CAUSE NO. 2011-08170

FELICITA DEL CARMEN CANAS, As Next Friend of YENIFER ESTEFANI CANAS ESCOBAR, JAVIER ENRIQUE CANAS ESCOBAR and BEATRIZ ABIGAIL DEL CARMEN CANAS, Minors	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY TEXAS
CENTERPOINT ENERGY RESOURCES CORP.	§	157TH JUDICIAL DISTRICT

PLAINTIFFS' 1st AMENDED MOTION FOR RECONSIDERATION OF DEFENDANT'S TRADITIONAL AND NO EVIDENCE SUMMARY JUDGMENT & MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF THIS COURT:

COMES NOW FELICITA DEL CARMEN CANAS, As Next Friend of YENIFER ESTEFANI CANAS ESCOBAR, JAVIER ENRIQUE CANAS ESCOBAR and BEATRIZ ABIGAIL DEL CARMEN CANAS, Minors (hereinafter referred to as "Canas" or "Plaintiffs") and asks the court to grant a new trial in the interest of justice and fairness.

I. BACKGROUND

1. This lawsuit arises from a March 7, 2007, natural gas explosion that destroyed a small garage apartment located in the rear of a home at 2425 Cumberland in Houston, Harris County, Texas. The odorant in the natural gas had faded to such an extent that the deceased was not allowed enough time to escape the area before the gas had already reached its explosive threshold. As a result, Guadalupe Del Carmen Canas, the occupant, suffered severe burns over most of her body and passed away after a few weeks in the hospital. The CANAS plaintiffs sued CENTERPOINT ENERGY

RESOURCES CORP., defendant, for its failure to warn customers that the ethyl mercaptan added to natural gas to warn people of gas leaks, is subject to odor fade, resulting in situations where a gas leak exists without any warning under theories of negligence, products liability, negligence per se, and misrepresentation. [1] Plaintiffs also alleged Centerpoint, pursuant to various regulations, failed to notify or inadequately notified or educate customers that it does not maintain the customer's buried piping, that it may be subject to corrosion and leakage and that it should be periodically inspected. See, 49 C.F.R. § 192.616, **Public Awareness.**

2. Centerpoint filed its motion for traditional and now evidence summary judgment on August 5, 2011. The Canas' filed a response that refuted these arguments on August 24, 2011. Centerpoint filed a reply to the response on August 26, 2011. The court granted the motion for summary judgment and signed a summary judgment order for Centerpoint on September 7, 2011. *See*, attached hereto as Exhibit A. The Canas' attach affidavits to this motion as Exhibits to establish facts not apparent from the record and incorporates them by reference.

II. SUMMARY OF ARGUMENT

3. The court should grant a new trial because it erred by granting the motion for summary judgment.

4. Centerpoint raised two issues in its motion for traditional and no evidence summary judgment. First, it asserted that the "filed-tariff doctrine" barred all of Plaintiffs' claims for strict liability, negligence, and gross negligence because the liability

[1] Other causes were alleged in plaintiffs' petition, but this is the main point of contention.

limitations prohibit any claims against Centerpoint arising out of or incident to the furnishing of gas that occur on the customer's side of the gas meter. This issue can only be decided on the basis of a traditional motion for summary judgment because it is an affirmative defense. Second, Centerpoint asserted that it owed no duty to Guadalupe Del Carmen Canas' because Plaintiffs failed to produce any evidence of Centerpoint's actual knowledge of a dangerous condition on the customer's property that caused the explosion. This may be decided on a traditional or no evidence motion for summary judgment.

5. Nevertheless, Centerpoint muddled the issues and the nature of Plaintiffs' factual and legal claims against it. Indeed, Centerpoint transformed the Canas' case from one about the failure of Centerpoint to warn about the dangerous condition of its gas (odor fade), into a case about actual or constructive knowledge about the dangerous condition (leak) in the customer's underground housepiping. Centerpoint may wish the Plaintiff's liability theories were about the furnishing of natural gas and the condition of its customer's pipe, but wishing so does not make it true. On the contrary, since the Canas' allegations are founded upon a products liability- marketing defect theory whether Centerpoint possessed actual or constructive knowledge of the leak or who's side it was on, is not germane to this litigation.

