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IN THE
COURT OF APPEALS OF INDIANA

ROBERT LONGARDNER, NAOMI LONGARDNER, and CHERYL L. LYNN,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 49A02-0511-CV-1029
CITIZENS GAS & COKE UTILITY, an Indiana Public Trust, and LOVE HEATING & AIR CONDITIONING, INC.,	)	

Appellees-Defendants.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable John L. Price, Senior Judge
Cause No. 49D07-0309-CT-1580

November 8, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Robert and Naomi Longardner, and their daughter, Cheryl L. Lynn (collectively, the Longardners), filed a complaint against Citizens Gas & Coke Utility (Citizens), Miller Pipeline Corporation (Miller Pipeline),[1] and Love Heating & Air Conditioning, Inc. (Love Heating), alleging negligence, trespass, nuisance, criminal trespass, and loss of consortium. Citizens filed two motions for summary judgment, and Love Heating filed a motion for summary judgment and two motions to strike, all of which the trial court granted. The Longardners appeal and raise the following restated issues:

1. Did the trial court abuse its discretion in granting Love Heating's motions to strike?

2. Did the trial court err in concluding Citizens was immune from liability for negligence?

3. Did the trial court err in concluding Citizens and Love Heating did not owe the Longardners duties of care?

4. Did Love Heating breach its duty of care?

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[1] Miller Pipeline is not a party to this appeal.

5. Did the trial court err in concluding Citizens did not cause the gas leak?

6. Did the trial court err in concluding natural gas was not the medical cause of Robert's and Lynn's physical ailments?

7. Did the trial court err in concluding Robert did not suffer compensable damages?

We affirm in part, reverse in part, and remand.[2]

Viewed in a light most favorable to the nonmoving parties, the facts are that Robert and Naomi owned an office building (the building) located at 3520 North Washington Boulevard in Indianapolis, and Robert and Lynn worked in the building as employees of United States Power Engineering Corporation (USPEC).[3] In August 2001, Citizens requested permission to move a gas meter located in the basement of the building. Citizens hired Miller Pipeline to move the gas meter from the basement to the exterior of the building, which it did. Miller Pipeline also repaired the "service lines," *i.e.*, the lines that "run from the main [line] to the individual residences or buildings . . . ." *Appellant's Appendix* at 367. In the course of relocating the gas meter, Miller Pipeline damaged the interior gas lines of the building. Sometime in September 2001, Robert began using the heat in the building for the first time since Miller Pipeline moved the gas meter, and from that time until March 2002, "a foul odor was noticeable in the [] [b]uilding[.]" *Id.* at 276. T. Daniel Bailey, Ph.D., also worked in the building, and "[o]n

[2] Oral argument was conducted in this case in Indianapolis on September 5, 2006. We commend the parties for the quality of their respective presentations at that proceeding.

[3] USPEC is owned by RWI, an Indiana corporation. Naomi owns 59% of RWI; Robert and Naomi's son owns 30% of RWI; Lynn owns 10% of RWI; and Robert owns 1% of RWI.

every occasion [that] [he] was at the [building] . . . in 2001, [he] detected a foul odor and was afflicted with headaches." *Id.* at 342.

Between September 2001 and March 2002, Robert experienced headaches, fatigue, disorientation, muscular spasms, irritated eyes, shortness of breath, coughing, fevers, joint pain, and blisters on his nose and mouth while in the building. On March 9, 2002, Robert suffered a myocardial infarction,[4] *i.e.*, a heart attack, after which a stent was placed in an artery in Robert's heart. Prior to suffering the heart attack, Robert "[n]ever had heart trouble in [his] life." *Id.* at 291. Robert did not suffer any permanent mental impairment from the incoherency. Lynn experienced high blood pressure, bloodshot and watery eyes, fatigue, a suppressed immune system, malaise, and "achiness[.]" *Id.* at 262. Prior to August 2001, Lynn had never experienced "significant headaches, fatigue, or dizziness while working at the [] [b]uilding." *Id.* at 276.

In September 2001, Robert employed Love Heating to service the building's heating system and "investigate the source of offensive odors in [the] building." *Id.* at 96. From September 2001 to November 2001, Love Heating visited the building on approximately ten occasions and was "advised of both the foul odor in the [] [b]uilding and [the] physical symptoms being experienced by Robert and [Lynn]." *Id.* at 276. Love Heating, however, never discovered a gas leak inside the building. In December 2001, Robert and Lynn requested that Citizens investigate the "continuing air quality problems"

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[4] In his deposition, Robert stated he did not "know for sure if it was a heart attack. I[t] might have well been. [He] call[ed] it a heart attack, because when a cardiologist looks at it, it's a heart attack. [But] [he] d[id]n't know [if it was a heart attack]." *Appellant's Appendix* at 292. David L. Tetrick, M.D., Robert's primary care physician, however, stated in his affidavit that Robert "suffered a myocardial infarction." *Id.* at 359. That is, Robert suffered a heart attack.

in the building. *Id.* "[Lynn] said she smelled an odor there [in the building]. That was the reason why [Citizens's] serviceman was there. . . . She said it smelled like . . . natural gas." *Id.* at 368.

On March 4, 2002, Clint Murphy, an employee of Citizens, visited the building in order to investigate Robert and Lynn's continued complaints. Morris French, Ph.D., an independent consultant hired by Citizens, accompanied Murphy to the building. French is a former director of laboratories at Indiana University Medical Center, department of pathology, and is currently the president and chief executive officer of Micro Air, Inc., a company that performs environmental testing and consultation in environmental affairs. Murphy and French

> did a complete walk-through of the building . . . looking for signs of both [sewer gas and natural gas]. . . . [They] frequently will find [natural gas] around valves. And sometimes that's a shut-off valve, and sometimes it's the pilot light valve of a water heater. . . . [French] went over to the gas water heater, and about 10 feet away, [he] could smell gas. And it's fairly common . . . when there is a gas leak, for [them] to find it in a defective or [] leaking pilot light area. . . . And as [French] got closer and closer, it was just obvious that it was leaking natural gas, and [he] made the recommendation that somebody come and repair it soon, because it was leaking . . . .

