be the duty of [Indiana Gas] to inspect [the] Customer’s piping, appliances or equipment.” (App. Vol. VII, p. 90.) Moreover, “[Indiana Gas] shall not be liable for damages caused by defective piping or appliances on [the] Customer’s Premises.” (App. Vol. VII, p. 96.) The Indiana Gas

² “An appellant is required to provide a narrative and fair statement of the facts presented in accordance with the standard of review appropriate to the judgment or order being appealed” *Ramsey v. Review Bd. of Ind. Dept. of Workforce Dev.*, 789 N.E.2d 486, 488 (Ind. Ct. App. 2003) (citing Ind. App. R. 46(A)(6)). “The statement of facts must . . . be devoid of argument.” *Id.* Miller’s Statement of Facts is riddled with argument, draws factual and legal conclusions that do not comply with the standard of review, and omits key facts directly pertinent to the issues on appeal. Many of Miller’s assertions are supported by inadequate pinpoint citations, missing Appendix citations altogether, or supported by citations to her summary judgment brief as opposed to evidence that was properly designated. Even more problematic is Miller’s discussion of evidence that was never designated in connection with her claims and thus not part of the summary judgment record under Trial Rule 56(C). *See* Argument, Section II, *infra*. Indiana Gas is filing a Motion to Strike Improper Material in Appellant’s Appendix and Brief.

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Tariff requires the customer to bear responsibility for the gas lines inside the customer’s home, declaring that the “Customer shall furnish, install, and maintain all necessary piping beyond the outlet side of the [gas] meter.” (App. Vol. VII, p. 90.)

The natural gas industry relies on the concept of jurisdiction when addressing whether a natural gas incident involved pipelines owned by the utility and thereby under the regulatory jurisdiction of the IURC and PHMSA, or gas lines owned by the customer. (App. Vol. VII, pp. 18, 151.) If the cause of a natural gas incident is deemed to be “not jurisdictional” or “non-jurisdictional”, this means the cause of the incident was not a leak on gas lines the utility owned or was responsible for. (App. Vol. VII, p. 18.)

The IURC monitors operator compliance through field inspections and incident investigations. (App. Vol. VII, pp. 143, 151-152.) Compliance issues and unsafe conditions are addressed through a variety of enforcement tools such as Corrective Action and Safety Orders, Notices of Probable Violation, and Warning Letters. (App. Vol. VII, pp. 143, 151-152.) The IURC issues fines for violations of pipeline safety regulations. (App. Vol. VII, pp. 143, 152.)

II. Indiana Gas’s Investigation into the Incident.

Indiana Gas immediately arrived at the scene to investigate the Incident. (App. Vol. VII, pp. 16, 118, 121-126.) Indiana Gas conducted its investigation under the observation of Dan Novak (“Novak”) and Howard Friend (“Friend”) of the IURC. (App. Vol. VII, pp. 133, 138.)

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A. A Gas Leak Survey Was Negative for Leaks on Indiana Gas's Facilities.

Indiana Gas's investigation included a gas leak survey. (App. Vol. VII, pp. 16, 120, 122-123, 131, 133, 135-136, 138, 140-141.) The gas leak survey included bar hole testing (making a hole in the soil and testing for the existence of natural gas using a combustible gas indicator); walking along the gas main and checking cleanouts and sewer manholes using a flame ionization unit to detect the indication of methane; and pressure testing the service line into the Phillips Resident. (App. Vol. VII, pp. 16, 120, 122-123, 131, 133, 135-136, 138, 140-141.) The ambient air and the soil were tested with Flame Pack 400 hydrocarbon gas detectors, Sensit Gold sensors, and a GMI GT gas detector looking for any potential leaks on Indiana Gas's facilities that may have allowed natural gas to migrate into the Phillips Residence. (App. Vol. VII, pp. 120, 127, 135-136, 140-141.) The gas leak survey was negative for leaks on Indiana Gas's facilities. (App. Vol. VII, pp. 16, 133, 135-136, 138, 140-141.)

B. Pressure Tests Were Negative for Leaks on Indiana Gas's Service Line into the Phillips Residence.

Indiana Gas also performed two pressure tests on the service line into the Phillips Residence. (App. Vol. VII, pp. 16, 131, 133, 135-136, 138, 140-141; Vol. VIII, pp. 11-13.) Both tests confirmed there were no leaks on the service line that is a part of Indiana Gas's system. (App. Vol. VII, pp. 16, 131, 133, 135-136, 138, 140-141; Vol. VIII, pp. 11-13.)

C. Odorator Readings Were Well Within the Regulatory Standard.

Because natural gas is odorless, odorants are added to give it a detectable smell. *See* 49 CFR § 192.625. The odorization of natural gas is governed by a federal regulation promulgated by PHMSA. The regulation provides that “[a] combustible gas in a distribution line must contain a natural odorant or be odorized so that at a concentration in air of one-fifth the lower explosive limit, the gas is readily detectible by a person with a normal sense of smell.” 49 CFR § 192.625. The lower explosive limit of natural gas in air is approximately 5%. (App. Vol. VII, pp. 147, 152, 170.) Therefore, the regulation requires that the odorant in natural gas be “readily detectible by a person with a normal sense of smell” at no more than 1% gas in air. (App. Vol. VII, pp. 147, 152.)

Indiana Gas, accompanied by the Jeffersonville Fire Department, performed odorator readings at the houses on either side of the Phillips Residence and the house across the street from the Phillips Residence on the day of the Incident. (App. Vol. VII, pp. 17, 121, 127.) An odorator is an instrument used to determine the percentage of gas in air at which the odor becomes readily detectable. (App. Vol. VII, p. 17.) Odorator readings determined the natural gas odorant levels at the three test locations were 0.21% (next door to the north), 0.21% (next door to the south), and 0.28% (across the street) – all well within the regulatory standard of no more than 1% gas in air. (App. Vol. VII, pp. 17, 121.)

D. Odor Fade Was Not Occurring.

Odor fade refers to loss of the odorant that is added to natural gas to give it a detectable smell. (App. Vol. VII, p. 153.) The evidence establishes that odor fade was not occurring in the area of the Incident. Dan Novak of the IURC and a representative of Indiana Gas both smelled odorant in the natural gas at 908 Assembly Road, two doors down from the Phillips Residence. (App. Vol. VII, pp. 17, 133, 153.) John Erickson, P.E., President of Safety & Compliance Evaluation, explained:

Odor fade is a condition where odorant in gas is depleted by adsorption onto the inner pipe wall of newly installed gas pipelines thus reducing the level of odorant in the gas. Odor fade can occur on newly installed plastic or steel pipelines until the pipe has become 'pickled,' e.g. the inner wall of the pipe has adsorbed as much odorant as it can adsorb. The gas to [the Phillips Residence] on May 19, 2019 was delivered through a steel main that had been in service for approximately 48 years and a plastic service line that had been in service for over 18 years. Odor fade is not an issue with pipe that has been exposed to odorized gas for years.

. . . . There is no evidence that odor fade was occurring in the gas going to 907 Assembly Road. There is ample evidence that odor fade was not occurring in the Assembly Road area including post-accident odorant tests and Dan Novak of the IURC smelling gas at the meter set at 908 Assembly Road.

(App. Vol. VII, p. 153.)

Regardless, there are no state or federal regulations that require Indiana Gas to notify customers about the possibility of odor fade. (App. Vol. VII, p. 153.) PHMSA has incorporated the American Petroleum Institute Recommended Practice 1162 ("RP1162") into its federal pipeline safety regulations. (App. Vol. VII, p. 153-154.)

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RP1162 does not include odor fade in the list of public awareness messages that natural gas distributors must provide their customers. (App. Vol. VII, p. 154.) Neither the IURC nor PHMSA has issued a violation or notice of probable violation to Indiana Gas citing a failure to notify its customers of odor fade. (App. Vol. VII, p. 154.)

By the time Indiana Gas and the Jeffersonville Fire Department arrived at the scene, representatives could not hear or smell gas coming from the service line into the Phillips Residence. (App. Vol. VII, pp. 131, 156-157; Vol. VIII, pp. 12, 14.) That is because the Incident had triggered an excess flow valve installed underground on the service line, immediately cutting off all gas flow to the Phillips Residence.³ (App. Vol. VII, pp. 131, 147; Vol. VIII, pp. 12, 14.) “An excess flow valve (EFV) is a mechanical safety device that may be installed on a natural gas service line, and is designed to automatically shut off the flow of natural gas through the service line in the event of a significant break[.]” (App. Vol. VII, p. 147.) Here, “[t]he service line excess flow valve [at the Phillips Residence] reacted as designed.” (App. Vol. VIII, p. 14.)