6. The main issue relevant to this litigation is whether Centerpoint had actual or constructive knowledge about the susceptibility of natural gas to odor fade. Plaintiffs admit Centerpoint is not liable in providing natural gas *service* to its customers, but it does have a duty to warn its customers about the dangerous

properties of its' *product*. Hence, the "filed rate doctrine" only immunizes Centerpoint from liability in supplying natural gas, but not for failing to warn its customers about the dangerous conditions inherent in the natural gas, itself. By transforming this case from one about the dangerous condition of a product to one about the dangerous condition of property, Centerpoint forces the "filed rate doctrine" into an area of law where it is just not applicable.

7. The court erred by granting the motion for summary judgment because Centerpoint did not meet its burden of proving, as a matter of law, that the "filed tariff doctrine"[2] bars products liability marketing defect claims based upon a utility company's failure to warn its customer about the dangerous condition of the gas it supplies. *See*, Provident Life & Accident Ins. Co. v. Knott, 128 S.W.3d 211, 215-16 (Tex. 2003); M.D. Anderson Hosp. & Tumor Inst. v. Willrich, 28 S.W.3d 22, 23 (Tex. 2000). Unless the movant meets its burden, the burden never shifts to the nonmovant. M.D. Anderson, 28 S.W.3d at 23; Casso v. Brand, 776 S.W.2d 551, 556 (Tex. 1989).

8. The court erred by granting the motion for summary judgment because the Canas' raised a fact issue on at least one element of Centerpoint's affirmative defense of the "Filed Tariff Doctrine." Jones v. Texas Pac. Indem. Co., 853 S.W.2d 791, 794 (Tex. App.—Dallas 1993, no writ).

III. AFFIRMATIVE DEFENSE

Centerpoint failed to conclusively prove all elements of its affirmative defense and/or the Canas' produced evidence creating a fact issue on at least one of the elements.

[2] The terms "filed rate doctrine" and "filed tariff doctrine" are used interchangeably since they both have the same meaning.

9. An affirmative defense is an independent reason why the plaintiff should not recover. Texas Beef Cattle Co. v. Green, 921 S.W.2d 203, 212 (Tex.1996). An affirmative defense allows the defendant to avoid liability even if the allegations in the plaintiff's petition are true. The affirmative defenses listed in TRCP 94 are not an exhaustive list. Tex. R. Civ Pro. 94. An employer's status as a subscriber to worker's compensation is considered an affirmative defense because it bars an otherwise legitimate claim from being heard. *See*, Wesby v. Act Pipe & Sup., 199 S.W.3d 614, 617 (Tex.App.-Dallas 2006, no pet.). Thus, the "filed tariff doctrine" is an affirmative defense since it provides an independent justification for Centerpoint to dodge liability even though the Canas' possess valid causes of action.

10. When a defendant moves for summary judgment on its affirmative defense, it must prove each element of its defense as a matter of law, leaving no issues of material fact. Johnson & Johnson Med., v. Sanchez, 924 S.W.2d 925, 927 (Tex.1996); *see* Macintyre v. Ramirez, 109 S.W.3d 741, 748 (Tex.2003) (when moving for summary judgment on an affirmative defense, the defendant has the burden to conclusively establish its defense). Thus, the plaintiffs, as the nonmovants, have no burden of proof unless the defendant conclusively proves all the elements of its affirmative defense. If the defendant establishes its right to an affirmative defense as a matter of law, the defendant is not entitled to summary judgment so long as the plaintiff creates a fact issue by producing controverting evidence on one of the elements of the defendant's

affirmative defense. *See, e.g.*, McFadden v. United Life Ins. Co., 658 S.W.2d147, 148 (Tex.1983).

IV. COMMON LAW DUTY

A utility has a common law duty to warn its customers about dangerous conditions intrinsic to its products and the Canas' claims are founded upon Centerpoint's duty to warn about the propensity of the ethyl mercaptan in natural gas to lose its odor as a result of odor fade.