Id. at 350-51. French was never contacted by Citizens following his March 4 visit to the building. Thereafter, Citizens's servicemen found leaks at the "boiler" and the "gas valve." *Id.* at 368.

In May 2002, York's Quality Air Conditioning & Heating inspected and repaired "all gas lines related to mechanical systems in the basement of the [] [b]uilding." *Id.* at 278. Following repairs, neither Robert nor Lynn experienced any of the symptoms that

occurred before the leaking natural gas lines were fixed. Dr. Tetrick, Robert's primary care physician, stated in an affidavit that:

> 3. Robert has been [his] regular patient for over ten years.
>
> * * *
>
> 5. Natural gas is an asphyxiant. Specifically, it reduces the lungs' ability to receive and process oxygen in the atmosphere.
>
> 6. A reduction of oxygen available to the lungs places significant stress on the heart and the cardiovascular system.
>
> 7. Symptoms such as headaches, fatigue, difficulty concentrating and skin and eye irritation are consistent with regular exposure to natural gas.
>
> 8. The stress placed on the cardiovascular system by the reduction of available oxygen caused by regular exposure to natural gas significantly increases the likelihood of myocardial infarction in individuals at risk for heart disease.
>
> 9. On March 9, 2002, Robert [] suffered a myocardial infarction.
>
> 10. In [his] medical opinion, [Robert's] regular exposure to natural gas could have increased his chances of suffering a myocardial infarction.

Id. at 359. As a result of Robert's heart attack and other symptoms, Naomi stated she "lost [Robert's] services, comfort, society, and companionship . . . ." *Id.* at 229. Specifically, Robert:

> would perform normal household chores, including lawn care, heating and air conditioning maintenance, gutter cleaning, window repair and washing, painting, deck resurfacing, tree trimming, and general maintenance. [Robert] is no longer able to perform [] chores, and [Naomi] was forced to hire someone to complete [those] services. In addition, [Robert] and [Naomi] enjoyed traveling and exercising. Because of [Robert's] heart attack and diminished health, [Naomi] is unable to enjoy his companionship in travel and exercise. . . . After [Robert's] health problems began, [Naomi was] unable to enjoy his companionship, society, and assistance because he [was] too ill to share [their] formerly-vibrant [sic]

> lifestyle. . . . Since [Robert's] health [] deteriorated, [Naomi] [] suffered a loss of [Robert's] income and a loss of his future income. . . . Most importantly, [Naomi was] in a mental state of constant worry over [her] husband's health . . . .

Id.

On September 5, 2003, the Longardners filed a complaint, which was later amended, against Citizens, Miller Pipeline, and Love Heating, alleging negligence, trespass, nuisance, criminal trespass, and loss of consortium. On March 22 and 24, 2005, Citizens filed two motions for summary judgment. On March 29, 2005, Love Heating filed a motion for summary judgment. Thereafter, on June 20, 2005, Love Heating filed two motions to strike Dr. Tetrick's affidavit and French's deposition. The trial court granted Citizens's and Love Heating's motions for summary judgment and Love Heating's motions to strike on August 16, 2005. The Longardners now appeal. Additional facts will be included as necessary.

This appeal comes to us upon the trial court's entry of summary judgment. Summary judgment is appropriate only where there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Matteson v. Citizens Ins. Co. of Am.*, 844 N.E.2d 188 (Ind. Ct. App. 2006). All facts and reasonable inferences drawn therefrom are construed in favor of the nonmoving party. *Matteson v. Citizens Ins. Co. of Am.*, 844 N.E.2d 188. Our review of a grant of a summary judgment motion is limited to those materials designated to the trial court. *Id.* We must review carefully a decision on summary judgment to ensure a party was not improperly denied its day in court. *Id.* Where, as here, a trial court enters findings of fact

and conclusions of law in granting a motion for summary judgment, the entry of specific findings and conclusions does not alter the nature of our review. *Id.* In the summary judgment context, we are not bound by the trial court's specific findings of fact and conclusions of law. *Id.* Rather, the trial court's findings and conclusions merely aid our review by providing us with a statement of reasons for the trial court's actions. *Id.* In the absence of genuine issues of material fact, we will affirm a summary judgment on any legal theory supported by the record. *Id.*

1.

The Longardners contend the trial court erred when it granted Love Heating's motions to strike the opinions of its expert witnesses, Dr. Tetrick and French. As noted above, Love Heating filed two motions to strike. In its first motion to strike, Love Heating requested the trial court strike Dr. Tetrick's affidavit because "Dr. Tetrick's opinion [regarding the link between Robert's exposure to natural gas and his increased risk of suffering a myocardial infarction] is inadmissible to prove proximate causation because it is speculative[,]" and there was "absolutely no opinion as to proximate causation of any injury suffered by [] Lynn." *Id.* at 415. Love Heating's second motion to strike requested the trial court strike "Dr. French's deposition testimony regarding [his opinion that] the symptoms [are] 'consistent with' natural gas exposure[, asserting it] is inadmissible to prove proximate causation because it is speculative and [French] is not competent to testify on such matters." *Id.* at 419.

All evidentiary rulings, including rulings on the admissibility of expert testimony, lie within a trial court's discretion, and we may reverse such a ruling only upon an abuse

of that discretion. *Armstrong v. Cerestar USA, Inc.*, 775 N.E.2d 360 (Ind. Ct. App. 2002), *trans. denied*. A trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances before it, or the reasonable, probable, and actual inferences and deductions drawn therefrom. *Id.* The proponent of expert testimony bears the burden of establishing the foundation and reliability of the scientific principles and tests upon which the expert's testimony is based. *Messer v. Cerestar USA, Inc.*, 803 N.E.2d 1240 (Ind. Ct. App. 2005), *trans. denied*.