³ Miller contends that “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.” (Appellant’s Br., p. 17.) Miller cites Volume VI, page 49 of her Appendix as support for this assertion. (Appellant’s Br., p. 17.) As addressed in the Argument, Section II, *infra*, this citation is to a separate expert report that Dunn prepared on behalf of a different set of plaintiffs – not Miller. (App. Vol. VI, pp. 44-58.) This other Dunn report was never part of the summary judgment record as to Miller’s claims. (See App. Vol. VIII, pp. 153-248; Vol. IX, pp. 1-248; Vol. X, pp. 1-138; Tr. pp. 49-51.)

E. The Incident Was Not Jurisdictional.

Indiana Gas’s investigation determined that the cause of the Incident was “not jurisdictional.” (App. Vol. VII, pp. 18, 131.) In technical terms, Indiana Gas concluded that the cause of the Incident was not a leak on gas lines that Indiana Gas owned or was responsible for. (App. Vol. VII, pp. 18, 131.)

Rather, Indiana Gas’s investigation revealed that the source of the natural gas involved in the Incident was a pipe inside the Phillips Residence that someone had intentionally opened on the afternoon of May 18, 2019, the day before the Incident. (App. Vol. VII, pp. 18, 131; Vol. VIII p. 14.) The gas meter at the Phillips Residence had an Encoder Receiver Transmitter (“ERT”) that stored a rolling 40 days’ worth of readings. (App. Vol. VII, p. 17.) The ERT data subsequently collected from the gas meter at the Phillips Residence showed there was a sudden increase in gas flow that started between 3:00 p.m. and 4:00 p.m. on May 18. (App. Vol. VII, pp. 18, 116.) According to the ERT data, the gas flow in the Phillips Residence suddenly jumped from 0.00 ccf to 2.74 ccf the afternoon of May 18.⁴ (App. Vol. VII, p. 116.) After 4:00 p.m. on May 18, the flow of gas through the meter continued at a rate of 4.04 to 4.12 ccf per hour until the Incident. (App. Vol. VII, p. 116.) The corresponding daily totals of natural gas flowing through the meter was 0.44 ccf on May 17, 35.80 ccf on May 18, and 19.94 ccf on May 19 (until the Incident occurred at approximately 5:00 a.m. that morning). (App. Vol. VII, pp. 18, 116.)

⁴ Centum cubic feet, or ccf, is a unit of measurement for natural gas, representing one hundred cubic feet.

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Multiple experts ruled that the source of the natural gas involved in the Incident was a pipe inside the Phillips Residence that someone had intentionally opened on the afternoon prior to the Incident:

- Gerry S. Mang of American Structurepoint, Inc. was on site the morning of the Incident. (App. Vol. VII, p. 118.) He found that “[a] cap had been recently removed from the open line by human intervention” and that “[t]he uncapped gas line inside the home is consistent with the amount of natural gas recorded on the ERT data for a period of 13 hours” prior to the Incident. (App. Vol. VIII, pp. 9, 14.) He further noted that, “[t]o remove the pipe cap would require two wrenches, one to hold the pipe nipple and one to remove the cap.” (App. Vol. VIII, pp. 9, 15.)
- Donald J. Hoffman, Ph.D., P.E., IAAI-CFI, of Safety Engineering Laboratories, who was also on site during the investigation, likewise concluded that “[t]he source of the natural gas. . . . was an uncapped gas line inside the home” and that “[t]he cause of this explosion was the opening of the gas line at approximately 3 P.M. the day before” the Incident. (App. Vol. VII, pp. 159, 168.) As he explained:

The sudden increase in gas flow at 3 P.M. on the afternoon prior to the incident is consistent with the removal of the piping's cap. The condition of the open piping after the incident (i.e., rusted but undamaged with pipe dope further up on the threads) is consistent with the removal of the cap. A properly tightened cap would likely have required use of a tool to remove it from the pipe. This evidence is consistent with someone intentionally removing the

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cap from the gas piping at approximately 3 P.M. on the day prior to the incident.

(App. Vol. VII, pp. 159, 168-169.)

- John Erickson, President of Safety & Compliance Evaluation, determined that “[l]eakage surveys, post-accident pressure tests of [Indiana Gas’s] pipeline facilities and hourly meter readings at [the Phillips Residence] indicate that the natural gas that caused this explosion came from a leak inside the house, not from [Indiana Gas’s] pipeline system.” (App. Vol. VII, pp. 143, 157.)

No Indiana Gas personnel were at the Phillips Residence on May 18, 2019, which was a Saturday. (App. Vol. VII, p. 19.) The only individuals present at the Phillips Residence on May 18 were Billy and Janet Phillips. (App. Vol. VIII, pp. 25, 76, 96.) On May 18, the Phillips both worked in the yard at the Phillips Residence from around 8:00 or 9:00 a.m. until 3:00 or 4:00 p.m. (App. Vol. VIII, pp. 76-77.) When Janet Phillips finished working in the yard, she left the Phillips Residence to go to the grocery store and get gas for her car while Billy Phillips remained alone at the Phillips Residence. (App. Vol. VIII, p. 77.) Billy Phillips was the only individual at the Phillips Residence from approximately 3:00 to 4:00 p.m. on May 18. (App. Vol. VIII, pp. 76-77.) Billy Phillips completed plumbing, electrical, painting, drywall, and flooring projects and kept tools at the Phillips Residence. (App. Vol. VIII, pp. 45-46.)

III. The IURC’s Final Incident Report.

The IURC prepared a Final Incident Report authored and signed by Howard Friend and Dan Novak. (App. Vol. VII, pp. 133, 135-136, 138, 140-141.) Friend and

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Novak were immediately at the scene following the Incident and were present to observe Indiana Gas’s investigation. (App. Vol. VII, pp. 132-133, 135-138, 140-141.) The IURC’s Final Incident Report concludes that the “leak survey was negative for gas leaks” on Indiana Gas’s pipelines, that “odorant levels [were] within the acceptable range”, and that “the cause of this [I]ncident [was] not jurisdictional.” (App. Vol. VII, pp. 135-136, 140-141.)

The IURC submitted its Final Incident Report to PHMSA. (App. Vol. VII, pp. 133, 135-136, 138, 140-141.) The IURC did not issue any notices of probable violation or take any other enforcement action with respect to Indiana Gas arising out of the Incident. (App. Vol. VII, pp. 143, 152.) The IURC did not assess any fines or require expenditures in lieu of fines as a result of the Incident. (App. Vol. VII, pp. 143, 152.)

SUMMARY OF ARGUMENT

The Court should affirm the trial court’s Summary Judgment Order. Absent a duty, there can be no breach of duty and therefore no liability in negligence. The evidence and the law are undisputed that Indiana Gas had no duty for the open pipe inside the Phillips Residence that was the source of the Incident. The Indiana Gas Tariff, on its face, defined the scope of Indiana Gas’s duty with respect to its pipelines as ending at the outlet side of the gas meter and not extending into the Phillips Residence. Indiana common law and federal regulation confirm that Indiana Gas was not responsible for customer gas lines that it neither owned nor controlled. The demarcation of duty established under the Indiana Gas Tariff, Indiana common law, and federal regulation is dispositive of Miller’s negligence-based claims.

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This lack of a duty is underscored by the results of the investigation, which revealed that the source of the Incident was non-jurisdictional, namely, gas leaking from an open pipe inside the Phillips Residence and beyond the outlet side of the gas meter. All of the testing performed during the investigation indicated that there were no leaks on Indiana Gas’s pipelines. The IURC’s Final Incident Report substantiates that the source of the Incident was non-jurisdictional. Miller failed to designate any evidence to controvert these undisputed facts. Indeed, she appears to have abandoned any of her original claims involving Indiana Gas’s pipelines, focusing exclusively on the odorization of the natural gas itself.

As for the odorization of the natural gas Indiana Gas supplied to its customers, Miller’s product liability and negligence-based claims rise and fall with the federal regulation governing odorization. It is undisputed that the natural gas was not defective and had been properly odorized. Odorator readings taken at the scene of the Incident showed natural gas odorant levels to be well within the federal standard. The IURC determined in its Final Incident Report that “odorant levels [were] within the acceptable range.” (App. Vol. VII, pp. 135-136, 138, 140-141.) It is also uncontroverted that odor fade was not an issue. In any event, Indiana Gas had no duty to warn its customers of this phenomenon and fully complied with federal pipeline safety regulations governing customer disclosures.

