2012 IL App (4th) 110808-U

Filed 6/8/12

NO. 4-11-0808

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

TAMMY POCKLINGTON, Special Administratrix of the Estate of MARGARET SHERRY HATLEN, Deceased; TAMMY POCKLINGTON, Special Administratrix of the Estate of COADY HATLEN, Deceased; TAMMY POCKLINGTON, Special Administratrix of the Estate of MICHAEL ALBRACHT, Deceased; and EDWIN TOMMY HATLEN,	)	Appeal from Circuit Court of Macoupin County No. 06L45
Plaintiffs-Appellants,	)	
v.	)	Honorable
AMEREN IP,	)	Patrick J. Londrigan,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Presiding Justice Turner and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: Plaintiffs' claim was barred by utility's tariff.

¶ 2 On August 2, 2006, Margaret Sherry Hatlen, Coady Hatlen, and Michael Albracht were killed and Edwin Tommy Hatlen was injured (collectively, the Hatlens) when a natural gas explosion destroyed their home. On August 14, 2006, Edwin and Tammy Pocklington, special administratrix of the estates of Margaret, Coady, and Michael (collectively, plaintiffs), filed suit against defendant, Ameren IP, which had supplied and regulated the gas supply to the home. On September 18, 2007, plaintiffs filed their third-amended complaint. On November 19, 2007, the trial court granted defendant's motion to dismiss. On appeal, this court reversed and remanded. *Pocklington v. Ameren IP* (*Pocklington I*), No. 4-07-1012 (Aug. 13, 2008) (unpublished order

pursuant to Supreme Court Rule 23). On August 4, 2009, the trial court granted defendant's first motion for summary judgment. On appeal, this court affirmed in part, reversed in part, and remanded with directions. See *Pocklington v. Ameren IP* (*Pocklington II*), No. 4-09-0914 (July 23, 2010) (unpublished order pursuant to Supreme Court Rule 23). On January 14, 2011, defendant filed a second motion for summary judgment, which the trial court granted.

¶ 3 On appeal, plaintiffs argue the trial court erred in granting defendant summary judgment. We affirm.

¶ 4 The relevant facts were fully set forth in our previous orders. We will reiterate only the necessary facts so as to provide a proper framework for our disposition.

¶ 5 The Hatlins were residing at 203 Sue Street in Carlinville on August 2, 2006, when Margaret, Coady, and Michael were killed and Edwin was injured by the natural gas explosion, that destroyed the residence. Natural gas is odorless in its original state. The chemical ethyl mercaptan, which is a sulfur component, is added as an odorant to give natural gas its distinctive smell so leaks can be detected more easily. Edwin's affidavit stated that the day before the explosion, Edwin, Margaret, and Edwin's friend, Donald Johnston, all smelled natural gas inside the home. Edwin and Margaret checked the stove to see if a burner was on, but the stove was off. Edwin and Donald also smelled a natural gas odor while outside playing basketball. Ken Reese, another friend of Edwin's, smelled natural gas while speaking with Edwin outside as well. Edwin's affidavit further stated that no one in the house found that the odor was strong or persistent, and he did not think the smell was emanating from inside the home.

¶ 6 An arson investigation report concluded that the explosion most likely occurred

when Margaret started the dryer, which ignited natural gas accumulated in the home. The report made no conclusions as to the origin of the gas leak.

¶ 7 On September 18, 2007, plaintiffs filed their third-amended complaint. Counts I through IV alleged identical acts of negligence on defendant's part relating to each of the Hatlens. Count I alleged negligence toward Margaret. Count II alleged negligence toward Coady. Count III alleged negligence toward Michael. Count IV alleged negligence toward Edwin. The third-amended complaint alleged that defendant breached its duty of care by (1) running gas in excess of 30 pounds per square inch gauge (p.s.i.g.), three to five times its own standard and industry standards; (2) failing to warn the Hatlens that it would run gas at excess pressure; (3) failing to replace a 43-year-old regulator when industry standards call for replacement after 10 to 15 years; (4) failing to test the regulator at regular intervals; and (5) failing to warn the Hatlens to leave the home when they smelled gas inside. Pounds per square inch gauge (p.s.i.g.) measures pressure relative to the surrounding atmosphere.

