IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JOEL BROWN and IRIS BROWN,	)	
	)	No. 291,2009
Plaintiffs Below, Appellants,	)	
	)	Superior Court
v.	)	
	)	New Castle County
UNITED WATER DELAWARE, INC.,	)	C.A. No. 07C-07-070 JAP
	)	
Defendant Below, Appellee.	)	

MEMORANDUM OPINION ON REMAND*

This is a suit for property damage caused by a fire which destroyed Plaintiffs' home. Plaintiffs alleged that because of assorted failures by United Water, the fire hydrants near their home did not work. According to Plaintiffs, had those hydrants been functioning properly, the firefighters would have been able to save all or part of their home.

This Court granted United Water's motion for summary judgment and dismissed the Browns' claims on the ground that they were barred by the filed rate doctrine, sometimes known as the enrolled tariff doctrine. Plaintiffs appealed and the Supreme Court affirmed this Court's ruling.

*Corrected May 20, 2010.

During the course of that appeal, however, the question arose whether the filed rate doctrine also serves to bar claims for gross negligence or willful and wanton conduct -- a question which had not been briefed or argued before this Court. In the interest of justice the Supreme Court, while retaining jurisdiction, remanded the matter to this Court for consideration of those issues. As this Court understands the Supreme Court's remand, it is directed to consider (1) whether the record in this case, when viewed in the light most favorable to plaintiffs, supports a claim for gross negligence or willful and wanton conduct; and (2) if so, is such a claim barred by the filed rate doctrine?

After the remand United Water advised by letter to the Court that it conceded that the filed rate doctrine does not bar claims for gross negligence and would therefore not brief the issue. In its letter United Water referred to unidentified "persuasive case law [which] clearly holds that the filed rate doctrine would not bar claims for gross negligence or willful misconduct." This Court hazarded a guess that United Water had in mind *Satellite System, Inc. v. Birch Telecom of Oklahoma, Inc.*[1] since the Supreme Court referred to that opinion in its opinion remanding this matter.

[1] 51 P.3d 585 (Ok. 2002).

The Court responded to counsel with a letter in which it pointed out that the cases cited in *Satellite System* generally did *not* support the proposition that "courts overwhelmingly reject attempts to limit liability either by contract or by tariff for gross negligence, willful misconduct and fraud." The Court informed counsel that it felt obligated by the remand to consider the issue despite United Water's concession. This Court invited United Water to brief the issue or, alternatively, to provide it with the case law it found to be persuasive. United Water chose to do the latter.

Having reviewed the submittals on remand, the Court concludes that (1) a reasonable trier of fact could find that United Water was grossly negligent but could not find that its misconduct was willful; (2) United Water has waived any argument that the filed rate doctrine bars claims for gross negligence; and (3) in Delaware a filed tariff can bar claims for gross negligence.

I. *FACTS*

The Supreme Court succinctly summarized the underlying facts. Rather than gilding the lily, this Court will simply repeat them here.

> In the early morning of December 20, 2005, Joel and Iris Brown discovered a fire in the living room of their Wilmington home. The Browns' neighbor called 911, and firefighters responded within

seven minutes. A paramedic with the firefighting crew attempted to connect the water hose to the hydrant nearest the Brown's house. The paramedic was unable to open the valve because he was trying to turn the valve in the wrong direction, and broke the stem. The fire chief then sent his crew to the next closest hydrant. They were unable to open the second hydrant, and concluded that it was frozen. The firefighters finally obtained water from a third hydrant, which was much farther from the Browns' home. By that time, however, the crew had been on the scene for more than 30 minutes and it was too late to same any portion of the house.

Investigations later revealed that United Water Delaware, had painted over the top of the first hydrant, thereby covering the arrow that shows which way to open the valve. United Water's inspection records described the second hydrant as "very hard to open" in November 2004 and "hard to open" in April 2005. Nonetheless, the record indicates that United Water took no action to correct the problem. The Fire Marshall's Office concluded that the second hydrant failed due to lack of maintenance.