We initially address the Longardners' contention that the trial court abused its discretion by striking French's deposition. The trial court granted Love Heating's motion to strike French's deposition testimony because he was not qualified to testify as an expert "for the purpose of proving proximate causation." *Appellant's Appendix* at 62. Ind. Evidence Rule 702 governs the admissibility of expert testimony, and states:

> (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
>
> (b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

Evid. R. 702 requires that an expert be qualified by his knowledge, skill, experience, training, or education. *Armstrong v. Cerestar USA, Inc.*, 775 N.E.2d 360. Before an expert may testify as such, therefore, the proponent of the expert must demonstrate the expert is competent in that area. *Id.*

French, a microbiologist and an epidemiologist, has a masters degree in epidemiology from the University of Michigan and a Ph.D. from the University of Michigan. French held a postdoctoral fellowship at the California State Health Department, is a member of the American Society of Microbiology and was a member of Public Health Services for approximately twenty years, is a former director of the Calhoun County, Michigan, Health Department laboratory, was the director of laboratories at Indiana University Medical Center, department of pathology, from 1971 until 1989, and has been the president and chief executive officer of Micro Air, Inc., a company that he founded in 1985 that specializes in environmental testing and consultation, for approximately seventeen years. French is qualified, therefore, to testify that Robert's "symptoms a[re] consistent with exposure to natural gas." *Appellant's Brief* at 15. French is not a medical doctor, however, and is not qualified to render an opinion regarding the medical cause of Robert's heart attack and other symptoms.

We turn next to the Longardners' contention that the trial court abused its discretion when it ordered "that the [a]ffidavit of Dr. David L. Tetrick be stricken from the record for the purpose of proving proximate causation." *Appellant's Appendix* at 60. The trial court struck Dr. Tetrick's testimony on the basis that it was speculative and insufficient to demonstrate a causal link between Robert's adverse health conditions and his exposure to natural gas. In their briefs, the parties debate the admissibility of Dr. Tetrick's affidavit under Evid. R. 702, but we first resort to the rules of evidence regarding relevance. Ind. Evidence Rule 401 states, "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to

the determination of the action more probable or less probable than it would be without the evidence." Ind. Evidence Rule 402 states, in relevant part, "[e]vidence which is not relevant is not admissible." A plaintiff's burden of proof may not be carried with evidence based upon mere supposition or speculation. *Topp v. Leffers*, 838 N.E.2d 1027 (Ind. Ct. App. 2005), *trans. denied*. Negligence cannot be established by inferential speculation alone. *Ind. Mich. Power Co. v. Runge*, 717 N.E.2d 216 (Ind. Ct. App. 1999). Evidence that establishes a mere possibility of cause or that lacks reasonable certainty or probability is insufficient evidence, by itself, to support a verdict. *Topp v. Leffers*, 838 N.E.2d 1027.

Dr. Tetrick stated in his affidavit that "[i]n [his] medical opinion, [Robert]'s regular exposure to natural gas could have increased his chances of suffering a myocardial infarction." *Appellant's Appendix* at 359. Based upon Dr. Tetrick's use of the phrase "could have increased," *id.*, Citizens argues "Dr. Tetrick's testimony falls into the same type of speculation that the Court recently rejected as insufficient to show medical causation in *Topp* [*v. Leffers*], 838 N.E.2d [1027]." In *Topp v. Leffers*, we stated, "'expert medical opinion couched in terms less than that of a reasonable degree of medical certainty[,] such as 'possible,' 'probable,' or 'reasonably certain,' are admissible and do have probative value. However, such medical testimony *standing alone*, unsupported by other evidence, is not sufficient *to support a verdict . . . .*'" *Id.* at 1033-34 (emphases supplied).

Initially, it is worth noting that the appellant in *Topp v. Leffers* appealed a trial court's entry of a directed verdict, not an entry of summary judgment. Conversely, the

Longardners appeal the entry of summary judgment. Dr. Tetrick's testimony, therefore, need only create a genuine issue of material fact, and need not be "sufficient to support a verdict." *Topp v. Leffers*, 838 N.E.2d at 1033. Further, discussing the requisite degree of medical certainty necessary to support a finding of medical causation, our Supreme Court has stated:

> [N]umerous jurisdictions, including the United States Supreme Court, have rejected the notion that the admissibility and probative value of expert testimony turns on the particular form of words and degree of certainty in which it is expressed. *See, e.g., Sentilles v. Inter-Carribbean Shipping Corp.*, [361 U.S. 107, 109 (1959)] ("The matter does not turn on the use of a particular form of words by the physicians in giving their testimony"); *United States v. Cyphers*[,] [553 F.2d 1064, 1072 (7th Cir. 1977)] (rejecting requirement that an expert's opinion testimony be stated in terms of "reasonable scientific certainty"); *State v. Edgin*, [520 P.2d 288 (Ariz. 1974)] (expert testimony not inadmissible merely because it tends to establish a possibility rather than a probability); *Graham v. Clark*, [152 S.E.2d 789, 792 (Ga. Ct. App. 1966)] (an expert's opinion should not be rejected merely because it is characterized as an "educated guess"); *Bachran v. Morishige*, [469 P.2d 808, 812 (Haw. 1970)] (". . . there is no necessity that an expert witness' testimony be limited or restricted by labels such as 'certainty,' 'reasonable medical certainty,' 'probability,' 'possibility,' etc."); *Dickinson v. Mailliard*, [175 N.W.2d 588 (Iowa 1970)] (expert opinion need not be couched in definite, positive, or unequivocal terms); *accord* 7 [John H. Wigmore,] WIGMORE ON EVIDENCE § 1976[, at] 186 (Chadbourn [r]ev. [ed.] 1978) ("This attempt to control the course of expert testimony is of course unreasonable in itself"); [Earl F.] Rose, A Pragmatic Approach to Medical Evidence and the Lawsuit, [5 U. TOL. L. REV. 237 (1974)] ([medical] certainty generally is [an] illusion . . . .).
>
> . . . [T]echnical scientific or medical matters such as cause-and-effect, under the state of the particular art, may be reduced to a matter of several possibilities. . . . It cannot, of course, be said that the average juror is knowledgeable about these factors to the extent of conclusively evaluating their import in the context of particular factual circumstances. Their ability to assess the evidence is facilitated by the knowledge and experience of an expert, whose opinion that any of several possibilities may have caused the effect, provides needed perspective to the less informed jurors. The expert testimony consequently is admissible, for it is

> relevant to the inquiry in that it tends to prove a material fact. *Jones v. State*, [425 N.E.2d 128 (Ind. 1981)]; *Lock v. State*, [403 N.E.2d 1360 (Ind. 1980)].