Further, and regardless of which factual or legal theory Miller proceeds under, the evidence is undisputed that Indiana Gas was not the proximate cause of the Incident. The evidence is uncontroverted that the source of the natural gas involved

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in the Incident was a pipe inside the Phillips Residence that someone had intentionally opened on the afternoon prior to the Incident. This was substantiated by the ERT data from the gas meter and corroborated by the rulings of multiple experts, who concluded that the only way the cap could have been removed from the open gas line inside the Phillips Residence was by human intervention. The evidence is uncontroverted that no Indiana Gas personnel were at the Phillips Residence on May 18, 2019, that Indiana Gas had no knowledge that the gas line had been opened, and that the only individuals present at the Phillips Residence on May 18 were Billy and Janet Phillips. Consistent with these facts, the IURC determined that “the cause of this [I]ncident [was] not jurisdictional.” (App. Vol. VII, pp. 133, 135-136, 138, 140-141.)

Miller did not designate any evidence to refute Indiana Gas’s overwhelming evidence negating the element of proximate cause. Her speculation as to other possible causes or what might have happened inside the Phillips Residence does not change these facts or preclude summary judgment. This is particularly true given Miller’s failure to offer any expert testimony to contradict the findings of the investigation, multiple experts, and the state agency charged with regulating Indiana Gas’s operations and overseeing its investigation.

Miller’s efforts to manufacture an issue of fact for trial are unavailing. Her attempts to inject into this appeal material that was never designated to the trial court in connection with her claims and thus not part of the summary judgment record for purposes of this appeal are improper and should be disregarded.

ARGUMENT

I. Standard Of Review.

Indiana summary judgment practice places the burden on a moving defendant to negate – that is, to designate evidence disproving – at least one element of the plaintiff’s claim. *Henderson v. Kleinman*, 103 N.E.3d 683, 687 (Ind. Ct. App. 2018). Once the defendant carries its burden, the burden then shifts to the plaintiff to come forward with contrary evidence requiring resolution by the trier of fact. *Id.* “A defendant is entitled to summary judgment by demonstrating that the undisputed material facts negate at least one element of the plaintiff’s claim.” *Ferguson v. O’Bryan*, 996 N.E.2d 428, 432 (Ind. Ct. App. 2013) (citation omitted). In reviewing a trial court’s summary judgment ruling, this Court stands in the shoes of the trial court, applying the same standards. *Cosgray v. French Lick Resort & Casino*, 102 N.E.3d 895, 899 (Ind. Ct. App. 2018).

This case implicates the question of Indiana Gas’s duty – if any – for the gas line inside the Phillips Residence that was the source of the Incident. The existence of a legal duty is a question of law for the court and therefore may be appropriate for disposition by summary judgment. *Ferguson*, 996 N.E.2d at 432. The interpretation of statutes and regulations likewise presents a question of law for which disposition by summary judgment is particularly appropriate. *See Longa v. Vicory*, 829 N.E.2d 546, 547–48 (Ind. Ct. App. 2005).

Ultimately, “[a] trial court’s grant of summary judgment is clothed with a presumption of validity.” *Lowrey v. SCI Funeral Servs., Inc.*, 163 N.E.3d 857, 860

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(Ind. Ct. App. 2021). Thus, the party that lost in the trial court bears the burden of persuading this Court that the trial court erred. *Id.* This Court may affirm the trial court's grant of summary judgment on any legal basis supported by the designated evidence. *Id.* at 861. On the other hand, the Court is prohibited from "reversing summary judgment orders on the ground that there is a genuine issue of material fact unless the material facts and relevant evidence were specifically designated to the trial court." *Rosi v. Bus. Furniture Corp.*, 615 N.E.2d 431, 434 (Ind. 1993). Applying the foregoing standards, the trial court's Summary Judgment Order should be affirmed.

II. Miller's Appellant's Brief and Appendix Contain Material That Was Never Designated in the Trial Court in Connection with Her Claims and Thus Not Part of the Summary Judgment Record.

Before turning to the substance of the trial court's Summary Judgment Order, Indiana Gas must address Miller's egregious attempts to introduce facts and evidence that were never designated in the trial court in connection with her claims and thus not part of the summary judgment record under Trial Rule 56(C). Indeed, Miller appears to be using her Appendix as a vehicle for making arguments in her Appellant's Brief based on matters that are not part of the summary judgment record relative to her claims and, therefore, outside the record in this appeal.

At page 17 of her Appellant's Brief, for example, Miller contends that "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." (Appellant's Br.,

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p. 17.) She cites Volume VI, page 49 of the Appendix – an expert report from Dunn – as support for this assertion. (Appellant’s Br., p. 17.)

However, Miller fails to mention that this citation is to a *separate* expert report that Dunn prepared on behalf of a *different* set of plaintiffs *a year before* Indiana Gas filed its Motion for Summary Judgment as to Miller’s claims – the only claims that are the subject of this appeal. (App. Vol. VI, pp. 44-58.) The other expert report from Dunn, which Miller includes in Volume VI of her Appendix and relies on in her Appellant’s Brief, is dated December 28, 2023. (App. Vol. VI, p. 44.) A different set of plaintiffs who are no longer part of this case – Kimberly Mangan, as Special Administratrix of the Estate of William Phillips, and Janet Phillips (“Phillips Plaintiffs”) – designated this other expert report in opposing a different summary judgment motion that Indiana Gas filed against the Phillips Plaintiffs on December 14, 2023.⁵ (App. Vol. VI, p. 44.) The trial court never ruled on Indiana Gas’s summary judgment motion as to the Phillips Plaintiffs’ claims. (App. Vol. II, pp. 26-35.) More importantly, Miller never designated Dunn’s other expert report (or her own report from Dunn) in opposing Indiana Gas’s Motion for Summary Judgment as to *her* claims. (App. Vol. VIII, pp. 153-248; Vol. IX, pp. 1-248; Vol. X, pp. 1-138; Tr. pp. 49-51.)

It is well settled that appellate review of a summary judgment ruling “is limited to those materials designated to the trial court.” *Ford v. Jawaid*, 52 N.E.3d 874, 877 (Ind. Ct. App. 2016). The trial court, in turn, is subject to the “bright-line

⁵ The Phillips Plaintiffs’ Designation of Evidence starts at Volume IV, page 61.

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rule” that it “may not consider untimely filed materials opposing summary judgment.” *Andry v. Thorbecke*, 218 N.E.3d 600, 604 (Ind. Ct. App. 2023) (quoting *HomEq Servicing Corp. v. Baker*, 883 N.E.2d 95, 96 (Ind. 2008)). “This is true regardless of the circumstances.” *Andry*, 218 N.E.3d at 604; *see also Booher v. Sheeram, LLC*, 937 N.E.2d 392, 395 (Ind. Ct. App. 2010) (“Our proverbial hands are tied, however, inasmuch as our Supreme Court has made it clear that the trial court simply had no discretion to accept the untimely filed documents, regardless of the circumstances.”), *trans. denied*. As the trial court correctly observed at the summary judgment hearing, the case law on this point “is legion.”⁶ (Tr., p. 51.)

Miller is trying to rectify her failures in the trial court by injecting an expert report that was never part of the summary judgment record for purposes of her claims and this appeal. In fact, Volumes IV and V of Miller’s Appendix are comprised entirely of filings and designated evidence from the summary judgment proceedings involving the Phillips Plaintiffs – not Miller. Portions of Volumes III and VI of Miller’s Appendix similarly contain materials from the Phillips Plaintiffs summary judgment proceedings. (App. Vol. III, pp. 82-249; Vol. VI pp. 1-61.)

⁶ Miller argues that the Phillips Plaintiffs previously disclosed Dunn as an expert witness, Indiana Gas deposed him, and Miller herself later identified him as a potential witness in her preliminary witness list. (Appellant’s Br., p. 12, *see also* p. 10.) To the extent Miller implies that notice of a witness’s existence or testimony should be enough to circumvent the bright-line rule and permit the belated introduction of evidence she failed to designate, that is not the standard. The bright-line rule is “firmly entrenched as an article of faith in Indiana law.” *Mitchell v. 10th and The Bypass, LLC*, 3 N.E.3d 967, 973 (Ind. 2014).

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Not only does Miller attempt to shoehorn the Phillips Plaintiffs’ designated evidence into this appeal, she also seeks to leverage the opinions Dunn provided on behalf of the Phillips Plaintiffs after being expressly told she could not make Dunn’s opinions a part of the summary judgment record in her case. (Tr., pp. 49-51.) Miller emphasizes the fact that she eventually *served* an expert report from Dunn on January 24, 2025, two weeks after her deadline to respond to Indiana Gas’s Motion for Summary Judgment had passed on January 10, 2025. (Appellant’s Br., p. 12.) Miller then purports to make comparisons between Dunn’s expert report prepared on her behalf with the separate expert report Dunn prepared for the Phillips Plaintiffs. (Appellant’s Br., p. 12.) But again, Miller designated *neither* of these reports in opposing Indiana Gas’s Motion for Summary Judgment as to *her* claims. (App. Vol. VIII, pp. 153-248; Vol. IX, pp. 1-248; Vol. X, pp. 1-138; Tr. pp. 49-51.) Indeed, the report Dunn prepared on Miller’s behalf has never even been *filed* in the trial court, let alone designated in connection with the summary judgment proceedings as to Miller’s claims. (App. Vol. II, pp. 3-39.)