11. The "filed rate doctrine" provides that the relationship between a utility company and its customers is governed by the tariff or rates on file with the appropriate governmental agency. The purpose of the agency and its regulations is to "protect the public interest in the rates and services of gas utilities." And, "to establish a comprehensive and adequate regulatory system for gas utilities to assure rates, operations, and services that are just and reasonable to the consumers and to the utilities." Because gas utilities are, by definition, monopolies. Tex. Util. Code Ann. § 101.002(a)(b).

12. Whether the "filed tariff doctrine" applies to bar a tort claim can only be ascertained by the nature of the claim being brought. Therefore, it must first be determined what common law duties a gas utility company owes or does not owe to its customers or consumers. The filed tariff doctrine does not preclude claims sounding in the common law duty of failure to warn in products liability cases. Plaintiffs recognize that Centerpoint has no duty to maintain, inspect or fix pipeline downstream of the meter. However, such a limitation does not preclude the gas company's duty to exercise reasonable care to minimize any hazard inherent in the gas itself. Susceptibility to odor

fade renders natural gas an unreasonably dangerous product. Plaintiffs seek only to recover on the theory of marketing defect for the defendant's failure to warn or to adequately warn of an inherently dangerous product.

13. According to Texas common law, "Utility companies owe a duty of ordinary care to anticipate and prevent personal injuries caused by their providing services." Grant v. Southwestern Electric Power Co., 20 S.W.3d at 774 (Tex.App.-Texarkana 2000) *overruled on other grounds*; Grant v. Southwestern Electric Power Co., 73 S.W.3d 211, 223 (Tex.2002) (Enoch, J. concurring). Natural gas is a product and as such, it is a product covered by the laws of products liability. *See e.g.*, Houston, Lighting & Power Co. v. Reynolds, 765 S.W.2d 784 (Tex.1988) (holding electricity to be a product). Recovery based on a products liability/marketing defect theory arises from the defendant's failure to warn or to adequately warn for safe use of the product. The duty to warn in connection with marketing a product is determined by the danger inherent in the product or associated with its foreseeable use. Bristol-Meyer Co. v. Gonzalez, 61 S.W.2d 801, 804 (Tex.1978). The *Texas Pattern Jury Charges* state, "A "marketing defect" with respect to the product means the failure to give adequate warnings of the product's dangers that were known or by the application of reasonably developed human skill and foresight should have been known…, which rendered the product unreasonably dangerous." PJC 71.5, Products Liability – Theories of Recovery, Marketing Defect-No Warning or Instruction or Inadequate Warnings or Instructions for Use Given with Product (2008). Even a product which is safely designed and manufactured may be unreasonably dangerous as marketed because of a lack of

adequate warnings or instructions. Lucas v. Texas industries Inc., 696 S.W.2d 372, 377 (Tex.1984) (opinion on reh'g).

14. As Centerpoint points out, a utility has no duty to inspect, maintain or fix a customer's wiring, appliances, etc. which the company did not install, own or control. However, the nature of Canas' claims are not based upon any duty of Centerpoint to inspect, maintain or fix a gas leak on the customer's side of the pipe. The Plaintiffs only ask whether a gas company owes a duty to warn its customers if it knows or has reason to know that the odorant added to the natural gas can be filtered, under certain circumstances, which means a gas leak may occur without the customer or consumer knowing about it. Plaintiffs' causes of action are not concerned with the gas leak itself or on which side of the piping the gas leak occurred.

15. In *Donahue v. Phillips Petroleum Company*, the plaintiffs were victims of a propane gas explosion. Donahue v. Phillips Petroleum Company, 866 F.2d 1008 (8th Cir.-1989). The Plaintiffs asserted that the ethyl mercaptan had lost its distinctive odor and did not serve its purpose as a warning agent, and on further assertions that the defendant, *Phillips*, had not warned anyone that, under certain conditions, ethyl mercaptan has this dangerous propensity to lose its odor. Nevertheless, the Court held the plaintiff could submit its case to a jury under two strict liability theories – defective product and failure to warn. 866 F.2d at 1009, 1010.

16. The *Donahue* plaintiffs did not have to prove that the odorant had faded at the time it left the hands of *Phillip's* because it was based on the nature of the mercaptan- its propensity to oxidize and lose its odor. 866 F.2d at 1010. That inherent

characteristic of the product was indisputably present at the time Phillips supplied the product to the company next in line in the chain of distribution and was ample evidence that it was in a defective condition at the time it left the hands of Phillips. Thus, the ethyl mercaptan, distributed without any warning to anyone that it might be ineffective, was unreasonably dangerous when used as an odorizing agent in natural gas. Id.

