

IN THE INDIANA SUPREME COURT
CAUSE NO. _____

CARLA MILLER,
APPELLANT

v.

INDIANA GAS CO., INC.,
APPELLEE

) An Appeal from the Clark Circuit Court No. 2
)
)
) Trial Court Case No(s): 10C02-2005-CT-067
) The Honorable William A. Dawkins,
) Magistrate Judge
)
) Indiana Court of Appeals Case No.: 25A-CT-866
)
)
)
)
)

APPELLANT'S REPLY TO PETITION TO TRANSFER

/s/ Ashton Rose Smith

Ashton Rose Smith (Temporary No.: 9679-95-9TA)

/s/ Emily A. DeVuono

Emily A. DeVuono, (Indiana Bar No.: 35617-22)

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Both lower courts erroneously gave more weight to the movant's post-explosion testing than to the contemporaneous firsthand testimony of the survivor closest to this deadly explosion—Janet Phillips—forming the basis of the Court's summary judgment. Summary judgment, however, is not the time for credibility determinations and weighing of the evidence. Indiana law has always been clear—until now—that the evidence at the summary judgment stage should be viewed in the light most favorable to the non-moving party, here, Carla Miller. Moreover, where there is evidence on both sides of a material issue—regardless of its perceived strength or even the plaintiff's ultimate likelihood of success at trial—the matter *must* be submitted to the jury. This principle is critical to the integrity of summary judgment in every civil case and enshrined in the constitutional right to a jury trial. Transfer to this Court is imperative.

First, Janet Phillips' testimony is material to the central issue: whether the gas that flooded the Phillips' home was properly odorized. Indiana Gas argues the gas was properly odorized based *solely* on its own testing that occurred at *nearby* locations *after* the explosion and that Ms. Phillips' testimony is immaterial. But post-explosion testing cannot go back in time to establish the odorization of the gas flooding the Phillips' home, instead, that is done with contemporaneous firsthand testimony of Janet Phillips (and Ms. Miller). It is undisputed that gas flooded the home and given the levels would have been detected if properly odorized. Indiana Gas concedes this. Yet, for some reason, the noxious odor was not detected by anyone for over 13 hours. That is the crux of the case and, the non-moving party, Ms. Miller presented sufficient evidence to support lack of odorization. Presumably, this is why Indiana Gas settled with all other parties.

There are competing inferences as to *why* the substantial accumulation of gas was not detected by anyone. Ms. Miller argued it was not properly odorized based on the sworn testimony of Ms. Phillips that she did not smell gas for over 13 hours and therefore the inference is lack of

odorization. Conversely, Indiana Gas argued maybe it was because the odorant smell was masked by something else, like the family dog. But these are questions for the jury to resolve. *Bochnowski v. Peoples Fed. Sav. & Loan Ass’n*, 571 N.E.2d 282, 285 (Ind. 1991).

Reconciling the absence of any detected odor for 13+ hours with Indiana Gas’ argument that the gas was “properly odorized,” necessarily requires choosing between conflicting accounts—an issue expressly reserved for the jury. *Hughley v. State*, 15 N.E.3d 1000, 1004 (Ind. 2014) (internal citations omitted). Where sworn testimony directly contradicts the movant’s evidence, “the factfinder must reconcile the credibility of those two accounts.” *Id.* at 1005. Thus, Janet Phillips’ testimony is material and the Court should not have disregarded it. Allowing that decision to stand gives courts permission to disregard and weigh testimony evidence, and determine the credibility of witnesses, completely usurping the role of the jury.

Second, the lower courts erroneously treated post-explosion testing as dispositive. Post-explosion testing is like checking the temperature after the fire is out or measuring the flood levels after the water has receded—it says little about the presence of odorant prior to the explosion. While it is one piece of evidence for the jury to weigh, it is not definitive. Importantly, at the summary judgment stage, Ms. Miller is **not required** to prove that the natural gas provided by Indiana Gas was defective. “Summary judgment is inappropriate whenever a conflict of evidence **may** exist on a material issue. Evidence sufficient to support a verdict is not required.” *Siner v. Kindred Hosp. Ltd. P’ship*, 51 N.E.3d 1184, 1189 (Ind. 2016) (internal citations omitted) (emphasis in original).

This case is about public safety. The federal regulation is a safety measure to protect Hoosiers, which indisputably failed here. It establishes a minimum safety standard,¹ not the outer

¹ CFR 49 192.625 is found under Part 162 of Title 49, Subtitle B, Chapter 1, Subchapter D, titled, “Transportation of Natural and Other Gas by Pipeline: **Minimum Federal Safety Standards**.”

limit of Indiana Gas' duties to consumers, who pay to have properly odorized gas. Indiana Gas conceded odorant is the customer's leak detector. (Vol. V, Miller-ROA-000075-79.) With Phillips' testimony that she did not smell gas and Indiana Gas conceding "a person with a normal sense of smell" – not an odorator – "should have been able to identify a readily detectable odorant in the – in the gas that we delivered to them" (Vol. X, Miller-ROA-000101), there is a direct conflict. Thus, to grant summary judgment, the Court had to disregard Ms. Miller's evidence and give the movant's evidence more weight. But "summary judgment should not be granted when it is necessary to weigh the evidence." *Bochnowski*, 571 N.E.2d at 285.

Indiana Gas cites 49 CRF § 192.625(f) arguing that post-explosion measure via odorator is the only evidence that matters, but subsection (f) simply describes the regulation's periodic sampling requirement – that is the floor, not the ceiling. It does not displace Indiana Gas' nondelegable everyday duty to consumers. Whether Indiana Gas satisfied that nondelegable duty with respect to this explosion is a jury question.

This case presents precisely the type of issue that warrants transfer to this Court because the decision below fails to construe the evidence in the light most favorable to Ms. Miller, a serious error depriving her of her constitutional right to jury trial. It compounds that error by creating a dangerous precedent that lower courts may choose to disregard evidence of the nonmovant, including sworn testimony of witnesses in favor of the movant. If allowed to stand, the Court of Appeals' decision will effectively abrogate the ability of plaintiffs to reach a jury in cases where firsthand testimony conflicts with *post hoc* evidence, manufacturing a rule that improperly favors one type of evidence over another.

For the foregoing reasons, Appellant, Carla Miller, respectfully requests this Court grant her Petition for Transfer.

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WORD COUNT CERTIFICATE

Pursuant to Rule 44 of Appellate Procedure, I verify that this Petition contains no more than 1,000 words. I verify that this Petition contains 998 words.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 4th day of May 2026, the foregoing was filed with the Clerk of the Indiana Supreme Court/Court of Appeals, through the Indiana E-filing system.

I hereby certify that on this 4th day of May 2026, the foregoing was served upon the following persons, through the Indiana E-filing system:

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