Miller’s efforts to insert these materials into her appeal of the Summary Judgment Order as to her claims are especially egregious considering her counsel’s admission at the summary judgment hearing that “we have not made [Dunn’s opinions] a part of the record at this point.” (Tr., p. 50.) The trial court repeatedly admonished Miller’s counsel that she had failed to timely designate *any* expert opinions in opposition to Indiana Gas’s Motion for Summary Judgment and that the trial court could not consider an expert report from Dunn. (Tr., pp. 49-51.)

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Having been told that it was too late to designate Dunn's expert report relative to Miller's claims, Miller's counsel brazenly resorts to introducing and relying upon a separate report from Dunn submitted on behalf of a different set of plaintiffs in connection with a separate summary judgment motion not before this Court. *See In re A.P.*, 882 N.E.2d 799, 802 n.2 (Ind. Ct. App. 2008) (striking portions of appellant's appendix that erroneously included documents from a separate proceeding that was not before the Court on appeal; emphasizing that "it is improper to support an appellate argument with evidence that is outside of the trial court record"). Such tactics violate basic rules of trial and appellate procedure and are not well taken. *See Emp'rs Ins. of Wausau v. Recticel Foam Corp.*, 716 N.E.2d 1015, 1020 n.3 (Ind. Ct. App. 1999) (cautioning that mischaracterization of the record "can hamper advocacy as it renders the facts unreliable to the court in deciding the issues").

Notably, Miller does not appeal the trial court's decision that an expert report from Dunn was "excludable" and could not be considered as summary judgment evidence in her case. (Tr., pp. 49-51.) Thus, Miller has waived the issue on appeal, and she cannot raise it for the first time in her Reply Brief. *See Akin v. Simons*, 180 N.E.3d 366, 375 (Ind. Ct. App. 2021) (reiterating that "grounds for error may only be framed in an appellant's initial brief and if addressed for the first time in the reply brief, they are waived"). While Miller suggests in passing that she believes "summary judgment was premature" because the case management deadlines for expert disclosures and the completion of discovery had not yet expired and she needed more time to review Indiana Gas's document production (Appellant's Br., pp. 11-12), these

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excuses do not justify Miller’s attempts to introduce facts and evidence on appeal that were never part of the summary judgment record in connection with her claims.

Regardless, she has waived that issue too. As the trial court pointed out, Miller did not file a motion under Trial Rule 56(I) to extend the time within which to respond to Indiana Gas’s Motion for Summary Judgment past the January 10, 2025 deadline. (App. Vol. II, pp. 32-35; Tr., pp. 49-51.) Nor did Miller submit any affidavits under Trial Rule 56(F) showing the need for a continuance of the response deadline to obtain additional affidavits, take additional depositions, or conduct more discovery. (App. Vol. II, pp. 32-35.) These were Miller’s options if she wanted to designate an expert report from Dunn or engage in any other discovery before responding to Indiana Gas’s Motion for Summary Judgment.⁷ *See HomEq*, 883 N.E.2d at 98-99 (instructing that when “a nonmoving party fails to respond to a motion for summary judgment within 30 days by either filing a response, requesting a continuance under Trial Rule 56(I), or filing an affidavit under Trial Rule 56(F), the trial court cannot consider summary judgment filings of that party subsequent to the 30-day period”).⁸

⁷ Miller also mentions that four Indiana Gas representatives who were identified in its investigative report have not been deposed. (Appellant’s Br., p. 34.) If Miller believed their testimony was critical to responding to Indiana Gas’s Motion for Summary Judgment, she had avenues for pursuing this relief. She did not avail herself of those opportunities.

⁸ The trial court extended Miller’s deadline to respond to Indiana Gas’s Motion for Summary Judgment, but the parties sought that extension *before* the 30-day deadline for responding to the motion had expired. Indiana Gas filed its Motion for Summary Judgment on November 26, 2024, and the parties submitted their Proposed Agreed Order to extend Miller’s deadline on December 13, 2024. (App. Vol. II, p. 32.)

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Instead, Miller elected to press ahead without any expert opinions and filed her materials in opposition to Indiana Gas’s Motion for Summary Judgment on January 10, 2025. (App. Vol. VIII, pp. 153-248; Vol. IX, pp. 1-248; Vol. X, pp. 1-138.) Having failed to pursue any of the options available to her under the rules of summary judgment procedure, Miller cannot be heard to complain that the trial court’s Summary Judgment Order was premature. *See Kimberlin v. DeLong*, 637 N.E.2d 121, 129 (Ind. 1994) (“A party cannot claim error in the trial court’s failure to take action when he fails to make the motions which would have given the court an opportunity to act.”). For the foregoing reasons, the Court should not consider the improper material contained in Miller’s Appellant’s Brief and Appendix in reviewing the trial court’s Summary Judgment Order.

III. The IURC’s Final Incident Report and Affidavits Are Admissible.

Indiana Gas must also address as a threshold evidentiary matter whether the IURC’s Final Incident Report and affidavits are admissible and properly part of the summary judgment record.⁹ The trial court’s decision to admit or exclude evidence at

⁹ Miller questions in conclusory fashion the adequacy of an affidavit from one of Indiana Gas’s representatives and the investigative report attached to that affidavit. (Appellant’s Br., pp. 33-34.) Miller also complains that the individuals who performed the testing did not authenticate Indiana Gas’s investigative report. (Appellant’s Br., p. 35.) Miller did not challenge the admissibility of this evidence in the trial court below, and cannot raise the issue for the first time on appeal. (App. Vol. VIII, pp. 121-152.) That issue is waived. *See D.H. by A.M.J. v. Whipple*, 103 N.E.3d 1119, 1127 (Ind. Ct. App. 2018) (“A mere general objection, or an objection on grounds other than those raised on appeal, is ineffective to preserve an issue for appellate review.”) (citation omitted); *see also Riggin v. Rea Riggin & Sons, Inc.*, 738 N.E.2d 292, 306 n.9 (Ind. Ct. App. 2000) (concluding that Court may consider affidavits where party failed to adequately object to their admission). Regardless, Miller fails to develop any cogent argument or legal authority as to why this evidence is inadmissible, beyond her bald

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the summary judgment stage is reviewed for an abuse of discretion. *Five Star Roofing Sys., Inc. v. Armored Guard Window & Door Grp., Inc.*, 191 N.E.3d 224, 234 (Ind. Ct. App. 2022). This Court will reverse a trial court’s decision to admit or exclude evidence only if that decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.*

Miller contends that the IURC’s Final Incident Report is inadmissible hearsay and does not fall within the public records hearsay exception under Evidence Rule 803. (Appellant’s Br., p. 35.) However, the Final Incident Report did not need to satisfy the requirements of Evidence Rule 803, because it was attached to and authenticated by the affidavits of Howard Friend and Dan Novak, representatives of the IURC who were physically present at the scene of the Incident, personally observed Indiana Gas’s investigation, and authored and signed the report. (App. Vol. VII, pp. 132-134, 137-139.)

Friend and Novak, as authors of the Final Incident Report with personal knowledge of the investigation, can certainly authenticate the report. *See* Ind. Evid. R. 901(a) (stating that to satisfy requirement of authentication, proponent need only produce sufficient evidence “to support a finding that the item is what the proponent claims it is”); Ind. Evid. R. 901(b) (explaining that item can be authenticated through

assertions. This, too, results in waiver of the issue on appeal. *See Reed v. Reid*, 980 N.E.2d 277, 297 (Ind. 2012) (stating that failure to support assertions with “cogent reasoning” and citations to legal authority results in waiver of the argument on appeal). Miller is prohibited from developing these arguments in her Reply Brief. *See Akin*, 180 N.E.3d at 375.

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“[t]estimony that an item is what it is claimed to be, by a witness with knowledge”). Authentication of the Final Incident Report aside, Friend and Novak can testify as to their personal involvement in the investigation giving rise to their preparation of the report, including the ultimate findings and conclusions embodied in the report. The findings and conclusions in the IURC’s Final Incident Report are not hearsay; they represent the findings and conclusions of the declarants who prepared the report and submitted the affidavits to which the report is attached. This is the antithesis of hearsay. *See* Ind. Evid. R. 801(c)(1) (“Hearsay” means a statement that “is *not* made by the declarant while testifying at the trial or hearing”) (emphasis added).