17. In another case, the defendant admitted that it is impossible to manufacture an odorant that is not susceptible to odor fade and that every odorant, contains this latent defect. Thus, given the nature of the odorant, the manner in which it is used and the reason for its use, the court concluded that the defendant had a duty to provide adequate warnings and instructions with its product about odor fade. "The failure to satisfy that duty renders the product both defective and unreasonably dangerous." Natural Gas Odorizing Inc. v. Downs, 685 N.E. 2d 155, 162 (Ind.Ct.App.-1997).

18. Although neither case specifically addresses whether warnings are required from a supplier of odorized natural gas, they make it quite clear that its susceptibility to odorant fade makes it an unreasonably dangerous product requiring a warning.

19. Similarly, the Supreme Court of Iowa held that a natural gas company had a duty to warn its customers of the dangerous condition inherent in its gas. Specifically, it held the defendant gas company had a duty to warn its customers that an inherent danger existed when its odorized gas was used with certain "cobra connectors" employed in gas piping. Estate of Pearson v. Interstate Power & Light Co., 700 N.W.2d

333, 341 (2005). The gas company's knowledge that sulfur compounds in its gas, as well as the added ethyl mercaptan, had a corrosive effect on the cobra connectors and that such corrosion caused leaks in the piping despite being on the customer's side. Id at 342 . In making its determination, the Court relied on the Restatement which states:

> One who supplies directly . . . a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel . . . or to be endangered by its probable use, for physical harm . . . if the supplier:
>
> (a) Knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied; and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize it's dangerous condition, and
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition or the facts which make it likely to be dangerous.

Restatement (Second) of Torts § 388, at 300-01 (1965).

20. Thus, these cases indicate that a gas company does have a duty to warn about the dangers of odor fade in odorized natural gas. The susceptibility to odor fade renders a product unreasonably dangerous while the "inherently dangerous" character of odorized gas requires warnings even if the potential danger is on the customer's side of the meter.

V. FILED RATE DOCTRINE

The filed rate doctrine does not relieve a gas utility of its common law duty to warn customers about the dangerous conditions inherent in natural gas.

21. Moreover, the Iowa Supreme Court, mentioned above, held that the "filed tariff doctrine" does not bar claims sounding in the common law duty of failure to warn. While recognizing that the defendant gas company has no duty to inspect any

equipment "downstream of the meter", the Court held the "filed rate doctrine" does not preclude the gas company's duty to "exercise reasonable care to minimize any hazard inherent in it gas services." The gas company had a duty to warn of such an "inherent hazard" notwithstanding the fact that the customer had responsibility for the pipes downstream of the meter. *Id.*, Pearson, 700 N.W.2d at 342-345.

22. In 2007, the Wisconsin Supreme Court, held that a tort claim against a utility alleging that stray voltage harmed cattle was not barred by the filed tariff doctrine because: 1) by seeking a reduction in stray voltage, the plaintiffs were not seeking a "privilege" within the meaning the filed rate doctrine; and 2) the conformance with the tariff did not eliminate the defendant's common law duty of ordinary care. Schmidt v. N. States Power Co., 742 N.W.2d 294 (Wis.2007) *See also* Siewert v. N. States Power Co., 793 N.W.2d 272 (Minn. 2011) (filed rate doctrine does not bar a tort claim based on negligence, strict liability, trespass, and nuisance.)