Noblesville Casting Div. of TRW, Inc. v. Prince, 438 N.E.2d 722, 728-29 (Ind. 1982). Dr. Tetrick, therefore, was not required to state his opinion in terms of "medical certainty" in order for it to be admissible for the purpose of proving proximate causation, and he was required to state his opinion in terms more conclusive than "possibility" only if his affidavit stood alone in support of Robert's assertion that natural gas was the proximate cause of his injuries.

It is inaccurate to characterize Dr. Tetrick's affidavit as "standing alone[.]" *Id.* As noted above, Dr. Tetrick stated: a reduction of oxygen available to one's lungs places significant stress on one's heart and cardiovascular system; natural gas is an asphyxiant and reduces the lungs' ability to process oxygen; the stress caused by the reduction of available oxygen caused by regular exposure to natural gas significantly increases the likelihood of a heart attack; Robert suffered a heart attack; Robert's regular exposure to natural gas, therefore, could have increased his chances of suffering a heart attack; and symptoms such as headaches, fatigue, difficulty concentrating, and skin and eye irritation are consistent with regular exposure to natural gas. Further, although French is unqualified to offer evidence regarding the medical cause of Robert's heart attack, he is qualified to provide evidence of the correlation between exposure to natural gas and the presence of certain physical symptoms. Finally, Robert's deposition testimony regarding the contemporaneousness of certain physical symptoms and the prolonged exposure to natural gas provides further evidence in support of his claim that his physical ailments

were proximately caused by exposure to natural gas. We cannot say that Dr. Tetrick's medical testimony, when combined with French's and Robert's deposition testimonies and Citizens's concession for the purpose of summary judgment that there were, in fact, natural gas leaks in the building, stands alone. The trial court, therefore, abused its discretion when it struck Dr. Tetrick's affidavit "for the purpose of proving proximate causation." *Appellant's Appendix* at 60.

2.

The Longardners contend the trial court erred when it concluded Citizens is shielded from liability. The Indiana Utility Regulatory Commission (the IURC) approved a tariff[5] that states:

> 6.4 All of the Customer's piping . . . necessary to utilize gas service furnished by the Utility shall be installed and belong to the Customer, and must be maintained at the Customer's expense. The Customer shall bring his piping to the meter outlet for connection to the Utility's piping in a location satisfactory to the Utility. The Utility shall not be liable for any loss, injury, or damage, including death, resulting from the Customer's use of such . . . piping, or occasioned by the gas service furnished by the Utility beyond the meter outlet. . . .
>
> 6.5 The Utility reserves the right to inspect the Customer's installation, but such inspection, or failure to make inspection, or the fact that the Utility may connect to such installation at the delivery point, shall not make the Utility liable for any loss, injury, or damage, including death, which may be occasioned by the Customer's use of such . . . piping of the Utility's service unless due to the sole negligence of the Utility. . . .

* * *

[5] In this context, a "tariff" is a "schedule of recurring or nonrecurring charges together with general regulations properly filed with and approved by the [IURC] applicable to customers of the utility for services furnished." *Prior v. GTE N., Inc.*, 681 N.E.2d 768, 771 n.1 (Ind. Ct. App. 1997), *trans. denied*.

7.25 The Customer shall hold the Utility harmless for any loss, cost, damage, or expense to any party, resulting from the use or presence of gas or gas appliances upon the Customer's premises unless due to the sole negligence of the Utility.

Id. at 143, 144-45.

Based upon the language of the tariff, the trial court concluded:

4. . . . [The Longardners'] nuisance and trespass claims are precluded by Paragraph 6.4 of the Tariff. [The Longardners'] nuisance and trespass claims are premised on the allegation that Citizens caused natural gas to enter, and to interfere with [the Longardners'] enjoyment of, the [building], through gas leaks in piping in the interior of the [building]. Paragraph 6.4 of the Tariff absolves Citizens of liability for, among other things, "loss, injury, or damage, including death, resulting from the Customer's use" of gas pipes beyond the meter outlet, and for loss, injury, or damage "occasioned by the gas service furnished by the Utility beyond the meter outlet." Because it is undisputed that the meter serving the [building] was on the outside of the building at the time of the alleged odor that led to Robert and [Lynn's] physical ailments, the alleged leaks inside the building were beyond Citizens['s] [] meter outlet. As a matter of law, Paragraph 6.4 of the Tariff absolves Citizens of liability on Counts II and III . . . .

5. Counts II and III for nuisance and trespass are also precluded as a matter of law by Paragraph 7.25 of the Tariff. Paragraph 7.25 absolves Citizens of liability "for any loss, cost, damage, or expense to any party, resulting from the use or presence of gas or gas appliance upon the Customer's premises unless due to the sole negligence of [Citizens]." [The Longardners'] nuisance and trespass claims are based on the allegation that Citizens caused the presence of natural gas in the [building], but these claims do not require an allegation or finding of negligence. [The Longardners] have not alleged in Counts II and III that the presence of gas was the result of Citizens' negligence. Consequently, Paragraph 7.25 also absolves Citizens of liability on Counts II and III . . . .

6. Count I for negligence also is precluded as a matter of law by Paragraph 6.4 of the Tariff. [The Longardners] allege that Citizens was negligent in three ways: (1) moving the gas meter from the interior to the exterior of the [building] in August 2001 and creating leaks in the

interior piping; (2) not identifying the source and cause of [the Longardners'] health problems from August 2001 through March 2002; and (3) not remedying a gas leak identified by [] French on March 4, 2002. Paragraph 6.4 of the Tariff absolves Citizens of liability for, among other things, "loss, injury, or damage, including death, resulting from the Customer's use" of gas pipes beyond the meter outlet, and for loss, injury, or damage "occasioned by the gas service furnished by the Utility beyond the meter outlet." For the same reasons that these provisions of Paragraph 6.4 of the Tariff preclude [the Longardners'] claims for nuisance and trespass, these provisions also absolve Citizens of liability on Count I . . . .