Miller’s reliance on *Duncan v. Duncan*, 764 N.E.2d 763 (Ind. Ct. App. 2002), and *Hagerman Constr., Inc. v. Copeland*, 697 N.E.2d 948 (Ind. Ct. App. 1998), is misplaced. In *Duncan*, the mother of an accident victim attached to her affidavit unsworn and uncertified copies of police documents that she had no involvement in preparing. 764 N.E.2d at 766. The mother had no personal knowledge to authenticate these documents, let alone testify as to their contents. In *Hagerman*, the defendant attempted to rely on evidence of safety orders issued by IOSHA at trial. 697 N.E.2d at 955. There is no indication that the defendant proffered a witness from IOSHA who could testify as to those orders based on the witness’s personal knowledge. *Id.*.

Duncan and *Hagerman* are inapposite given Friend’s and Novak’s personal knowledge, first-hand observation of, and direct involvement in the investigation giving rise to the Final Incident Report, which they authored and signed. *Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 159 (Ind. Ct. App. 1997) (“*Downs I*”),

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which Miller relies on heavily in her Appellant's Brief, considered accident reports issued by both the IURC and the National Transportation Safety Board in reviewing the trial court's summary judgment order in that case.

Beyond the Final Incident Report itself, Miller challenges the admissibility of the affidavits from Friend and Novak. Summary judgment affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affidavit is competent to testify to the matters stated therein." Ind. Trial R. 56(E). "An affidavit need not contain an explicit recital of personal knowledge when it can be reasonably inferred from its contents that the material parts thereof are within the affiant's personal knowledge." *DeLage Landen Fin. Servs., Inc. v. Cmty. Mental Health Ctr., Inc.*, 965 N.E.2d 693, 701 (Ind. Ct. App. 2012) (citation omitted).

Here, Miller asserts that Friend's and Novak's affidavits contain inadmissible hearsay because they recount purportedly "secondhand information." (Appellant's Br., pp. 34-35.) This characterization flies in the face of the affidavits themselves, which establish that Friend and Novak were physically present at the scene of the Incident and personally observed the testing recounted in the Final Incident Report. This is not "secondhand information." (Appellant's Br., p. 34.) Nor does the information constitute statements by out-of-court declarants. *See* Ind. Evid. R. 801(a). They are facts and events that Friend and Novak witnessed and experienced first-hand, and to which Friend and Novak can testify based on their personal knowledge.

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Nevertheless, Miller suggests that Friend's and Novak's affidavits fail to qualify them as expert witnesses and that their testimony is not "reliable" under Evidence Rule 702. (Appellant's Br., p. 35.) But Friend and Novak were not proffered as expert witnesses. They were proffered as fact witnesses – representatives of the state agency with regulatory authority over Indiana Gas's operations and investigation into the Incident. Miller cites no legal authority – nor is Indiana Gas aware of any – that the representatives of a regulatory body who have first-hand knowledge of an investigation and were personally involved in the events giving rise to their preparation of an investigative report can only testify as to those facts and the results of their investigation if they are qualified as expert witnesses.

Finally, Miller dismisses the IURC's Final Incident Report and affidavits as "inconsequential" because the IURC's "investigation was primarily to determine if a service line maintained by Indiana Gas had leaked." (Appellant's Br., p. 34.) Miller's position reflects a fundamental misunderstanding of the natural gas industry and IURC's role in that highly regulated framework.

The Natural Gas Pipeline Safety Act of 1968 established the federal pipeline safety program and led to national safety standards for the transportation of natural gas. 49 U.S.C. § 1671, *et seq.* The law also established procedures under which states could assume responsibility for the regulation and enforcement of these standards under a certified agreement with PHMSA. 49 U.S.C. § 1671(5). The Indiana General Assembly created the IURC's Pipeline Safety Division to serve as the state's pipeline safety authority. Ind. Code § 8-1-22.5-2. The IURC Pipeline Safety Division operates

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in partnership with PHMSA under a certification agreement and receives its authority under state law to enforce state and federal safety regulations over interstate pipelines. Ind. Code § 8-1-22.5, *et seq.* The IURC's Pipeline Safety Division is also authorized to investigate natural gas incidents. *Id.*

The Final Incident Report authored by Novak and Friend was the report of the IURC Pipeline Safety Division to PHMSA. (App. Vol. VII, pp. 132-141.) The IURC concluded and reported to PHMSA that Indiana Gas was not at fault for the Incident. Thus, despite Miller's efforts to diminish the Final Incident Report as somehow inconsequential, it should be self-evident that the report is eminently consequential to Miller's claims.

IV. The Trial Court's Summary Judgment Order Should Be Affirmed.

A. Miller Has Waived Any Purported Error in the Trial Court's Summary Judgment Order on Her Claims Involving Indiana Gas's Pipelines and Facilities.

Having addressed the proper scope of the summary judgment record, Indiana Gas now turns to the merits of the trial court's Summary Judgment Order, which should be affirmed on appeal. In considering the propriety of summary judgment, it is important to understand the scope of Miller's position relative to her original claims in this case. Miller's operative Intervening Complaint asserted a product liability claim under the IPLA attacking *both* Indiana Gas's "natural gas distribution system" *and* the natural gas itself. (App. Vol. II, pp. 118, 120.) Miller's negligence-based claims likewise identified supposed breaches arising from Indiana Gas's purported conduct with respect to *both* its "natural gas lines" and facilities *and* the natural gas

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itself. (App. Vol. II, pp. 120-121.) The trial court entered summary judgment on all of Miller's claims in the Intervening Complaint. (App. Vol. II, p. 57)

However, Miller has abandoned any claims regarding Indiana Gas's pipelines and facilities in lieu of focusing exclusively on her allegations concerning the natural gas itself (more specifically, its odorization). In her Appellant's Brief, and despite her contentions in the operative Intervening Complaint, Miller maintains that "the piping (which delivered the natural gas . . . is not at issue in this lawsuit)" (Appellant's Br., p. 22.) She insists that "she does not allege the gas lines were defective." (Appellant's Br., p. 30.) Instead, her singular theory on appeal is that the question of "whether Indiana Gas properly odorized the gas" is for the jury to decide. (Appellant's Br., p. 28.) Having chosen to tailor this appeal solely to her claims involving the natural gas itself, Miller has waived any argument that summary judgment on her pipelines and facilities-based claims was improper. *See Akin*, 180 N.E.3d at 375.

B. Indiana Gas Had No Duty for the Pipeline Inside the Phillips Residence that Was the Source of the Incident.

Miller's waiver notwithstanding, the evidence and the law are undisputed that Indiana Gas had no duty for the pipeline inside the Phillips Residence that was the source of the Incident. Indiana Gas supplied natural gas service to the Phillips Residence pursuant to the terms and conditions of the Indiana Gas Tariff. A tariff is required by the IURC to establish the terms and conditions of utility service to a utility's customers. *Airco Indus. v. Ind. Mich. Power*, 614 N.E.2d 951, 952 n.1 (Ind. Ct. App. 1993). "The tariff governs the relations between a utility and its customers."

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Ameritech Publ’g., Inc. v. Strachan, 783 N.E. 2d 378, 381 (Ind. Ct. App. 2003). Once a utility regulatory commission approves a tariff, it is “a law, not a contract, and has the force and effect of a statute.” *Ill. Cent. Gulf R.R. Co. v. Sankey Bros., Inc.*, 384 N.E.2d 543, 545 (Ill. App. Ct. 1978), *aff’d* 398 N.E.2d 3 (Ill. 1979).

The Indiana Gas Tariff plainly states: (1) “[i]t shall *not* be the duty of [the] Company to inspect [the] Customer’s piping, appliances or equipment”; (2) the “Company shall *not* be liable for damages caused by defective piping or appliances on [the] Customer’s Premises”; and (3) the “*Customer* shall furnish, install, and maintain all necessary piping beyond the outlet side of the [gas] meter” (App. Vol. VII, pp. 90, 96) (emphases added). Accordingly, the Indiana Gas Tariff, on its face, defined the scope of Indiana Gas’s duty with respect to its pipelines as ending at the outlet side of the gas meter and not extending inside the Phillips Residence. *See U.S. Steel Corp. v. N. Ind. Pub. Serv. Co.*, 951 N.E.2d 542, 561 (Ind. Ct. App. 2011) (looking to “plain language of the [gas] tariff” to determine its meaning), *trans. denied*. For this reason alone, Indiana Gas had no duty for the pipeline inside the Phillips Residence, which was the source of the Incident.