23. Referring to the filed tariff doctrine, former Supreme Court Justice William Renquist's concurrence made the point that "the tariff does not govern the entirety of the relationship between the common carrier and its customers. It does not serve as a shield against all actions based in state law." Am. Tel. & Tel. Co. v. Cent. Off. Tel., 524 U.S. 214, 230-231 (1998). Thus, the distinction between those claims barred by the filed rate doctrine and those claims not barred rests on whether the contract itself-or some other legal duty is the basis of the alleged harm. *See id.*

24. The liability exclusions found in the case of *Adams v. Northern Illinois Gas Co.*, are quite similar to the exclusions found in Centerpoint's tariff. Like Centerpoint,

the defendant in *Adams* argued that the plain language of the limitations barred imposition of any duty on the gas company. The facts in *Adams* are similar those in the *Estate of Pearson*, case mentioned above, where a defective cobra connector caused a leak on the customer's side of the meter. The Illinois Supreme Court held, "the tariff essentially codifies the common law rule that a gas company has no duty with respect to a consumer's gas pipes and fittings, based on the consumer's responsibility for maintaining his or her own equipment and the company's lack of control or knowledge." Adams v. Northern Illinois Gas Co., 809 N.E.2d 1252, 1268. (Illinois.2004). Like Centerpoint, the defendant argued that the tariff provision absolved it of any duty, but the Court held that despite the "filed tariff doctrine", the gas company had a duty to warn the Plaintiff that Cobra connectors were potentially hazardous even though on the customer's side of the meter. *Id* at 1273.

25. Nevertheless, in another Illinois case, *Turner v. Illinois Gas Co.*, the court did hold that the "filed tariff doctrine" forbade the plaintiff's claims when a gas explosion occurred as a result of damaged pipes on the customer's side of the meter. However this case is distinguishable from the other cases and the Canas' case because in *Turner*, the Plaintiffs alleged the defendant utility was negligent for *failing to inspect* the gas piping in their basement and to warn plaintiffs of any risk posed by the *condition of the piping* not under a theory of strict products liability-failure to warn. (*emphasis added*) Turner v. Northern Illinois Gas Co., 930 NE 2d 418 (CA - 2nd Illinois - 2010).

26. In sum, these cases taken together stand for the proposition that although the "filed tariff doctrine" relieves a gas utility of any duty to maintain, inspect, fix, etc.,

the customer's pipes, it does not relieve a gas utility of its duty to warn consumers about the unreasonably dangerous condition intrinsic to its product. In marketing defect cases, the defective or unreasonably dangerous condition of the marketed product arises not from the product itself, but because the seller fails to warn the user of its inherent danger. Technical Chemical Co. v. Jacobs, 480 SW.2d 602-605 (Tex.1972). As such it is covered by the laws of products liability.

27. Finally, Texas follows this line of thought as an appellate court recently indicated that strict liability claims are not barred, as a matter of law, by the "filed rate doctrine." RT Realty, L.P. v. Texas Utilities Electric Co., 181 S.W.3d 905, 918 (Tex.App.-Dallas 2006). (Appellants failed to raise a *fact issue* on their strict liability claim since their claim was based on the utilities' failure to maintain their customer's equipment and not on the dangerous or defective nature of the electricity itself.)

IV. TARIFF AMBIGUITIES

Since Centerpoint drafted the limitation of liability provisions any ambiguities must be construed in favor of the plaintiffs.

28. Tariffs amount to a binding contract between the utility and its customers. Therefore, the rules of contract construction are applicable to tariffs. Sw. Elec. Power Co., 20 S.W.3d at 768, (Tex.App.-Texarkana 2000) *aff'd in part & rev'd in part*, 73 S.W.3d 211 (Tex.2002). Ambiguity is a question of law for the court to decide. R & P Enter v. LaGuarta, Gavrel & Kirk, Inc., 595 S.W.2d 517, 518 (Tex.1980). If a written contract is worded allowing for a definite or certain legal meaning, it is not ambiguous. GTE Sw., Inc. v. Public Utility Com'n, 102 S.W.3d 282, 293 (Tex.App.Austin-2003). A contract is

not ambiguous if it can be given a definite or certain meaning as a matter of law. Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd., 940 S.W.2d 587, 589 (Tex.1996). However, if the contract is subject to two or more reasonable interpretations after applying the pertinent rules of construction, the contract is ambiguous. Universal CIT Credit Corp. v. Daniel, 243 S.W.2d 154, 157 (Tex.1951). Although parol evidence relating to a parties' intent is not admissible for the purpose of creating ambiguity, the contract may be read in light of the surrounding circumstances. GTE Sw., Inc., 102 S.W.3d at 293. The relevant provisions of Centerpoint's tariff are as follows:

> **14. ESCAPING GAS**
>
> Immediate notice must be given to Company by Consumer of any escaping gas on Consumer's premises. No flame shall be taken near the point where gas is escaping and as an added precaution, the gas should immediately be shut off at the meter by Consumer. Company shall not be liable for any damage or loss caused by the escape of gas ***from Consumer's house piping or Consumer's appliances***.