7. [The Longardners'] Count I for negligence is also precluded by Paragraph 6.5 of the Tariff. Paragraph 6.5 absolves Citizens of liability for failing to inspect a customer's piping or connecting to faulty piping installed at the delivery point. [The Longardners'] allegations that Citizens: (1) did not identify the source and cause of [the Longardners'] health problems from August 2001 through March 2002; and (2) did not remedy the gas leak identified by [] French on March 4, 2002; are encompassed as a matter of law by the unambiguous terms of Paragraph 6.5 of the Tariff.

8. Paragraph 7.25 absolves Citizens [] for the use or presence of gas in the [building]. All of [the Longardners'] negligence claims are encompassed by the unambiguous limitation of liability contained in Paragraph 7.25 as a matter of law.

9. The limitation of liability provision in Paragraph 6.4 of the Tariff does not contain a saving exception for instances where Citizens is "solely negligent," and therefore Paragraph 6.4 of the Tariff applies to preclude Count I for negligence as a matter of law regardless whether [the Longardners] have alleged, or can establish, that Citizens was solely negligent. . . .

10. Naomi's claim for loss of consortium also is precluded by the Tariff for the same reasons as [the Longardners'] negligence claims, because her loss of consortium claim is derivative of the negligence claims. "Being derivative in nature, a spouse's loss of consortium claim cannot proceed when the injured spouse's negligence claim against the same party is barred . . . ." *Wine-Settergren v. Lamey*, 716 N.E.2d 381, 390 (Ind. 1999). Count V for loss of consortium is dismissed as a matter of law.

Id. at 22-25.

The parties devoted a substantial portion of their briefs and oral arguments before this court to discussing whether the IURC has the authority to approve a tariff that limits or eliminates a utility's liability for negligence. We decline to address that issue, however, because we conclude the facts of the instant case do not fall within the language of the tariff, and, therefore, the tariff does not shield Citizens from liability on the Longardners' negligence, trespass, or nuisance claims, or Naomi's loss of consortium claim.

As noted above, paragraph 6.4 requires Citizens's customers to install and maintain their own piping, and "bring [their] piping to the meter . . . ." *Id.* at 143. Under that scenario, paragraph 6.4 shields Citizens from liability for, among others, injury resulting from customers' use of such piping or gas service furnished by Citizens beyond the gas meter. In the instant case, Citizens relocated the gas meter from the basement of the building to the outside of the building. In addition to relocating the gas meter, Citizens replaced the gas mains in the 3500 block of Washington Boulevard, the block within which the building is located. Citizens also repaired the "service lines," *i.e.*, the lines that "run from the main [line] to the individual residences or buildings[.]" *Id.* at 367.

The Longardners' designated evidence included the affidavit of David Phillips, an employee of Franklin Heating and Cooling, whom the Longardners hired to "resolve ongoing gas leaks in the gas line serving the mechanical systems at [the building]." *Id.* at 406. Phillips stated that:

6. [b]ased upon [his] observations in the basement of the [] building, the gas lines serving the mechanical systems in the basement consisted of original black iron pipe and a new black pipe [that] appeared to have been added and installed in order to relocate the gas meter outside of the [] building.

7. . . . [I]t was [his] observation that the new pipe had been cut too long so that the north end of the original pipe had been pushed out of its original alignment.

Id. at 407.

Viewed in a light most favorable to the Longardners, the facts are that the Longardners did not install the piping or bring the piping to the meter. Rather, Citizens relocated the gas meter, installed new main line pipes, service pipes, and a pipe in the basement of the building for its own convenience and pursuant to its own policy. Paragraph 6.4 of the tariff, therefore, does not shield Citizens from liability under the facts of the instant case, and the trial court erred when it concluded to the contrary.[6]

3.

The Longardners contend the trial court erred when it concluded Citizens and Love Heating did not owe them a duty of care. We concluded above that Citizens was not shielded from liability by virtue of the IURC-approved tariff. In determining whether the law recognizes any obligation on the part of a particular defendant to conform its conduct to a certain standard for the benefit of the plaintiff, we balance the following three factors: (1) the relationship between the parties; (2) the reasonable foreseeability of

[6] The trial court also concluded the Longardners' claims for trespass, nuisance, and loss of consortium were precluded by the tariff. We conclude, however, the tariff does not apply to the facts of this case, and Citizens is thus not immune from liability for trespass and nuisance. Further, in light of the fact that the tariff does not shield Citizens from liability for negligence, the trial court also erred when it dismissed Naomi's derivative loss of consortium claim.

harm to the injured person; and (3) public policy concerns. *Webb v. Jarvis*, 575 N.E.2d 992 (Ind. 1991). "The *Webb* test, however, is inapplicable in cases where the element of duty has already been declared or otherwise articulated under a different test." *Cox v. N. Ind. Pub. Serv. Co., Inc.*, 848 N.E.2d 690, 696 (Ind. Ct. App. 2006). It is well settled that a utility has a duty to use reasonable care in the distribution of gas because the utility conveys a dangerous instrumentality. *Palmer & Sons Paving, Inc. v. N. Ind. Pub. Serv. Co., Inc.*, 758 N.E.2d 550 (Ind. Ct. App. 2001). "Furthermore, a gas company has a duty to use reasonable care in operating its lines so as to prevent the escape of gas in such quantities as to become dangerous to life and property." *Id.* at 554. Citizens, therefore, owed the Longardners a duty of reasonable care to prevent the escape of natural gas in quantities that posed a danger to their lives and property.

We must next examine each of the three factors in the *Webb* test to determine whether Love Heating owed the Longardners a duty of care. Generally we will find a duty of care exists if reasonable people would recognize it and agree that it exists. *Harris, et al. v. Raymond, et al.*, 715 N.E.2d 388 (Ind. 1999).