Indiana common law bolsters the conclusion that a gas company is not responsible for gas lines that it does not own or control. In *Downs v. Panhandle East Pipeline Co.*, 694 N.E.2d 1198, 1204–07 (Ind. Ct. App. 1998), *trans. denied* (“*Downs II*”), this Court affirmed the trial court’s entry of summary judgment on the basis that a natural gas distributor could not be held liable for leaking gas pipelines over which it had no ownership or control. In reaching this conclusion, the Court in *Downs II*

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analogized the supply of natural gas to the supply of electricity, which the Court had previously discussed in *Northern Indiana Public Service Co. v. East Chicago Sanitary District.*, 590 N.E.2d 1067 (Ind. Ct. App. 1992) (“*NIPSCO*”). *Id.* at 1204.

In *NIPSCO*, this Court recognized that utility company liability generally turns on whether “the utility owned the power lines involved” in an electrical incident. 590 N.E.2d at 1072. As this Court explained, “It is the ownership of the lines that creates the relationship upon which any liability is based.” *Id.* at 1072-73. The Court specifically acknowledged the distinction between the electricity supplier’s “own wires” and “the wires owned and maintained by [the] customer” of the electricity supplier. *Id.* at 1073 (citation omitted). Absent ownership and control of the power lines in question, the Court held that *NIPSCO* owned no duty to ensure the safety of the customers injured in an electrical incident. *Id.*

Citing *NIPSCO*, this Court in *Downs II* reiterated that, “absent ownership and control of the faulty wiring, a supplier of electricity has no duty for injury caused by the owner’s failure to safely maintain the wiring.” 694 N.E.2d at 1204. The Court found the *NIPSCO* case “instructive on the issue of duty” in the natural gas context. *Id.* The Court saw “no reason why this rule should not be applied when the utility involved is natural gas rather than electricity.” *Id.*

This Court’s analogy between electricity and natural gas in *Downs II* makes sense. If a fire is caused by a short circuit in the wiring inside a residence, the utility that provides electricity to the residence is not responsible. Likewise, if a water pipe inside a residence ruptures, the utility that provides water to the residence is not

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responsible. Natural gas companies like Indiana Gas are not subject to a higher standard of care for gas lines inside the customer’s home that it does not own or control. *See id.* at 1205 (“[W]here ownership or control of the utility lines is absent, actual knowledge of the circumstances that created an imminent danger to the injured party is required before liability attaches.”) (citing *NIPSCO*, 590 N.E.2d at 1073). A gas company need only “exercise ordinary care in operating *its* mains and service lines so as to prevent the escape of gas” *Richmond Gas Corp. v. Reeves*, 302 N.E.2d 795, 811 (Ind. Ct. App. 1973) (emphasis added).

Federal regulation confirms that the responsibility of a gas company terminates at the outlet side of the gas meter. In particular, 49 CFR § 192.3 states that “[a] service line ends at the outlet of the customer meter or at the connection to a customer’s piping, whichever is further downstream, or at the connection to customer piping if there is no meter.” By federal regulation, therefore, the gas line that extends from the outlet side of the gas meter into and throughout the customer’s home is the responsibility of the customer – not the gas company.

The demarcation of duty established under the Indiana Gas Tariff, Indiana common law, and federal regulation is dispositive of Miller’s negligence-based claims. To prevail on a negligence claim, the plaintiff must demonstrate a duty owed to the plaintiff by the defendant. *Lowrey*, 163 N.E.3d at 861. Whether a duty exists is a question of law for the court to decide. *Id.* Absent a duty, there can be no breach and therefore no liability. *Id.*

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Here, the investigation revealed that the source of the Incident was non-jurisdictional, namely, gas leaking from an open pipe inside the Phillips Residence. (App. Vol. VII, pp. 16-18, 131, 133, 135-136, 138, 140-141.) The gas survey of Indiana Gas's facilities was negative for leaks on Indiana Gas's facilities. (App. Vol. VII, pp. 16, 133, 135-136, 138, 140-141). Two pressure tests of the service line confirmed that the Indiana Gas-owned service line into the Phillips Residence was not leaking. (App. Vol. VII, pp. 16, 131, 133, 135-136, 138, 140-141). The IURC's Final Incident Report substantiated that the source of the Incident was non-jurisdictional. (App. Vol. VII, pp. 133, 135-136, 138, 140-141.)

Moreover, Indiana Gas had no knowledge that the gas line had been opened inside the Phillips Residence until after the Incident. (App. Vol. VII, pp. 17-19.) No representatives of Indiana Gas were at the Phillips Residence on May 18, 2019, the day the gas line was opened. (App. Vol. VII, p. 19.) And the gas meter at the Phillips Residence only stored data for subsequent collection through radio frequency by a laptop inside a vehicle driving down the street – it did not transmit any data to Indiana Gas in real time. (App. Vol. VII, pp. 17-18.)

Miller failed to designate any evidence to controvert these undisputed facts. As noted above, Miller has abandoned her product liability and negligence-based claims premised on Indiana Gas's pipelines and facilities as distinct from the natural gas it supplied to its customers. *See* Argument, Section IV(A), *supra*. Absent a duty with respect to the pipeline inside the Phillips Residence that was the source of the

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Incident, Indiana Gas cannot be held liable for the Incident. The trial court's Summary Judgment Order should be affirmed on this basis. (App. Vol. II, pp. 51-52.)

C. The Evidence is Undisputed That the Natural Gas Indiana Gas Supplied Was Properly Odorized.

Turning to Miller's claims involving the natural gas itself, any analysis of whether the natural gas that Indiana Gas supplied was properly odorized must begin and end with the federal regulation addressing the odorization of natural gas. Miller's own Intervening Complaint rests on allegations that Indiana Gas failed to supply its customers with natural gas containing "levels of odorant consistent with the requirements of any and all applicable . . . Federal laws" (App. Vol. II, p. 121.)

The federal regulation promulgated by PHMSA provides that "a combustible gas in a distribution line must contain a natural odorant or be odorized so that at a concentration in air of one-fifth the lower explosive limit, the gas is readily detectable by a person with a normal sense of smell." 49 CFR § 192.625. Under this regulation, the odorant in natural gas must be "readily detectible by a person with a normal sense of smell" at no more than 1% gas in air. (App. Vol. VII, p. 147.) It is undisputed that odorator readings taken at the scene of the Incident showed natural gas odorant levels to be well within the 1% upper limit for detection under the federal standard: 0.21% (next door to the north), 0.21% (next door to the south), and 0.28% (across the street). (App. Vol. VII, pp. 17, 121.) The IURC determined in its Final Incident Report that "odorant levels [were] within the acceptable range." (App. Vol. VII, pp. 135-136,

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140-141.) Miller failed to submit any evidence to controvert the undisputed fact that the natural gas was properly odorized under 49 CFR § 192.625.¹⁰

Absent any evidence that the natural gas was not properly odorized pursuant to 49 CFR § 192.625, Miller cannot prevail on her product liability claim under the IPLA. Such a claim, at a minimum, requires proof of a “defective” product under the statute. *See* Ind. Code § 34-20-2-3 (identifying manufacturing defect and defective design as possible ways in which a product can be defective). Nor can Miller prevail on her negligence-based theories absent a breach of any duty relative to the odorization of the natural gas. *See Lowrey*, 163 N.E.3d at 861 (listing elements of a negligence claim, including duty and breach of that duty). The trial court’s entry of summary judgment on Miller’s claims, to the extent they arose out of the odorization of natural gas, was correct and should be affirmed. (App. Vol. II, pp. 53-54.)

¹⁰ Miller contends that the trial court “ignore[d]” other testing at the scene that showed a lower explosive limit of 2%. (Appellant’s Br., p. 29.) Miller is presumably referencing a statement in the notes documenting Indiana Gas’s investigation, which state, “D. Tharp found a small leak over the tap at 907 Assembly. It looked like it had been dug up recently. Reading 2% LEL. (Note: later dug up and was determined to have been residual gas from casing from when service was recently replaced on 5-1-19 for a fault reading).” (App. Vol. VII, p. 122.) Again, the IURC was present for the investigation and concluded that the “odorant readings from the neighborhood [were] within the acceptable range.” (App. Vol. VII, pp. 135-136, 138, 140-141.) The IURC clearly understood what “Reading 2% LEL” in the investigation notes meant. First, this reading did not come from an odorator and was from a completely different piece of equipment. (App. Vol. VII, pp. 122, 127, 131.) Second, the equipment was detecting “residual gas” that got trapped inside an old PVC sleeve during the replacement of a service line on May 1, 2019, weeks before the Incident – not an active leak at the time of the Incident. (App. Vol. VII, pp. 122, 131.) Lastly, a 2% LEL reading indicates that the *gas concentration* is at 2%, as compared to a gas concentration of 5% - which is the level that could cause an explosion (i.e., a gas concentration of 5% is the LEL of natural gas). The reading has nothing to do with odorization levels. It is identifying whether there was enough residual gas being detected to present a risk of ignition.