See Texas Gas Rate Book – attached hereto as Exhibit B (emphasis added). [3]

29. A reasonable person could find that this limitation merely codifies the common law rule that a utility company has no duty or responsibility beyond the meter to inspect, maintain or fix consumer's house piping. However, Centerpoint's overly expansive interpretation would preclude liability for even its own negligent or intentional acts. This provision does not bar the Canas' claims because they are based on a products liability(marketing defect) -failure to warn theory of liability. Under this theory, the proximate cause of the death of Guadalupe Del Carmen Canas was not due

[3] Attached to Centerpoint's Motion for Traditional and No Evidence Summary Judgment as Exhibit B.

to the escape of gas from the customer's piping, but from the dangerous condition of the gas because of Centerpoint's failure to warn about it. The other relevant terms are as follows:

17. NON-LIABLITY

(a) The Company shall ***not be liable*** for any loss or damage caused by variation in gas pressure, defects in pipes, connections and appliances, escape or leakage of gas, sticking valves or regulators, or for any other loss or damage ***not caused by the company's negligence arising out of or incident to the furnishing of gas*** to any Consumer.

(b) Company shall not be liable for any damage or injury resulting from gas or its use ***after such gas leaves the point of delivery*** (customer's pipelines) ***other than damage caused by the fault of the company*** in the manner of ***installation*** of service lines, in the manner in which such service lines are ***repaired*** by the Company, and in the negligence of the Company in ***maintaining*** its meter loop. All other risks ***after the gas left the point of delivery*** shall be assumed by the Consumer, his agents, servants, employees or other persons.

See Texas Gas Rate Book – attached hereto as Exhibit C (emphasis added).[4]

30. Paragraph 17 (a) allows for the rational conclusion that Centerpoint is only liable when its negligence is the sole proximate cause of damages, subject to those situations specifically listed. Also, the phrase "furnishing of natural gas" could certainly mean the limitation refers only to the service or supplying of natural gas and not to the "product" of natural gas, itself. Furthermore, a reasonable interpretation of this sentence, would mean that Centerpoint is liable, in these circumstances, when its negligence is the sole proximate cause of loss or damage. Even Centerpoint admits that section 17(a) allows a claim for negligence.[5]Paragraph 17(b) could reasonably be

[4] Attached to Centerpoint's Motion for Traditional and No Evidence Summary Judgment as Exhibit B.
[5] See, Centerpoint's Traditional and No Evidence Motion for Summary Judgment, p.8.

construed to mean that Centerpoint is not liable unless it actually installed, repaired or maintained the customer's pipes in a negligent manner.

31. The above- referenced tariff provisions are ambiguous because each one is subject to two or more reasonable meanings. A contract is ambiguous if, after applying the appropriate rules of construction, it is subject to two or more reasonable interpretations. GTE Sw., Inc. v. Public Utility Com'n, 102 S.W.3d 282, 293 (Tex.App.Austin-2003). Furthermore, contract language will be construed against the drafter if the contract is found to be ambiguous. *Id at 293.* Thus, since Centerpoint drafted the tariff provisions, any ambiguity should be strictly construed against it. Also, since the duty to warn about the dangerous condition of its product was not included in Centerpoint's tariff, this claim should not be barred as a matter of law.

32. In sum, the three liability limitations may reasonably be interpreted to do nothing more than restate the common law duty a utility owes to its customers regarding the customer's piping. None of these limitations in any way refer to the dangerous condition of the gas itself. None of these limitations contain any reference, whatsoever, to excluding liability for failure to warn about the propensity of the mercaptan in natural gas to lose its odor. As said above, the nature of this case is in products liability, and in a marketing defect case, the relevant issue, is not the product itself, but the failure to provide a warning. The existence of a duty to warn of dangers or instruct to the proper use of a product is a question of law. Munoz v. Gulf Oil, 732 S.W.2d 62, 654 Tex.App.-Houston[14th Dist.] 1987, writ ref'd n.r.e.) Whether there is a

defect in the marketing that was a producing cause of the injuries is a question of fact for the jury.