Construing the record in the light most favorable to the non-moving parties, the Plaintiffs, the following additional facts emerge. Fire hydrants

have directional arrows which indicate the direction in which the shaft connected to the valve should be turned in order to open the valve. There is no direct testimony in the record as to whether the directional arrows on the two hydrants in question were visible that night, but taking the testimony in the light most favorable to Plaintiffs there is sufficient evidence they were painted over. R.T. Leicht, an investigator for the State Fire Marshall's Office, testified that during his investigation after the fire he found that paint around the arrows had been chipped off. He speculated that this was done the night of the fire in an effort to determine the correct direction to turn the valve. Mr. Leicht testified that his inspection of other nearby hydrants, at least some of which are maintained by United Water, revealed that the directional arrows were painted over, making it difficult, even in broad daylight, to see the direction in which the arrow was pointing.

Wayne Marti, a United Water employee whose job it is to inspect hydrants, testified it was necessary for firefighters to be able to see the direction of the arrow in order to open the valve. Therefore when Mr. Marti noticed paint obscuring the directional arrow on a hydrant, he would chip it off. Donald Moorhead, another United Water hydrant inspector, testified, however that inspection of the directional arrows was not part of United Water's inspection protocol.

As noted previously, after the responders were unable to open the first hydrant because they turned the valve the wrong way, they proceeded to the next hydrant which they were also unable to open. United Water's records reveal that this hydrant was inspected twice in the thirteen months preceding the fire. On November 12, 2004 United Water inspectors noted that the hydrant was "very hard to open," and on April 18, 2005 it was "hard to open." According to Mr. Moorhead (one of the United Water inspectors) if a hydrant is "very hard to open" it is taken out of service and if it is "hard to open" it is lubricated.

Fire Marshall inspector Leicht testified that the standard of care required that defects be repaired as soon as possible after they are detected. This was not done here. Susan Skomorucha, United Water's general manager, testified that there is no evidence that any remedial action was taken after reports were received that the second hydrant was "very hard to open" and "hard to open." Fire Marshall inspector Fox testified that no one at United could tell him why the hydrant was not replaced.

II. *ANALYSIS*

A. *A reasonable trier of fact could find that United Water was grossly negligent*

United Water confronts the bull by the horns, contending that the evidence in the record does not even show it was negligent, much less grossly negligent.

With respect to the first hydrant, it argues that there is no direct evidence that the directional arrow was obscured by paint. While this may be true, the contention overlooks a basic principle relating to motions for summary judgment -- the non-moving party is entitled to all reasonable inferences which may be drawn from the record. A reasonable trier of fact could conclude, on the basis that the directional arrows on other nearby hydrants were obscured by paint, that the arrows on the hydrants in question were also obscured by paint when the firefighters arrived and that the paint was scraped off during efforts to open those hydrants.

In its argument concerning the second hydrant[2] United Water seeks to recast Plaintiffs' argument as being grounded in *res ipsa loquitur*, even though neither the Plaintiffs' complaint nor their other submissions before this Court have used this term. From this United Water deduces that Plaintiffs must disprove other possible causes for the failure of the hydrant

[2] United Water titles this argument "Plaintiff Failed to Offer any Evidence that the Second Hydrant Failed, Only that it Would Not Open for a Paramedic." This title is misleading because it creates the impression that an untrained paramedic was attempting to open the hydrant alone. There is evidence in the record that the paramedic was being assisted by a trained firefighter. Further, at least some Delaware paramedics have also been certified as firefighters. *See State v. Taye*, 2009 WL 4017638 (Del. Super.).

to open, such as the valve being turned the wrong way or the mechanism being frozen because of cold weather.[3]

The Court disagrees with United Water's underlying premise -- that Plaintiffs' claim is based upon the doctrine of *res ipsa loquitur*. It has long been recognized that the doctrine is not applicable when there are specific claims of negligence:

> *Res ipsa loquitur* is, of course, a rule of circumstantial evidence available to prove a plaintiff's case when other proof is not forthcoming. Basically, the doctrine is that negligence may be inferred from circumstances when, in the opinion of reasonable men, the injury would not have occurred except for some unknown negligence on the part of the person in control of the thing in question.[4]