The Longardners and Love Heating never executed a written contract that clearly delineated the nature of their relationship. Nevertheless, Love Heating went to the building at the Longardners' request in order to "service the boiler and related systems at the [] [b]uilding." *Appellant's Appendix* at 276. Further, "representatives of Love Heating were advised of both the foul odor in the [] [b]uilding and the physical symptoms being experienced by Robert and [Lynn], such as headaches, fatigue, and dizziness." *Id.*

Regarding forseeability, we have stated that the "imposition of a duty is limited to those instances where a reasonably foreseeable victim is injured by a reasonably foreseeable harm." *Williams v. Cingular Wireless*, 809 N.E.2d 473, 477 (Ind. Ct. App. 2004), *trans. denied*. We have distinguished between the foreseeability component of the duty analysis and the foreseeability component of proximate cause by stating:

> [f]oreseeability in the context of proximate cause involves evaluating the particular circumstances of an incident after the incident occurs. According to the American Law Institute, foreseeability for proximate cause purposes is determined from a perspective that is "after the event and looking back from the harm to the actor's negligent conduct." As stated in Indiana, "[a] negligent act or omission is the proximate cause of an injury if the injury is a natural and probable consequence which, in light of the circumstances, should reasonably have been foreseen or anticipated." Thus, when determining proximate cause, foreseeability is determined based on hindsight, and accounts for the circumstances that actually occurred.
>
> By logical deduction, the foreseeability component of the duty analysis must be something different than the foreseeability component of proximate cause. More precisely, it must be a lesser inquiry; if it was the same or a higher inquiry it would eviscerate the proximate cause element of negligence altogether. If one were required to meet the same or a higher burden of proving foreseeability with respect to duty, then it would be unnecessary to prove foreseeability a second time with respect to proximate cause. Additionally, proximate cause is normally a factual question for the jury, while duty is usually a legal question for the court. As a result, the foreseeability component of proximate cause requires an evaluation of the facts of the actual occurrence, while the foreseeability component of duty requires a more general analysis of the broad type of plaintiff and harm involved, without regard to the facts of the actual occurrence.

Id. at 477.

In this case, Robert and Lynn were reasonably foreseeable victims. Robert and Lynn personally requested that Love Heating inspect the building, and informed Love

Heating of the odor and physical symptoms they experienced. The forseeability of the harm suffered, however, is less clear. At this point, the cause of Robert's heart attack is inconclusive; it could have been caused by a prolonged exposure to natural gas, or occurred because Robert was eighty-three years old and worked approximately fifty to fifty-five hours per week. It is difficult to determine, therefore, the extent of the harm Love Heating could have prevented. Nevertheless, Love Heating was aware of the symptoms of which Robert and Lynn complained, and that a noxious odor existed in the building. We cannot say, therefore, that the persons who suffered harm and the harm suffered were unforeseeable.

The third factor determinative of whether Love Heating owed the Longardners a duty is public policy. With respect to preventing injuries, we have already noted that many, if not all, of the symptoms exhibited by Robert and Lynn were present before the Longardners contacted Love Heating. Love Heating, however, could have prevented the continued presence of those physical ailments.

On balance, the relationship between the parties, the foreseeability of harm, and sound public policy counsel in favor of the extension of a duty under the facts in this case. That is, under the circumstances of this case, we recognize a duty of care and agree that it exists. *See Harris, et al. v. Raymond, et al.*, 715 N.E.2d 388.

4.

The Longardners contend Love Heating breached its duty of care. Whether one has breached its duty of care is an issue generally to be determined by the trier of fact. *Sizemore v. Templeton Oil Co., Inc., et al.*, 724 N.E.2d 647 (Ind. Ct. App. 2000). Robert

and Lynn began to smell a moldy or musty odor in the building in September 2001, and experienced the physical symptoms detailed above at approximately the same time. Robert and Lynn contacted Love Heating and informed it of both the odor and their physical symptoms. Love Heating did not discover or repair the gas leaks that existed in the building at that time, and Robert and Lynn's symptoms persisted. From these facts an inference can be drawn that Love Heating breached its duty of care to the Longardners.

5.

The Longardners contend the trial court erred when it concluded Citizens did not cause the natural gas leak. The trial court entered the following findings regarding causation-in-fact:

> 32. For purposes of the Second Motion, Citizens does not dispute that it relocated the gas meter in the [building] from the interior to the exterior in August 2001. . . . [T]here is no dispute that [the Longardners] did not begin to notice a musty odor until September 2001, and did not experience symptoms until that time.
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> 33. . . . [I]t is undisputed that Citizens'[s] Operations and Maintenance Manual sets forth the procedures to be followed when Citizens relocates a gas meter. Those procedures mandate that "[p]rior to re-establishing gas service, the entire service line and house line piping system shall be pressure tested" pursuant to specific procedures. There is no evidence that Citizens did not follow these procedures when relocating the [building] meter. . . . [I]t is undisputed that [the Longardners] designated no evidence of a gas leak in the gas lines at the [building] upon the meter relocation in August 2001.
>
> 34. . . . [I]t is undisputed that there were no leaks in the [building] gas lines as of January 10, 2002. A contemporaneous Citizens record of a service visit to the [building] on January 10, 2002 states: "Found no lks. @ 09 or service. Advised cust of same. Left safe." [The Longardners] have designated no evidence that there were leaks in the gas lines as of January 10, 2002.

35. In fact, [the Longardners] designated evidence that former Citizens employees Mike Kern and Clint Murphy visited the [building] in December 2001 and on January 16, 2002 respectively, and that neither of them found any gas leaks. . . . [I]t is undisputed that there is no evidence of any gas leaks in the [building] gas lines either at the time of the meter relocation in August 2001, nor at least as late as January 16, 2002.

36. . . . [I]t is also undisputed that there is no evidence that anyone ever smelled natural gas in the [building] until March 4, 2002. As designated by Love Heating, Robert's deposition testimony described the odor as a "musty" and a "moldy" odor, not as natural gas. Neither [Lynn's] affidavit nor the affidavit of non-party Dan Bailey identified the odor they smelled as natural gas odor, even though [Lynn] was in the [building] on a daily basis.