33. Centerpoint contends that the "filed rate doctrine" serves as a "magic" shield, protecting it from any duties it owes after the natural gas crosses the line into customer's piping. However, as the previous cases point out, the "filed tariff doctrine" does not apply to claims based upon strict products liability for failure to warn.

34. Each tariff is decided on a case-by-case basis where the court will determine whether a liability limitation is reasonable or not. *See,* Sw. Elec. Power Co. v. Grant, 73 S.W.3d 211, 216 (Tex.2002). The situation in the *Grant* case was unique, to say the least, as the plaintiff alleged her injuries were the result of an electrical shock to her face that came from either an unplugged television, an electrical wall outlet, or a light switch. i.e., the customer's appliances. *Id*., at 214. The opinion did not address whether the defendant's tariff provision precluded claims based on products liability.

35. The Court held the liability limitation to be reasonable because it was narrowly drawn and it provided a remedy for gross negligence and willful misconduct and because it did not exclude liability from negligence in other contexts, i.e., relieve the utility of its duties under other circumstances. *Id.,* at 220. It did not hold injury limitations for ordinary negligence were reasonable as a matter of law under all circumstances, but only that they are not prima facie unconscionable under the UCC and do not violate public policy. *Id.,* at 215, 222. Nevertheless, Justice Enoch points out that,

> "The Court ventures an opinion on the reasonableness and the enforceability of a personal injury liability exclusion in a utility tariff when no other state supreme court nor any federal court has decided that issue. What the Court finds is only two opinions from state intermediate appellate courts that have addressed whether a tariff can limit liability for personal injury damages – hardly settled authority. The Court hides the dearth of authority in the personal injury context by citing economic damage cases, which by the mere fact they are economic damage cases makes them distinct from a case involving personal injury. . . I am unwilling to decide that utility may, through its tariff, disclaim liability for personal injury damages when precedent is virtually non-existent"

Southwestern Electric Power Co. v. Grant, 73 S.W.3d at 224- 225 (Enoch, J. concurring).

36. Every liability limitation is required to be reasonable. In order for a limitation of liability to be reasonable it must be narrowly drawn. Reading Centerpoint's tariff provisions to relieve it from liability for all its duties after the gas crosses the "magic" line into the customer's side, including the failure to warn about the dangerous condition of its gas, is unreasonably broad. A tariff provision that is unreasonable is invalid as matter of law. *See*, Sw.Elec. Power v. Grant, 73 S.W.3d at 219.

37. Moreover, the limitation of liability provisions do not appear to be in accord with the purpose of the statutes to which it must conform. The applicable provision in Centerpoint's gas tariff states,

> **2. APPLICATION OF RULES**
>
> (a) . . . these rules apply to all Consumers . . . ,except insofar as they are . . . in conflict with a statute of the state of Texas, valid Municipal Ordinance, valid final order of any court or of the Railroad Commission of Texas, or written contract executed by Company,… Whenever possible, these rules shall be construed harmoniously with laws, contracts, ordinances, and orders.

See Texas Gas Rate Book – attached hereto as Exhibit D[6]

[6] Attached to Centerpoint's Motion for Traditional and No Evidence Summary Judgment as Exhibit B.

The relevant portions of the Texas Utilities Code state,

> **Section 101.002: PURPOSE AND FINDINGS**
>
> (a) This subtitle is enacted to ***protect the public interest*** in the rates and services of gas utilities. The purpose of this subtitle is to establish a comprehensive and adequate regulatory system for gas utilities to assure rates, operations, and services that are ***just and reasonable*** to the consumers and to the utilities. (emphasis added).
>
> (b) Gas utilities are by definition monopolies in the areas they serve. As a result, the normal forces of competition that regulate prices in a free enterprise society do not operate. Public agencies regulate utility rates, operations, and services as a substitute for competition. Tex. Ut. Code Ann. § 101.002 (1997).
>
> **Section 104.251 GENERAL STANDARD**
>
> A gas utility shall furnish service, instrumentalities, and facilities that are safe, adequate, efficient, and reasonable. Tex. Ut. Code Ann. § 104.251 (2007)

38. Accordingly, it does not appear possible for Centerpoint's tariff to be construed in harmony with the Texas Utilities Code. The main purpose of the Texas Utilities Code is to protect the public interest against a powerful gas monopoly such as Centerpoint, and to ensure that a gas utility provides just, reasonable and safe service to its customers. Conversely, the entire purpose of Centerpoint's tariff is to relieve Centerpoint of any responsibility for breaches of these statutory duties. Likewise, there does not appear to be any concern, whatsoever, for protecting the public interest.