¶ 8 On November 19, 2007, the trial court granted defendant's motion to dismiss plaintiffs' third-amended complaint for failure to state a claim (735 ILCS 5/2-615 (West 2004)). In August 2008, this court reversed the dismissal and remanded to the trial court for further proceedings in *Pocklington I.*

¶ 9 In January 2009, defendant filed its first motion for summary judgment. Defendant argued that plaintiffs had failed to raise questions of material fact as to whether the pressure regulator failed, causing or exacerbating a gas leak inside the Hatlens' home. Defendant further argued that it provided adequate warnings to the Hatlens of the steps to take in the event of a natural gas leak through pamphlets, print advertisements, bill stuffers, and warnings on the

bills themselves. Defendant attached the affidavit of Jerome Themig to its motion.

¶ 10 Themig's affidavit stated that he worked as the manager of gas compliance and training for defendant. Themig averred that defendant provided a safety pamphlet to its customers when turning on gas service and every two years thereafter. It also provided a monthly newsletter, Amerenlines, and monthly bill, both of which contained gas-safety messages. The pamphlet stated as follows:

"**If you smell a faint gas odor near an appliance:**

! Make sure all pilot lights are lit; if you find a pilot light extinguished, open windows and doors to vent the area; then wait 15 minutes before relighting the pilot light.

! If the odor persists, call [defendant].

If you smell gas inside your home or business and the smell is strong, persistent natural gas odor, or you hear a hissing or leaking sound you should:

! Leave the building (home or business) immediately, taking everyone with you (including pets), and leave all doors and windows open behind you.

! Call [defendant] from a neighbor's home or nearby business--we respond to emergencies 24 hours a day, 7 days a week.

In these conditions:

! **DO NOT** use telephones, cellular phones, computers,

appliances, elevators or garage door openers.

! **DO NOT** touch electrical outlets, switches or doorbells.

! **DO NOT** smoke, use a lighter, match or other open flame.

! **DO NOT** position or operate vehicles or powered equipment where leaking gas may be present.

! **DO NOT** re-enter the home to open doors or windows."

(Emphases in original.)

¶ 11 The gas safety tips in Amerenlines repeated defendant's advice to consumers to check for extinguished pilot lights upon smelling gas around an appliance and to call defendant in the event of a "strong, persistent natural gas odor." A message in a bill dated June 29, 2006, stated "If you ever smell gas, call [defendant] to investigate the problem." A bill dated July 31, 2006, contained a warning, including the signs of a possible gas leak, and instructing customers to leave the home and call defendant in the event of a possible leak. Defendant also provided an advertisement from the Enquirer-Democrat, a Macoupin County newspaper. Dated April 6, 2006, the advertisement stated "If you detect the distinct rotten-egg odor of natural gas, leave the building immediately, and call [defendant]."

¶ 12 In response to defendant's evidence regarding its warnings to the public, plaintiffs put forth the deposition of Gordon R. Plunkett, a former employee of Natural Gas Odorizing, Inc. Plunkett's affidavit states that defendant breached the standard of care and caused the Hatlens' injuries when its warnings instructed consumers to distinguish between a strong, persistent gas odor and a faint gas odor. According to Plunkett's affidavit, a determination regarding the concentration of natural gas should never be made according to the strength of the odor. Sense of

smell varies from person to person, and the intensity of an odor lessens the longer a person is around an odor. The affidavit also stated that defendant's warnings did not comply with section 192.616 of chapter 49 of the Code of Federal Regulations (49 C.F.R. § 192.616 (2005)), regarding the recognition of and the appropriate reaction to a suspected pipeline leak. Finally, the affidavit stated that defendant failed to provide a scratch-and-sniff area on the safety pamphlet to demonstrate the smell of natural gas to its customers.

¶ 13 Plaintiffs also relied on the affidavit from Edwin Hatlin stating that the day before the explosion, Edwin, Margaret, and Edwin's friends, Donald Johnston and Ken Reese, all smelled natural gas both inside and outside the home.

¶ 14 In an August 2009 docket entry, the trial court granted defendant's first motion for summary judgment. Plaintiffs appealed and this court affirmed summary judgment as to all of plaintiffs' negligence allegations except plaintiffs' failure-to-warn claim. See *Pocklington II*.

¶ 15 On January 14, 2011, defendant filed a second motion for summary judgment. Citing the tariff defendant had filed with the Illinois Commerce Commission (ICC), defendant argued plaintiffs failed to "plead and prove that [defendant's] allegedly inadequate warnings were the sole cause of the complained of injuries and deaths." Defendant attached the affidavit of Robert Miller to its second motion for summary judgment. Miller's affidavit stated that he worked as a certified fire investigator. Defendant retained Miller to investigate the natural gas explosion that occurred at 203 Sue Street, Carlinville, Illinois. During his inspection, Miller observed a fitting that previously connected an interior gas line to the gas water heater located in the basement of the residence. The fitting was not properly connected, allowing gas to escape into the basement. Miller concluded that the explosion was caused by an accumulation of natural

gas inside the residence. "This accumulation was the result of a leak at a fitting that connected an interior gas line to the water heater that had been improperly installed." Miller's findings were consistent with the facts and conclusions outlined in the reports of the ICC and the Illinois State Fire Marshall.