37. . . . [I]t is undisputed that [] French attended a meeting at the [building] on March 4, 2002. He examined the gas meter, house lines, and [the Longardners'] gas appliances to try to detect the smell of natural gas. It is undisputed that [] French did not smell gas at the meter, in the house lines, or at the gas furnaces. It is undisputed that the only place in the [building] where [] French smelled gas on March 4, 2002 was at the control assembly in [the] water heater. It is undisputed that March 4, 2002 is the first time anyone ever smelled natural gas in the [building].

38. . . . [I]t is undisputed that the leak at the water heater [] French smelled on March 4, 2002 was the only gas leak identified at the time of Robert's heart attack five days later, on March 9, 2002.

39. [The Longardners] do not contest the designated evidence cited above . . . .

40. . . . [I]t is undisputed that there is no evidence of gas leaks in the relocated house lines until after Robert's heart attack. The only evidence [the Longardners] cite in opposition to the undisputed evidence designated above is: (1) the testimony of two witnesses that on March 15, 2002 and May 16, 2002, they observed flaws in the [building's] gas lines; and (2) the discovery of leaks in the [building's] gas lines [occurred] for the first time on March 13, 2002 – four days after Robert's heart attack.

41. . . . [The Longardners] designated no evidence that the two witnesses who observed the gas lines on March 15 and 16, 2002 observed, or were otherwise competent to testify as to, the condition of the gas lines at the time of their relocation in August 2001. Nor did [the Longardners] designate any other evidence that the gas lines were in the same state on March 15 and 16, 2002 as they were in August 2001. . . . [N]either of these witnesses' statements about their observations made on March 15 and 16, 2002 are probative of, or material to, the condition of the gas lines more than six months before in August 2001, or at any other time.

42. [] [T]he existence of leaks in the gas lines on March 13, 2002 is insufficient to create a genuine issue of material fact as to the existence of leaks more than six months earlier in August 2001, especially given the undisputed evidence that there were no leaks in the lines at least as late as January 16, 2002. [The Longardners] have designated no evidence that the condition of the gas lines on March 13, 2002 was the same as in August 2001. . . . [T]he existence of leaks in the gas lines on March 13, 2002 is not probative of the condition of the gas lines more than six months before in August 2001, or at any other time.

43. Rather than dispute the evidence Citizens designated, and rather than designate evidence of the condition of the gas lines or the existence of leaks in August 2001, [the Longardners] instead attempt to create a genuine issue of material fact by contending that the facts support an inference that there were leaks in the gas lines in August 2001. [The Longardners] ask [the trial] [c]ourt to draw the inference that the gas lines were leaking in August 2001 from the following: (1) the emergence of a musty odor (but not a natural gas odor) and physical symptoms one month after the meter relocation; (2) the discovery of a gas leak in [the Longardners'] water heater (but not in the gas lines) on March 4, 2002; (3) the observations of two witnesses on March 15 and 16, 2002 that the gas lines at those points in time were flawed; and (4) the discovery of gas leaks in the gas lines on March 13, 2002. In light of the undisputed evidence designated by Citizens and set forth above, the [trial] [c]ourt finds that the inference that there were leaks in the gas lines in August 2001, or at any time before March 13, 2002, is unreasonable.

Appellant's Appendix at 35-40.

As the trial court found and Citizens conceded for the purposes of its summary judgment motion, Citizens relocated the gas meter from the interior to the exterior of the building in August 2001. Robert and Lynn began to experience their physical ailments in September 2001, the first time they used the heating system in the building after Citizens relocated the gas meter. Robert, Lynn, and Bailey experienced adverse physical symptoms that were temporally coincident to the use of natural gas in the building after Citizens relocated the gas meter. The trial court found that no one smelled natural gas in the building, and that, to the extent there was an odor in the building, it was merely identified as moldy, musty, or foul. Contrary to the trial court's finding, however, the fact that neither Robert, Lynn, nor Bailey identified the foul odor as natural gas does not mean they did not smell natural gas, but simply that they did not identify it as such. As of March 2002, at least three gas leaks were discovered in the building. In sum: (1) Citizens relocated the natural gas meter in the building; (2) Robert, Lynn, and Bailey detected a "musty" or "moldy" odor in the building after using the heating system, *id.* at 36; (3) Robert, Lynn, and Bailey experienced similar physical symptoms that were temporally coincident to the use of the heating system in the building and the detection of the odor; and (4) there were at least three gas leaks discovered in the building in March 2002. Viewed in a light most favorable to the Longardners, these facts and the inferences drawn from them are sufficient to create a genuine issue of material fact as to whether Citizens was the cause of the natural gas leaks. The trial court, therefore, erred in concluding to the contrary.

6.

The Longardners contend the trial court erred when it concluded there was no genuine issue of material fact as to whether the natural gas leaks were the proximate cause of Robert and Lynn's physical ailments. In support of their contention, the Longardners rely upon *Femco, Inc., et al. v. Colman, et al.*, 651 N.E.2d 790 (Ind. Ct. App. 1995). In *Femco*, the trial court denied the defendants' motion for summary judgment. We affirmed the trial court's decision, and stated:

> [the plaintiff's physician's] affidavit establishes that he examined and treated [the plaintiff] for the complaints at issue here, that he was aware of the ingredients of Vandalism Mark Remover and their potential effects and that he was of the opinion, as a medical doctor with first hand knowledge of the situation, that the product Vandalism Mark Remover was responsible for [the plaintiff's] ailments. [The plaintiff's physician's] affidavit was made on personal knowledge. He was [the plaintiff's] family physician and had examined and treated her for all of the ailments complained of. His affidavit was based on admissible evidence, including the Material Safety Data Sheet for Vandalism Mark Remover. [The plaintiff's physician] was competent to testify as to the matters stated in his affidavit. His course of treatment and diagnosis of her illness were within his expertise. Thus, [the plaintiff's physician's] conclusion was not without a foundation nor was his affidavit merely conclusory, and it provided sufficient contrary evidence to the expert opinions presented by [the defendant] to defeat the motion for summary judgment.

Id. at 794.