VII. CENTERPOINT'S KNOWLEDGE

Plaintiffs' claims do not concern Centerpoint's knowledge about a dangerous condition on the customer's property, but the dangerous condition of its product. The Canas' produced sufficient evidence that Centerpoint knew or had reason to know that the natural gas it supplied to its customers was

defective because the mercaptan added to warn of gas leaks is subject to odor fade. Furthermore, proof of actual knowledge regarding dangerous conditions inherent in a product is not required in an action for products liability.

39. Centerpoint asserts that it owed no duty to the Canas' because they failed to produce any evidence of Centerpoint's actual knowledge of a dangerous condition on the customer's property that caused the explosion. This may be decided based on a traditional or no evidence motion for summary judgment. However, as related above, whether Centerpoint had actual knowledge of a dangerous condition on the customer's property is utterly irrelevant to a claim based on a products liability/ marketing defect-failure to warn theory of recovery. The only relevant issue is whether Centerpoint knew or had reason to know about the inherently dangerous propensity of its gas to lose its odor due to odor fade.

40. The court erred by granting Centerpoint's no-evidence motion for summary judgment because the Canas' provided summary-judgment evidence that raised a fact issue on whether Centerpoint knew or had reason know about the phenomenon known as odor fade, a dangerous condition inherent in natural gas. Tex. R. Civ. P. 166a(i).

41. Furthermore, the court erred by granting Centerpoint's traditional motion for summary judgment because there is a disputed fact issue about whether Centerpoint had actual knowledge or reason to know about the dangerous condition of natural gas in that the mercaptan added to warn of leaks is subject to odor failure, which must be submitted to the jury. *See* Park Place Hosp. v. Estate of Milo, 909 S.W.2d 508, 511 (Tex. 1995).

42. In this case there is no doubt Centerpoint knew or had reason to know of the danger that gas may become de-odorized when the mercaptan is filtered out through the soil or in other ways whereupon gas may accumulate to an explosive level without any warning. It is not a question of if such a failure would occur, but when. Centerpoint is aware that when gas migrates underground it can become odorless. Centerpoint corporate representative, Winston Meyers, has known of odorant fade for more than ten years. Centerpoint admits that odorless or under odorized gas that enters a structure is dangerous. Centerpoint does not warn its customers that underground gas can migrate into their home in an odorless or under-odorized condition. *See*, attached hereto as Exhibit E[7]

43. Furthermore, the Canas' are not required to prove Centerpoint possessed actual knowledge in an action for products liability. "A "marketing defect" with respect to the product means the failure to give adequate warnings of the product's dangers that were known *or* by the application of reasonably developed human skill and foresight *should have been known*…, which rendered the product unreasonably dangerous." (*emphasis added*). PJC 71.5, Products Liability – Theories of Recovery, Marketing Defect-No Warning or Instruction or Inadequate Warnings or Instructions for Use Given with Product (2008); Dewayne Rogers Logging, Inc. v. Propac Industries, Ltd., 299 S.W.3d 374, 384 (Tex. App—Tyler 2009, no pet. h.); *accord* USX Corp. v. Salinas, 818 S.W.2d 473, 482-483 (Tex. App.—San Antonio, writ denied); Bristol-Meyer Co. v. Gonzalez, 61 S.W.2d 801, 804 (Tex.1978).

[7] Plaintiffs' Response to Centerpoint's Traditional and No Evidence Motion for Summary Judgment.

PRAYER

44. For these reasons, and in the interest of justice and fairness, the Canas' ask the court to grant a new trial.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been forwarded to all of the parties or through their counsel of record by certified mail/fax/personal delivery/email on this 7th day of Ocotber 2011.

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