¶ 16 On February 7, 2011, the trial court granted plaintiffs' request for additional time "to conduct discovery and respond to defendant's motion for summary judgment." On July 26, 2011, plaintiffs filed their response to defendant's motion for summary judgment. Plaintiffs admitted "[t]he tariff speaks for itself; and the gas which ignited the explosion at 203 Sue Street did leak into to [*sic*] the house through a flared fitting inside the house." However, plaintiffs alleged defendant failed to warn plaintiffs as required by federal regulation "to evacuate the house and call Defendant if and when natural gas was detected inside the house."

¶ 17 On August 17, 2011, the trial court granted defendant summary judgment and this appeal followed.

¶ 18 Plaintiffs argue the trial court erred in granting defendant summary judgment.

¶ 19 The purpose of summary judgment is not to try a question of fact but to determine whether a genuine issue of material fact exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43, 809 N.E.2d 1248, 1256 (2004). Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2004). In reviewing a grant of summary judgment, this court must construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the

nonmoving party. *Williams v. Manchester*, 228 Ill. 2d 404, 417, 888 N.E.2d 1, 9 (2008). Where reasonable persons could draw divergent inferences from the undisputed material facts or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114, 649 N.E.2d 1323, 1326 (1995). If a party moving for summary judgment introduces facts that, if not contradicted, would entitle him to a judgment as a matter of law, the opposing party may not rely on his pleadings alone to raise issues of material fact. *Hermes v. Fischer*, 226 Ill. App. 3d 820, 824, 589 N.E.2d 1005, 1008 (1992).

¶ 20 The summary judgment procedure is to be encouraged as an aid in the expeditious disposition of a lawsuit. *Adams*, 211 Ill. 2d at 43, 809 N.E.2d at 1256. However, summary judgment is a drastic means of disposing of litigation that should not be granted unless the movant's right to judgment is clear and free from doubt. *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280, 864 N.E.2d 227, 232 (2007). In all appeals from the entry of summary judgment, we conduct a *de novo* review of the record. *Espinoza,* 165 Ill. 2d at 113, 649 N.E.2d at 1326.

¶ 21 A tariff is a public document setting forth the services being offered; the rates and the charges for the services; and the governing rules, regulations, and practices relating to those services. *Adams*, 211 Ill. 2d at 55, 809 N.E.2d at 1263. The Public Utilities Act (Act) requires public utilities such as defendant to file tariffs with the ICC. 220 ILCS 5/9-102 (West 2004); *Adams*, 211 Ill. 2d at 55, 809 N.E.2d at 1263. A tariff is usually drafted by the regulated utility, but when duly filed with the ICC, it binds both the utility and the customer and governs their relationship. *Adams*, 211 Ill. 2d at 55, 809 N.E.2d at 1263. Once the ICC approves a tariff, it " 'is a law, not a contract, and has the force and effect of a statute.' " *Adams*, 211 Ill. 2d at 55,

809 N.E.2d at 1263 (quoting *Illinois Central Gulf R.R. Co. v. Sankey Brothers, Inc.*, 67 Ill. App. 3d 435, 439, 384 N.E.2d 543, 545 (1978), *aff'd*, 78 Ill. 2d 56, 398 N.E.2d 3 (1979)). "The rights as defined by the tariff cannot be varied or enlarged by *either contract or tort* of the carrier." (Emphasis in original.) *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 227 (1998) (quoting *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156, 163 (1922)).

¶ 22 Defendant's tariff on file with the ICC provides in relevant part as follows:

> " Utility shall not be liable for injury (including death) or damage to persons or property caused by the presence of gas at any location owned or controlled by Customer, and Customer shall protect and save Utility harmless from all such injury (including death) or damage except where the injury or damage shall be shown to have been occasioned solely by the negligence of Utility."