Here Plaintiffs advance, and the evidence supports, a specific theory of negligence: United Water was on notice that the hydrant was difficult to open and failed to take steps to remediate the problem. United Water's effort to redefine the nature of Plaintiffs' claim is unavailing. The significance of this is, of course, that it is unnecessary for Plaintiffs to prove the lack of maintenance is the only possible cause of the inability to open the hydrant.[5]

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[3] One possible theory espoused by United Water as to why the hydrant was difficult to open is that it had been "frozen shut" by cold weather at the time of the fire. There are two flaws with this contention. First, United Water has failed to adduce any evidence of the air temperature in the days and hours preceding the fire. Second, the contention overlooks that the hydrant was "hard to open" during an inspection the previous April, presumably a time when it would not be "frozen" by the air temperature.

[4] *Slovin v. Gauger*, 200 A.2d 565, 567 (Del. 1964).

[5] *Kuyper v. Gulf Oil Corp.*, 410 A.2d 164, 165 n.1 (Del. 1980) ("We agree with plaintiffs that it is no longer correct in a simple negligence case to say, under the general circumstantial evidence rule that the conclusion of negligence or proximate cause 'must be the only reasonable inference possible.'").

Having concluded that United Water's argument it was not even negligent is without merit, the Court must next consider whether United Water was grossly negligent or guilty of willful misconduct. Gross negligence is defined as "a higher level of negligence representing 'an extreme departure from the ordinary standard of care.'"[6] In other words, a finding of gross negligence requires "more than ordinary inadvertence or inattention."[7] The Delaware Supreme Court has referred to gross negligence as the "functional equivalent" of criminal negligence, which is defined as the failure to perceive a risk of harm of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of conduct a reasonable person would observe.[8] The words "willful and wanton" imply a degree of negligence higher than gross negligence.[9] In order for conduct to be willful or wanton, it must reflect a "conscious indifference" or an "I don't care" attitude."[10]

Generally whether circumstances amount to gross negligence and willful or wanton conduct is a question of fact for the jury.[11] The Court may

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[6] *Browne v. Robb*, 583 A.2d 949, 953 (Del. 1990) (quoting W. Prosser, Handbook of the Law of Torts 150 (2d ed. 1955)).
[7] *Jardel v. Hughes*, 523 A.2d 518, 530 (Del. 1987)
[8] *Id.*; 11 *Del. C.* § 231(a).
[9] *Pauley v. Reinoehl*, 2002 WL 1978931, at *7 (Del. Super.); *Morris v. Blake*, 552 A.2d 844, 847 (Del. Super. 1988).
[10] *Porter v. Turner*, 954 A.2d 308, 312 (Del. 2008).
[11] *Estate of Alberta Rae v. Murphy*, 2006 WL 1067277 (Del. Super.); *Midland Red Oak Realty, Inc. v. Friedman, Billings & Ramsey, Co.*, 2005 WL 445710, at *4 (Del. Super.).

decide the issue as a matter of law only where no reasonable jury could find gross negligence or willful or wanton conduct.[12] Applying the above standards to the instant record, the Court finds there is evidence in the record sufficient to allow a reasonable trier of fact to find that United Water was grossly negligent. On the other hand, the Court finds that a reasonable trier of fact could not find that United Water acted willfully or wantonly.

Taking all reasonable inferences in favor of the non-moving party, a reasonable trier of fact could infer that an agent of United Water painted over the directional arrow on the hydrant. This alone would constitute, at most, ordinary negligence. But the record also shows that United Water knew that obscured directional arrows could cause problems in the event of a fire, and it also knew that obscured directional arrows were a common occurrence on its hydrants. Yet, despite this knowledge, United Water failed to direct its inspectors to assure themselves that the arrows were clearly visible when they conducted routine inspections of the hydrants. This failure, with its potential to cause damage or injury at any site reliant upon a United Water hydrant, is more than ordinary inadvertence or inattention. At the same time, it does not reflect a "conscious indifference" to the safety of others. There is no evidence that United Water made a deliberate decision

[12] *Id.*

not to require its inspectors check the directional arrows and, if necessary, scrape off the excess paint.[13] A reasonable trier of fact could find, therefore, that United Water was grossly negligent in failing to require inspection of the directional arrows.