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Miller’s efforts to manufacture issues of fact on the matter of odorization are unavailing and cannot save her claims from summary judgment. Miller attempts to portray Indiana Gas in a bad light by referencing a purported history of improper odorization that fell “outside of industry standards[.]” (Appellant’s Br., p. 17.) She cites to testing “from across the area” that supposedly produced odorator readings in excess of the legal limit. (Appellant’s Br., p. 17.) But the testing in the so-called “area” upon which Miller relies was done in Madison, Indiana – *more than 40 miles away* from the scene of the Incident in Jeffersonville, Indiana. (App. Vol. X, pp. 39-41.) Miller offers no explanation – beyond sheer speculation – as to how test results from a different city more than 40 miles away could possibly have any bearing on the cause of the Incident in this case.¹¹ *See Cosme v. Clark*, 232 N.E.3d 1141, 1150 (Ind. 2024) (emphasizing that “speculation is not enough to overcome summary judgment”) (citation omitted).

Miller complains that the odorator readings taken at the scene of the Incident were “*post-explosion* odorator readings.” (Appellant’s Br., p. 24.) However, she offers no authority or evidence that such readings are not an accurate data point in the

¹¹ In addition to her misleading reference to testing supposedly performed in the “area”, Miller mischaracterizes the results of the “sniff tests” – i.e., odorator testing – performed in Madison prior to the Incident. (Appellant’s Br., p. 17.) Miller does not cite to anything in the record to support her claim that the odorator readings in Madison were at 1.2% – “20% higher than the legal limit.” (Appellant’s Br., p. 17.) Contrary to Miller’s assertion, the odorant in Madison was in fact detected *at 1%* gas in air. (App. Vol. X, pp. 39-41.) The testimony regarding this testing confirmed that the odorator readings in Madison were “within range” at 1%. (App. Vol. X, p. 40.) Federal regulation requires the odorant in natural gas to be readily detectible at 1% gas in air or less. 49 CFR § 192.625. Miller’s misstatements in her Appellant’s Brief are not well taken. *See Emp’rs Ins. of Wausau*, 716 N.E.2d at 1020 n.3.

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investigation of any natural gas incident. The IURC – the state agency charged with regulating Indiana Gas and overseeing the investigation – certainly viewed the odorator readings taken on the day of the Incident as a valid data point based on its conclusion in the Final Incident Report that “the odorant levels [were] within the acceptable range.” (App. Vol. VII, pp. 135-136, 138, 140-141.)

Nevertheless, Miller tries to minimize these odorator readings by attacking the sufficiency of Indiana Gas’s affidavits, which – according to Miller – lack “any specificity” about how the odorator tests were performed. (Appellant’s Br., p. 24.) But the perceived level of specificity in the affidavits does not change the results of the odorator readings themselves. Once Indiana Gas designated evidence of odorator readings within the federal standard, it was incumbent upon Miller to rebut those findings with proof. This, she failed to do.

Regardless of Miller’s failure to meet her burden, Indiana Gas presented more than enough evidence to lay a foundation for the odorator readings. Howard Friend from the IURC testified that he personally “observed representatives of [Indiana Gas] obtain odorant readings from the neighborhood that indicated odorant levels were within the acceptable range.” (App. Vol. VII, p. 138.) The testimony from an Indiana Gas representative provided additional detail about the odorator readings, including where they were performed, the type of instrument used, how an odorator works, and who performed the odorator testing. (App. Vol. VII, p. 17.) Indeed, Indiana Gas directed the Jeffersonville Fire Department to observe the odorator readings because it “wanted a neutral party to be involved” in the testing. (App. Vol. VII, p. 17.) Indiana

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Gas’s investigative report further documents the odorator testing and includes a map identifying exactly where the odorator readings were taken in relation to the Phillips Residence, the levels detected, and even the brand and serial number of the odorator used. (App. Vol. VII, pp. 121, 127.)

Odorator readings aside, Miller points to Janet Phillips’s testimony that she did not personally smell natural gas at the Phillips Residence prior to the Incident. (Appellant’s Br., p. 16.) That does not create an issue for trial either. The federal regulation that governs the odorization of natural gas does not mandate that every single human being must be able to smell the gas, let alone that they must be able to smell the gas in the ambient air inside the residence. The regulation merely requires that gas “in a distribution line” be odorized such that someone with “a normal sense of smell” is able to detect it at a concentration in air of “one-fifth the lower explosive limit.”¹² 49 CFR § 192.625. The evidence is undisputed that the natural gas readily met this federal standard. Janet Phillips’s testimony – even accepting it as credible and true – does not change that incontrovertible fact.

Miller also contends that, by the time Indiana Gas and the Jeffersonville Fire Department arrived at the scene, representatives could not hear or smell gas coming from the service line into the Phillips Residence. (Appellant’s Br., pp. 26-28.) But her

¹² Checking for natural gas odor “in a distribution line” versus the ambient air eliminates the potential for other odors masking one’s ability to detect the odorant in the natural gas. There is evidence that Billy Phillips smoked pot in the Phillips Residence every day, and the Phillips had a dog and a cat that lived in the house – all of which would mask other odors. (App. Vol. VIII, pp. 70-72, 74.)

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analysis of this evidence reflects a misunderstanding of the elements involved in a natural gas distribution system.

Jeff Higdon, an Indiana Gas employee, and Captain Sharp of the Jeffersonville Fire Department did not hear or smell gas coming from the service line into the Phillips Residence because the Incident had triggered an excess flow valve installed underground on the service line, immediately cutting off all gas flow to the Phillips Residence. (App. Vol. VII, pp. 131, 147; Vol. VIII, pp. 12, 14.) “An excess flow valve (EFV) is a mechanical safety device that may be installed on a natural gas service line, and is designed to automatically shut off the flow of natural gas through the service line in the event of a significant break[.]” (App. Vol. VII, p. 147.) Here, “[t]he service line excess flow valve [at the Phillips Residence] reacted as designed.” (App. Vol. VIII, p. 14.) This was confirmed by evidence at the scene that there was “no flame or burning at the meter separation break on the outlet of the wing valve or main shut-off at the meter set next to the house[.]” (App. Vol. VIII, p. 12.)

Miller presented no evidence to the contrary. While Miller makes much ado about a valve that Captain Sharp manually shut off upon his arrival at the scene of the Incident, she confuses the excess flow valve with the valve at the gas meter. (Appellant's Br., pp. 26-29.) These are two different things. Unlike the excess flow valve, the valve at the gas meter is above ground and located on the gas meter itself. (App. Vol. IX, p. 83.) It was prudent for Captain Sharp, out of an abundance of caution, to turn off the valve located on the gas meter even though the Incident had already triggered the underground excess flow valve and automatically shut of the

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flow of gas into the Phillips Residence. (App. Vol. VII, pp. 131, 146-147; Vol. VIII, pp. 12, 14.) The fact that Captain Sharp later turned off the valve located on the gas meter does not remotely suggest that the natural gas Indiana Gas supplied was not properly odorized prior to the Incident.

For all these reasons, Miller failed to create a genuine issue for trial. The trial court's Summary Judgment Order, concluding that there is no genuine issue of material fact that the natural gas delivered by Indiana Gas to the Phillips Residence was properly odorized, should be affirmed. (App. Vol. II, pp. 54-54.)

D. Indiana Gas Had No Duty to Warn Its Customers of Odor Fade.

A product can also be defective if the manufacturer fails to give adequate warnings of the product's dangers. *See* Ind. Code § 34-20-2-3. Miller insists that the natural gas Indiana Gas supplied its customers was defective because Indiana Gas failed to warn its customers of odor fade. (Appellant's Br., p. 31.) Not so.

The evidence establishes that odor fade was not occurring in the area of the Incident. Dan Novak of the IURC and a representative of Indiana Gas both smelled odorant in the natural gas two doors down from the Phillips Residence. (App. Vol. VII, pp. 17, 133, 153.) John Erickson, President of Safety & Compliance Evaluation, explained that odor fade is a phenomenon that "can occur on newly installed plastic or steel pipelines until the pipe has become 'pickled,' e.g. the inner wall of the pipe has adsorbed as much odorant as it can adsorb." (App. Vol. VII, p. 153.) Odor fade was not an issue here because of the age of the pipeline delivering natural gas to the

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Phillips Residence and the fact that the pipe had “been exposed to odorized gas for years.” (App. Vol. VII, p. 153.)

The fact that one person – Janet Phillips – claims not to have smelled gas prior to the Incident does not refute the uncontroverted state of the pipeline or change the undisputed conditions in which odor fade can even occur. Nor can one person’s sense of smell contradict the odorator readings that showed natural gas odorant levels to be well within the 1% upper limit for detection under the federal standard. (App. Vol. VII, pp. 17, 121.) *See* 49 CFR § 192.625. One person’s sense of smell is not the standard for proper odorization. *See id.* Accordingly, the Court need not reach the question of whether Indiana Gas had a duty to warn its customers of odor fade that was not actually occurring. (App. Vol. II, p. 54.)