¶ 23 Such tariff provisions are usually referred to as liability limitations. *Adams*, 211 Ill. 2d at 56, 809 N.E.2d at 1248. The underlying theory of liability limitations is that, because a public utility is strictly regulated, its liability should be defined and limited so that it can provide service at reasonable rates. A reasonable rate depends in part on a rule limiting liability. *Adams*, 211 Ill.2d at 56-57, 809 N.E.2d 1264. The goal of a tariff is to secure reasonable and just rates for all without undue preference or advantage to any; and because that end is attainable only by adherence to the approved rate, based upon an authorized classification, that rate represents the whole duty and the whole liability of the company. *Adams*, 211 Ill. 2d at 57, 809 N.E.2d at 1264.

¶ 24 This court held in *Pocklington II* that defendant's tariff "limits its liability to those

situations in which any personal injury or property damage occurring at any location owned or controlled by a customer was caused solely by defendant's negligence." *Pocklington II*, slip order at 27. Defendant attached to its second motion for summary judgment the affidavit of a certified fire investigator stating the accumulation of natural gas inside the residence "was the result of a leak at a fitting that connected an interior gas line to the water heater that had been improperly installed." Plaintiffs have not cited a source that would preclude the limitation of liability claimed by defendant. Thus, the duty claimed by plaintiffs must be found to exist on the basis of the language of the tariff or not at all.

¶ 25 The language at issue is unambiguous. Defendant "shall not be liable *** except where the injury or damage shall be shown to have been occasioned solely by the negligence of [defendant]." Our duty is to apply the plain meaning of these words, in light of the underlying purpose of the Act, which is to provide citizens of Illinois with utility service at reasonable rates and, as a necessary part of that scheme, to limit the liability of utility companies.

¶ 26 In *Sarelas v. Illinois Bell Telephone Co.*, 42 Ill. App. 2d 372, 192 N.E.2d 451 (1963), the plaintiff claimed that Illinois Bell Telephone owed him a duty of continuing service, which it violated by interrupting his service for 2 1/2 hours as the result of a clerical error. The appellate court noted that "in the case of an ordinary corporation this would be nothing of which to complain, for in general a corporation is entitled to refrain from doing business with its customers unless it is otherwise bound by contract; but a utility is different. It has a duty to its subscribers that goes beyond that of an ordinary corporation. However, this duty has but one source, the tariff, which in this instance is on file with the [ICC]." *Sarelas*, 42 Ill. App. 2d at 374, 192 N.E.2d at 453. Thus, the appellate court observed, "the extent to which defendants

owed plaintiff 'a legal duty' is determined by the particular provisions of the tariff on file with the commission; there is no contract *** on which plaintiff can rely, nor are his allegations of a breach of duty sufficient to constitute a claim in tort." *Sarelas*, 42 Ill. App. 2d at 375, 192 N.E.2d at 453. In the end, a breach of duty by the utility "arises either from the tariff or not at all." *Sarelas*, 42 Ill. App. 2d at 375, 192 N.E.2d at 453. See also *Pocklington II*, slip order at 25 ("Accordingly, the tariff applies to plaintiffs' claims and controls defendant's liability").

¶ 27 Plaintiffs have not identified language in the tariff or in the Act from which the duty plaintiffs claim can be said to arise. Indeed, the plain language of the tariff expressly disclaims any such duty. Where there is no genuine issue of material fact to be decided, there is no purpose in proceeding to trial. See *Witzig v. Illinois Power Co.*, 114 Ill. App. 2d 139, 144-45, 251 N.E.2d 902, 905 (1969) (quoting *Brooks v. Dean Berenz Asphalt Co., Inc.*, 83 Ill. App. 2d 258, 261, 227 N.E.2d 100, 102 (1967) (" 'We are unable to find any facts or inferences in this record which would allow the plaintiff to submit the decisive issue of the defendant's negligence to a jury.' A like observation applies here to plaintiff's contributory negligence")).

¶ 28 Plaintiffs argue defendant cannot claim that "new" evidence justifies a summary judgment on the failure-to-warn theory when this court sustained that theory in *Pocklington II*, and defendant knew that fact from the beginning. Miller stated in his affidavit: "Examination further revealed that the party who attached the gas line to the water heater attempted to install a flared fitting, but did so improperly. This, over time, resulted in a leak at the fitting." In fact, Miller's affidavit was not before this court in *Pocklington II*. Further, much of the "evidence" referenced by plaintiffs was stricken from the record. Any argument pertaining to material stricken from the record must be disregarded. See, *e.g.*, *Stokes v. Colonial Penn Insurance Co.*,

313 Ill. App. 3d 202, 204, 728 N.E.2d 1276, 1277 (2000).

¶ 29 For the reasons stated, we affirm the trial court's grant of summary judgment in defendant's favor.

¶ 30 Affirmed.