In November, 2004 United Water's inspectors noted that the second hydrant was "very hard to open," but nothing was done to fix it. At this point, the Court would readily ascribe this to a simple oversight and would characterize it as negligence. Five months later, however, United Water received a second report indicating that the hydrant was "hard to open." United Water still took no corrective action. At this point, in the Court's view, a trier of fact could reasonably conclude that United Water's failure amounted to something more than an oversight and that, under the circumstances could find that its repeated failure to repair the hydrant amounted to gross negligence.

B. *United Water has waived any argument the claims for gross negligence are barred by the tariff*

It is unnecessary to devote much space to this portion of the analysis. United Water has conceded that the filed rate doctrine cannot preclude claims for gross negligence because of its reading of case law from other

[13] It is unlikely that economic factors would have motivated United Water to decide not to inspect the arrows when the rest of the hydrant was being negligible. The incremental cost of looking at the arrow and scraping off any excess paint would be negligible.

states. This concession and the accompanying decision not to brief this issue[14] constitutes a waiver of any defense United Water may have had under the filed rate doctrine.[15]

Having concluded that the evidence in the record supports Plaintiffs' claim that United Water was grossly negligent and that United Water waived any defense to gross negligence it might have had under the filed rate doctrine, the analysis can, and perhaps should, end here.[16] Nonetheless, the Court will indulge itself in an extended *obiter dictum* to consider whether, under Delaware law, the filed rate doctrine may foreclose claims for gross negligence. It does so for two reasons: first, this Court does not feel free to ignore the implicit instructions from the Supreme Court; second, the Court does not want this state to make the mistake made in other jurisdictions and subscribe almost by default to the notion that there is an overwhelming majority of persuasive cases holding that the filed rate doctrine cannot preclude claims for gross negligence. The Court recognizes, of course, that

[14] Although the Court disagrees with United Water's counsel's reading of the cases from other jurisdiction, it has no doubt that the decision of counsel not to brief this issue is well intended and done in accordance with what they believed to be their ethical obligation.

[15] *See Wright v. State*, 980 A.2d 1020, 1024 (Del. 2009) ("we hold that by making a tactical decision not to object at trial, Wright has waived appellate review of any arguable claim of error in this direct appeal."); *Adkins v. State*, 2010 WL 922765 (Del.) (same).

[16] In its submittal to this court on remand United Water argued that, as a matter of law, there is a superceding or intervening cause of Plaintiffs' injuries. This argument is beyond the scope of the remand, and the court has not considered it.

its analysis is not the result of an adversarial argument and, importantly, that Plaintiffs have not had an opportunity to weigh in on the issue.[17]

C. *Under Delaware law the filed rate doctrine may bar claims for gross negligence*[18]

Contrary to popular dicta from other states, there are few cases which hold that the claims for gross negligence are not barred by the filed rate doctrine. Some of the few courts which have actually held that the doctrine does not bar claims for gross negligence have not explained the basis for their ruling, while others have pointed to public policy as the source of this rule. There is no Delaware statutory bar to tariffs limiting liability for gross negligence. Consequently, any such prohibition must be found in the public policy of our state. It is settled that, under our concept of separation of powers, the creation of public policy is the legislature's prerogative. This Court is not free to create a policy that filed rates may not bar claims for gross negligence. The question, therefore, is whether the General Assembly has created a policy which precludes filed rates from barring claims for gross negligence. The Delaware Supreme Court effectively answered that question more than twenty years ago: no such policy exists.

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[17] Plaintiffs' inability to voice their opinion on this issue is not prejudicial to them because this Court has held that United Water waived any defense to the gross negligence claims it had under the filed rate doctrine.

[18] The Court has assumed for purposes of this dictum that the language of the tariff filed by United Water encompasses gross negligence.