Regardless, Indiana Gas had no duty to warn its customers of odor fade under the IPLA or any other law. For starters, there are no state or federal regulations that require Indiana Gas to notify customers about the possibility of odor fade. (App. Vol. VII, p. 153.) PHMSA has incorporated RP1162 into its federal pipeline safety regulations. (App. Vol. VII, p. 153.) RP1162 does not include odor fade in the list of public awareness messages that natural gas distributors are required to provide to their customers. (App. Vol. VII, p. 154.) Neither the IURC nor PHMSA has ever issued a violation or notice of probable violation to Indiana Gas citing a failure to notify its customers of odor fade. (App. Vol. VII, p. 154.)

“In a product liability action, there is a rebuttable presumption that the product . . . was not defective and that manufacturer or seller of the product was not

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negligent if, before the sale by the manufacturer, the product . . . complied with applicable . . . standards, regulations, or specifications established, adopted, promulgated, or approved by the United States or by Indiana, or by an agency of the United States or Indiana.” Ind. Code § 34-20-5-1(2). It is uncontroverted that Indiana Gas complied with federal pipeline safety regulations with respect to odor fade. Hence, Miller’s failure to warn claim is “ineffectual.” *See Gresser v. Dow Chem. Co., Inc.*, 989 N.E.2d 339, 346 (Ind. Ct. App. 2013) (“Because it is undisputed that (1) Dow complied with federal regulations and state law label requirements; and (2) the [plaintiffs] presented no admissible evidence to rebut the presumption that [termiticide that caused illness] is not defective, Dow is entitled to judgment as a matter of law” and plaintiffs’ failure to warn theory is “ineffectual”).

Downs I, 685 N.E.2d 155, does not save Miller’s failure to warn claim from summary judgment. Contrary to Miller’s broad reading, *Downs I* does not stand for the sweeping proposition that all gas companies owe a duty to warn of odor fade in all circumstances. Rather, the holding in *Downs I* was limited to the specific factual context of that case, in which the gas utility admitted in its response to a request for admission that, “when odorized natural gas leaks from underground pipe and passes through soil, the natural gas can lose its odorized characteristics.” 685 N.E.2d at 164 n.14. The only odor fade at issue in *Downs I* was the odor fade caused by natural gas seeping into the soil, namely, natural gas that had been leaking from an underground pipe owned by the gas utility for about two weeks. *Id.* at 159; *see also id.* at 158 n.2.

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This is a far different fact pattern from Miller’s case, in which the evidence is undisputed that the source of the natural gas involved in the Incident was a pipe inside the Phillips Residence that someone had intentionally opened the day before the Incident. Indiana Gas had no duty for the pipeline inside the Phillips Residence. *See* Argument, Section IV(B), *supra*. Moreover, the only evidence in the record is that odor fade was not an issue with the pipeline delivering natural gas to the Phillips Residence, since the pipe had been exposed to odorized gas for years. (App. Vol. VII, p. 153.) Indiana Gas did not have a duty to warn its customers under these circumstances. *Downs I* is inapposite.¹³

For all these reasons, Miller failed to create a genuine issue for trial. The trial court’s Summary Judgment Order, concluding that Indiana Gas had no duty to warn Miller of odor fade, should be affirmed. (App. Vol. II, pp. 54-55.)

¹³ *Heritage Operating, L.P. v. Mauck*, 37 N.E.3d 514 (Ind. Ct. App. 2015), does not help Miller’s cause either. (Appellant’s Br., p. 30.) *Heritage Operating* presented a “unique inquiry” because an unauthorized party had tampered with a half-full propane tank the gas company left on the property and reconnected the gas line so the new tenants had gas. 37 N.E.3d at 521–22. This Court held that it was reasonably foreseeable that future tenants would try and access the half-full propane tank the gas company had left on the property. *Id.* If anything, *Heritage Operating* defeats Miller’s position. In *Heritage Operating*, the Court held that the defendant, a retailer of propane gas and not the manufacturer, could not be held liable in strict product liability under the IPLA. *Id.* at 523–24 (citing Ind. Code § 34-20-2-3). Similarly, Indiana Gas is merely a retailer of natural gas, not the manufacturer of it. Pursuant to its Indiana Gas Tariff, its obligation to provide natural gas services to its customers is contingent on its ability “to obtain sufficient gas supplies” from other sources. (App. Vol. VII, p. 96.)

E. The Evidence is Undisputed That Indiana Gas Was Not the Proximate Cause of the Incident.

Finally, regardless of which factual or legal theory Miller proceeds under, the evidence is undisputed that Indiana Gas was not the proximate cause of the Incident. “Proximate cause requires, at a minimum, that the harm would not have occurred but for the defendant’s conduct.” *Carey v. Ind. Physical Therapy, Inc.*, 926 N.E.2d 1126, 1129 (Ind. Ct. App. 2010). For this additional reason, the trial court’s Summary Judgment Order should be affirmed.

The evidence is uncontroverted that the source of the natural gas involved in the Incident was a pipe inside the Phillips Residence that someone had intentionally opened on the afternoon of May 18, 2019, the day before the Incident. This was substantiated by the ERT data from the gas meter, which showed a sudden increase in gas flow starting that afternoon and continuing until the time of the Incident around 5:00 a.m. on May 19. (App. Vol. VII, pp. 18, 116.) This was further corroborated by the rulings of multiple experts, who concluded that:

- “A cap had been recently removed from the open line [inside the Phillips Residence] by human intervention” – a cap that could only be removed with someone using two wrenches. (App. Vol. VIII, p. 14-15.)
- “The condition of the open piping after the incident (i.e., rusted but undamaged with pipe dope further up on the threads) is consistent with the removal of the cap. A properly tightened cap would likely have required use of a tool to remove it from the pipe.” (App. Vol. VII, pp. 159, 168.)

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- “[T]he natural gas that caused this explosion came from a leak inside the house, not from [Indiana Gas’s] pipeline system.” (App. Vol. VII, pp. 143, 157.)

It is likewise uncontroverted that no Indiana Gas personnel were at the Phillips Residence on May 18, 2019, and that the only individuals present at the Phillips Residence on May 18 were Billy and Janet Phillips. (App. Vol. VII, p. 19; Vol. VIII, pp. 25, 76, 96.) Billy Phillips was alone at the Phillips Residence when the spike in ERT data from the gas meter began. (App. Vol. VIII, p. 77.) He kept the very sort of tools that would have enabled him to remove the cap, opening the gas line in the basement of the Phillips Residence. (App. Vol. VIII, p. 46.)

Consistent with these facts, the IURC determined in its Final Incident Report that “the cause of this [I]ncident [was] not jurisdictional.” (App. Vol. VII, pp. 135-136, 140-141.) The IURC concluded that Indiana Gas did not violate any federal or state pipeline safety regulations. (App. Vol. VII, pp. 143, 152.) The IURC did not issue any notices of probable violation or take any other enforcement action with respect to Indiana Gas arising out of the Incident. (App. Vol. VII, pp. 143, 152.) Nor did the IURC assess any fines or require expenditures in lieu of fines as a result of the Incident. (App. Vol. VII, pp. 143, 152.)

Miller did not designate any evidence to refute Indiana Gas’s overwhelming evidence negating the element of proximate cause. Her speculation as to other possible causes or what might have happened inside the Phillips Residence does not change these facts or preclude summary judgment. *See Cosme*, 232 N.E.3d at 1150.

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This is particularly true given Miller's failure to offer any expert testimony to contradict the findings of the investigation, multiple experts, and the state agency charged with regulating Indiana Gas's operations and overseeing its investigation. *Cf. WESCO Distrib., Inc. v. ArcelorMittal Ind. Harbor LLC*, 23 N.E.3d 682, 695 (Ind. Ct. App. 2014) ("Where causation is not within a lay person's understanding, expert testimony is necessary."). The trial court's Summary Judgment Order should be affirmed on this basis. (App. Vol. II, pp. 55-56.)

CONCLUSION

The Court should affirm the trial court's Summary Judgment Order.

Respectfully submitted,

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WORD COUNT CERTIFICATE

The undersigned counsel verifies that the foregoing Appellee's Brief (excluding cover page, table of contents, table of authorities, word count certificate, certificate of service, and signature block) contains 14,000 words as determined by the word count of the word processing system used to prepare this Brief, specifically Microsoft Word, which is no more than the 14,000 words permitted by Indiana Appellate Rule 44(E).

/s/ Thomas J. Costakis

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing has been served upon the following counsel of record via the Indiana Electronic Filing System (IEFS) this 8th day of August, 2025:

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