1. *There is no overwhelming persuasive case law holding that tariffs cannot preclude claims for gross negligence*

In the latter half of the last century there was a cultural phenomenon known as "famous for being famous." The notion was that certain people achieved celebrity status for no identifiable reason. Historian and social theorist Daniel Boorstin defined such a person as one "who is known for his well-knowness."[19] The proposition that claims for gross negligence cannot be barred by the filed rate doctrine qualifies as "famous for being famous," because although the concept is often referred to in dictum, the cases in which it actually appears as a holding are rare.

One case which illustrates the point is *Satellite System, Inc. v. Birch Telecom of Oklahoma, Inc.*[20] which was referred to by the Supreme Court in its opinion remanding this matter for the proposition that "[c]ourts overwhelmingly reject attempts to limit liability either by contract or by tariff for gross negligence, willful misconduct, and fraud."[21] Notably *Satellite System* itself does not stand for the proposition that the filed rate doctrine cannot bar claims for gross negligence. Gross negligence was not an issue in *Satellite System*; the claims presented there were for breach of

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[19] Daniel J. Boorstin, *The Image: A Guide to Pseudo-events in America* (1961). The phenomenon was referred to as the "Zsa Zsa Factor" in a paper authored by Neal Gabler who was then a senior fellow at the Norman Lear Center at the University of Southern California. Neal Gabler, *Toward a New Definition of Celebrity*.

[20] 51 P.3d 585 (Ok. 2002).

[21] *Id.* at 589.

contract and fraud. The court held that the filed rate doctrine barred the contract claim but did not bar the fraud claim. The decision did not turn, however, on the supposed overwhelming rejection of the filed rate doctrine as a bar to claims for gross negligence. Rather it turned on an Oklahoma statute which created "a strong legislative public policy" against contractual provisions which exempt a party from responsibility for his fraud or willful injury to another. The *Satellite System* court found that:

> Based on Oklahoma's public policy as stated in section 212 of title 15, attempts to limit liability for fraud either by tariff or by contract are unreasonable. Because Birch's tariff attempted to limit its liability for fraud, it was unreasonable, does not have the force of law, and is not binding.[22]

Turning to the *Satellite System* court's observation about the overwhelming rejection of an expansive view of liability limitations in tariffs, the court cites eleven cases. In most of the cases cited by the *Satellite System* court the so-called rule was dictum because the court found no gross claim or evidence of gross negligence.[23] Indeed, in one of the cases the court expressly held it need not consider the issue:

> After weighing the evidence the Court concludes and finds that directory omission in this case was caused by simple clerical error, not constituting gross negligence or willful or wanton misconduct. In view of this finding it is unnecessary for this Court

[22] 51 P.3d at 589.

[23] *Holman v. Southwestern Bell Tel. Co.*, 358 F. Supp. 727 (D. Kan. 1973); *Robinson Ins. & Real Estate, Inc. v. Southwestern Bell Tel. Co*., 366 F. Supp. 307 (W.D. Ark. 1973); *Wheeler Stuckey, Inc. v. Southwestern Bell Tel. Co.*, 279 F. Supp. 712 (W.D. Okla. 1967); *Burdick v. Southwestern Bell Tel. Co.*, 675 P.2d 922 (Kan. Ct. App. 1984); *Bulbman, Inc. v. Nevada Bell*, 825 P.2d 588 (Nev. 1992); *Garrison v. Pacific Northwest Bell*, 608 P.2d 1206 (Or. Ct. App. 1980).

> to decide whether under Arkansas law, as argued by defendant, willful and wanton misconduct rather than gross negligence is necessary.[24]

In another case the tariff itself excluded gross negligence from the limitation on liability,[25] another based its holding on a regulation of the state public utility commission restricting tariff limitations on liability for gross negligence and willful misconduct,[26] and still another based its holding on a public policy emanating from a legislative enactment.[27] Finally, one court wrote, again in dictum, that the only exception was for willful and wanton conduct.[28]

Except for two cases which turned on either an express legislative policy or a prior ruling of the public utility commission, the only one case cited by the *Satellite System* court actually held that a tariff cannot preclude liability for a claims based upon an elevated degree of culpability, such as willful conduct. In *Southern Bell Telephone & Telegraph Co. v Invenchek, Inc.*[29] the court held that a telephone company tariff could not preclude liability for willful conduct. Its holding, however, is unadorned with either citation or explanation. The entire analysis of the tariff issue in *Invenchek* is limited to the following:

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[24] *Robinson.*, 366 F.Supp. at 312.
[25] *Sommer v. Mountain States Tel. & Tel. Co.*, 519 P.2d 874 (Ariz. Ct. App. 1974).
[26] *Pink Dot Inc. v. Teleport Commc'ns Group*, 107 Cal. Rptr. 2d 392 (Cal. Ct. App. 2001).
[27] *Tate v. Mountain States Tel. & Tel. Co.*, 647 P.2d 58 (Wyo. 1982).
[28] *Burdick*, 675 P.2d 922.
[29] 204 S.E.2d 457 (Ga. Ct. App. 1974).

> Count 3 alleges that the interruptions of telephone service, delays, and disconnections of plaintiff's telephone were the result of wilful [sic] misconduct on the part of the defendant. Here the tariff quoted above has not application, and constitutes no defense as against this count, and the grant of the motion to strike was to this extent accurate.

This Court does not find such pronouncements to be persuasive.

The illusion that there is a formidable array of cases holding that a tariff may not limit liability for gross negligence is not limited to *Satellite System*. This Court has examined the cases identified by United Water in its submittal as well as many supporting cases cited therein, and its conclusions about those cases are summarized in the appendix which is attached to this memorandum opinion. Suffice it to say, that summary demonstrates there is no Maginot Line of holdings prohibiting tariffs from limiting liability for gross negligence.

2. *A tariff may preclude liability for gross negligence under Delaware law*

The Court was unable to find any statute or constitutional provision which prohibits a tariff from limiting liability for gross negligence. Consequently any such prohibition must arise from the public policy of this state. This Court is not free to itself fashion such a policy. Rather, it is well established that the creation of public policy falls within the domain of the legislature, not the courts. "Delaware's bedrock constitutional principle of

separation of powers restrains [the courts] from promoting an alternative social agenda."[30] Thus, "the General Assembly decides these matters of social policy, not the courts."[31]

No public policy can be deduced from legislative enactments which would prevent United Water (or other utilities, for that matter) from limiting its liability for gross negligence in its tariff. More than twenty years ago, in *Whalen v. On-Deck, Inc.*,[32] the Supreme Court had occasion to consider whether there was a public policy against insurance covering punitive damages for wanton conduct. The *Whalen* court found that the "Delaware Legislature has formulated no such policy, and this Court has indicated in the past that it would defer to the Legislature on the issue."[33] It necessarily follows that if there is no public policy against insuring for wanton conduct, there is no policy against a utility from limiting its liability for gross conduct. Any change to the holding in *Whalen* must come from the legislature,[34] and in the years since *Whalen* the General Assembly has not acted to do so. The Court therefore finds there is no public policy which precludes a utility from limiting its liability for gross negligence by way of a tariff.

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[30] *Berns v. Doan*, 961 A.2d 502, 505 (Del. 2008).
[31] *Reidel v. I.C.I. Americas, Inc.*, 968 A.2d 17,21 (2009).
[32] 514 A.2d 1072 (Del. 1986).
[33] *Id.* at 1074.
[34] *See Beattie v. Beattie*, 630 A.2d 1096, 1098 (Del. 1993) ("changes in well-settled public policy must be effected by the General Assembly").

It bears repeating that the last portion of this opinion has been written without the benefit of adversary briefing. The Court concludes that tariffs containing limitations on liability for gross negligence are not barred by Delaware law. If that proposition is to change, it must come from the General Assembly or the Public Service Commission.

__________/s/__________
John A. Parkins, Jr.

oc: Prothonotary

Case Name and Citation	Holding or Dictum	Comment	Pertinent Language
Allen v. General Tel. Co. of Northwest, Inc. 578 P.2d 1333 (Wash. Ct. App. 1978)	Dictum.	No claim of gross negligence. Limitation upheld.	
*Angelo Pavone Enters., Inc. v. South Central Bell Tel. Co.,*459 So.2d 1223 (La. Ct. App. 1984)	Dictum.	No evidence of negligence.	"This case must be governed by the legal duty imposed upon [the utility] by the above quoted tariff, and Pavone bears the burden of proving that same was breached. We hold that he did not bear that burden." (459 So.2d at 1226).
Bulbman, Inc. v. Nevada Bell 825 P.2d 588 (Nev. 1992)	Dictum.	Claims for negligence and fraud, but no claim for gross negligence. Utility conceded limitation did not apply to fraud claim.	"The intentional wrongful conduct required to convert a contract case into a fraud case cannot be found here. Or, as the trial court commented, the evidence in this case 'is simply not the stuff of an intentional tort sounding in fraud." (825 p.2d at 592).
Burdick v. Southwestern Bell Tel. Co., 675 P.2d 922 (Kan. Ct. App. 1984)	Dictum.	Court found only negligence. Wrote that only exception to limitation on liability is willful conduct. No discussion of gross negligence.	"The general rule is that the *only* exception to the application of the tariff limitations is made when the defendant's conduct has been shown to be willful and wanton." 675 P.2d at 925 (emphasis added).
Garrison v. Pacific Northwest Bell 608 P.2d 1206 (Or. Ct. App. 1980)	Dictum.	Evidence in record did not establish claim for gross negligence.	"We conclude as a matter of law that this evidence raises no genuine issue of material fact. So long as defendant trains it employees to recognize that there is a difference between the categories of physicians which is significant for directory classification purposes, defendant's failure to train its employees in

			the details of physicians' training and job functions is not gross negligence." (608 P.2d at 1212).
Gas House, Inc. v. Southern Bell Tel. & Tel. Co., 221 S.E.2d 499 (N.C. 1976).	Dictum.	Claim for breach of contract and negligence only.	
Georges v. Pacific Tel. & Tel. Co. 184 F. Supp. 571 (D.Or. 1960)	Dictum.	Claim for negligence only. Limitation upheld.	"Such a minor change could be of no importance and could not be a deviation or a breach of the contract which would give rise in and of itself to an actionable intentional wrongdoing on the part of the defendant." (184 F.Supp. At 576).
Hamilton Employment Service v. New York Tel. Co., 171 N.E. 710 (N.Y. 1930)	Dictum.	Claim for negligence only. Limitation upheld.	"The complaint before us alleges negligence without characterizing it as gross or stating facts from which gross negligence could be inferred." 171 N.E. at 711.
Holman v. Southwestern Bell Tel. Co., 358 F. Supp. 727 (D. Kan. 1973)	Dictum.	No gross negligence found.	"Even taking all of the plaintiffs' allegations as true, we hold that, as a matter of law, the plaintiffs have failed to show willful or wanton conduct as defined by the courts. Hence, plaintiffs are precluded by the tariff from asserting their claim for negligence."
Louisville Bear Safety, Inc. v. South Central Bell Tel. Co., 571 S.W.2d 438 (Ky. Ct. App. 1978)	Dictum.	Court found negligence only.	"Bear Safety argues that since South Central Bell was guilty of gross wanton negligence the exculpatory clause of the contract does not apply. Since we have already determined that South Central was not guilty of such conduct, that argument is without merit." 571 S.W.2d

			at 439.
Pilot Industries, Inc. v. Southern Bell Tel. and Tel. Co., 495 F. Supp. 356 (D.S.C.1979)	Dictum.	Negligence only.	"In any event, there is nothing in the record to sustain a finding of 'gross negligence' or willful misconduct'." 495 F.Supp. At 363.
*Pink Dot, Inc. v. Teleport Communications Group,*107 Cal. Rptr. 2d. 392 (Cal. Ct. App.2001)	Held that plaintiff could pursue claims for fraud, intentional interference and willful conduct.	California PUC enacted regulations prohibiting utilities from precluding liability for willful acts and allowing for limited liability in claims involving gross negligence.	"In 1967 the [PUC] undertook, on its own motion, to investigate all tariff provisions limiting the liability of telephone companies. In its Decision No. 77406, filed June 30, 1970 the commission adopted findings and announced an order requiring each telephone company to adopt, as a part of its tariff, new limitation of liability rules. In substance the new rules were to (1) provide expressly for liability or willful misconduct, fraudulent conduct or violations of law; (2) allow liability for gross negligence to a limit of $10,000." 107 Cal.Rpt. 2d at 396.
Robinson Ins.& Real Estate, Inc. v. Southwestern Bell Tel. Co., 366 F. Supp.307 (W.D. Ark. 1973)	Dictum.	Court expressly declined to reach the issue whether limitation barred claim for gross negligence.	"In view of this finding [of negligence only] it is unnecessary for this Court to decide whether under Arkansas law, as argued by [the utility], willful and wanton misconduct rather than gross negligence is necessary."

Seagroatt Floral Co. v. New York Tel. Co., 429 N.Y.S.2d 309 (N.Y. App. Div.1980)	Not discussed.	No discussion of tariff or of the effect thereof.	
Seaworth & McGill, P.A. v. Southern Bell Tel. and Tel. Co., 578 P.2d 1333 (Wash. Ct. App. 1978)	Dictum.	Turned on language of contract. Language of exculpatory contract clause did not encompass gross negligence.	"No reasonable argument can be made that the errors and omissions clause here can be said to cover intentional and malicious, or grossly negligent action on the part of [the utility]." 580 So.2d at 628.
Smith v. Southern Bell Tel. & Tel. Co. 364 S.W.2d 952 (Tenn. Ct. App. 1962)	Dictum.	Limitation upheld.	"As we see the situation there is nothing more than a simple mistake in connection with the arrangement of the name complained of in this cause, we are not in a position to say that such amounts to gross negligence or wilful [sic.] negligence." 364 S.W.2d at 958.
Sommer v. Mountain States Tel. & Tel. Co., 519 P.2d 874 (Ariz.Ct. App. 1974)	Dictum.	No claim for gross negligence. Tariff itself excluded willful conduct from limitation on liability.	Tariff stated in pertinent part "provided, however, that this limitation of liability shall not apply in the event the mistake, omission, interruption, delay, error or defect in transmission, service or facilities *is caused by the willful and deliberate act of the Telephone Company."* 519 P.2d at 876 (emphasis added)
*Southern Bell Tel. & Tel. Co. v. Invenchek, Inc.*204 S.E.2d 457 (Ga. Ct. App.1974)	Holding.	Without citation to any authority or other explanation, court held that limitation did not apply to willful conduct.	"Count 3 alleges that the interruptions of telephone service, delays, and disconnections of plaintiff's telephone were the result of wilful misconduct on the part of the defendant.

			Here the tariff quoted above has no application, and constitutes no defense as against this count, and the grant of the motion to strike was to this extent accurate." 204 S.E.2d at 459.
State ex.rel. Mountain States Tel. & Tel. Co. v. District Court, 503 P.2d 526 (Mont. 1972)	Dictum.	Negligence only found.	
Tate v. Mountain States Tel. & Tel. Co., 647 P.2d 58 (Wyo. 1982)	Holding.	Contractual limitation limiting liability for gross negligence violated Wyoming public policy.	
Wheeler Stuckey, Inc. v. Southwestern Bell Tel. Co., 279 F. Supp. 712 (D. Okla. 1967)	Dictum.	Court found only negligence, and limitation was upheld. Court stated in dictum that limitation on liability is enforceable "so long as it does not seek immunity from gross negligence or wilful [sic.] misconduct" but cites no authority to support this proposition.	"Plaintiff's recovery will be limited to the terms of the contract above mentioned." (279 F.Supp. At 715).
Willhite v. South Central Bell Tel. Co., 693 F.2d 340 (5th Cir. 1982)	Dictum	Court found no negligence. Did not reach tariff issue.	"Since we have affirmed the trial court's finding concerning negligence, we need not decide whether South Central's liability was effectively limited by the provision in the

tariff." 693 F.2d 340.