In the instant case, Dr. Tetrick was Robert's primary case physician and personally examined Robert. Dr. Tetrick's affidavit was based upon personal knowledge, and stated that natural gas is an asphyxiant, that an asphyxiant places a strain on the cardiovascular system which can lead to a heart attack, and that exposure to natural gas could have increased Robert's chances of suffering a heart attack. Dr. Tetrick was competent to

testify as to matters regarding Robert's health, and his conclusion was neither foundationless nor conclusory. Dr. Tetrick's affidavit, therefore, provided sufficient evidence to create a genuine issue of material fact as to the proximate cause of Robert's heart attack and other physical symptoms. The trial court, therefore, erred when it entered summary judgment against Robert.

The Longardners, however, did not designate sufficient evidence regarding Lynn's physical ailments to create a genuine issue of material fact as to the proximate cause thereof. The only symptom for which Lynn consulted a physician was her corneal abrasions. As to her other symptoms, Lynn surmised they were caused by exposure to natural gas by visiting a website and deduced the same because "during that time period, [she] had elevated blood pressure. Never had had it before and [she] do[esn't] have it now." *Appellant's Appendix* at 262. Lynn did not provide the opinion of any medical expert with regard to her corneal abrasions, and her suppositions regarding the cause of her other physical ailments are insufficient to defeat Citizens's motion for summary judgment. *See Hannan v. Pest Control Servs., Inc.*, 734 N.E.2d 674 (Ind. Ct. App. 2000) (temporal coincidence of the presence of toxic substance in addition to the plaintiffs' alleged and self-reported illness is insufficient to establish a prima facie case on the element of causation), *trans. denied*. The trial court, therefore, did not err in this regard.

7.

The Longardners contend "[t]he trial court misconstrued the law when granting summary judgment to the [d]efendants on the element of damages" because "damages recoverable for tortious conduct include the value of lost time, physical pain and mental

suffering, and damage to real property." *Appellant's Brief* at 30 (citations and quotations omitted).

Initially, the Longardners contend there is a genuine issue of material fact regarding whether Robert incurred damages for the value of lost time.[7] Upon sufficient proof of liability in a personal injury action, a plaintiff is entitled to recover for resultant impairment of earning ability, if any. *Reith-Riley Constr. Co., Inc. v. McCarrell*, 325 N.E.2d 844 (Ind. Ct. App. 1975). The phrase "impairment of earning ability" encompasses both the value of the time a plaintiff has lost and the value he probably will lose because of the injury. *Id.*

> Historically, many courts have recognized that this element of damage--value of time--is comprised of two distinct sub-elements which are usually denominated:
>
> (1) loss of time, and
>
> (2) decreased earning capacity.
>
> The first of these sub-elements, loss of time, refers to the time which the plaintiff has lost prior to trial because of his injury, while the second, decreased earning capacity, designates the time which probably will be lost after trial. In both cases, it must be emphasized that the compensable element is time. It is the time [that] belonged to the plaintiff and [that the] plaintiff's injury has deprived him of that is compensable.

[7] The Longardners also contend the trial court erred when it granted summary judgment against Lynn on the element of damages. We need not address this argument in light of our conclusion regarding causation. *See Beckom, et al. v. Quigley*, 824 N.E.2d 420, 428 (Ind. Ct. App. 2005) ("since we already established the absence of a duty of care owed by [the defendant] to the [plaintiffs], we do not need to address the other two elements of a negligence action").

Id. at 847-48. Further, "[e]ven where the concern is earnings lost between the date of injury and the date of trial, the damage element is loss of time, rather than actual wages." *Crenshaw v. McMinds*, 456 N.E.2d 433, 434 n.1 (Ind. Ct. App. 1983).

The trial court granted summary judgment on the issue of damages in favor of the defendants based in part upon the fact that Robert reported higher earnings during the years in which he was allegedly exposed to natural gas. As noted above, the compensable injury under a theory of lost earnings is loss of time, not actual wages lost. Robert's increased earnings during the years of exposure, therefore, are not dispositive of the issue of damages for loss of time. Beginning in September 2001, Robert estimated he lost between seventy- and eighty-percent of his productive time, stating, "during the period of [exposure,] . . . [his] eyes and body would become tormented. [] [B]y noontime of those days, [he] could not move, [he] would become incoherent, and fever blisters would break out over [his] nose and mouth, and [he]'d just have to get up and get out of the building . . . ." *Apellant's Appendix* at 292-93. In light of this designated evidence, there was a genuine issue of material fact regarding damages for loss of time, and the trial court erred in granting summary judgment to the contrary. *See Montgomery Ward & Co. v. Gregg*, 554 N.E.2d 1145, 1165 (Ind. Ct. App. 1990) (evidence that plaintiff was twice passed over for a promotion which would amount to a nine percent increase in base salary because of absenteeism and physical inability to do the job resulting from personal injury constituted "evidence in the record from which the jury could find and assess an adverse effect upon [plaintiff's] earning capacity"), *trans. denied*; *State v. Totty*, 423 N.E.2d 637, 646 (Ind. Ct. App. 1991) (where a wreck caused plaintiff to experience dizzy

spells, headaches, and problems with his neck, spine, and lower back, evidence that it took him twenty-five to thirty-three percent longer to haul produce was "sufficient to justify the jury being instructed on the consideration of . . . lost earning capacity").

Further, the Longardners contend there exists a genuine issue of material fact regarding whether Robert is entitled to damages for pain and suffering. One who is injured by the negligence of another is entitled to reasonable compensation. *Zambrana v. Armenta*, 819 N.E.2d 881 (Ind. Ct. App. 2004), *trans. denied*. "Reasonable compensation" means a sum that reasonably compensates a victim both for bodily injuries and pain and suffering. *Id.* The difficult question in this regard is how much money reasonably compensates a victim for his injuries and pain and suffering. *Id.* "While no particular degree of mathematical certainty is required in determining damages, the award must be within the scope of the evidence." *Id.* at 891.

As we concluded above, there are genuine issues of material fact as to whether Citizens and Love Heating were negligent and caused Robert's injuries. The trial court, therefore, erred when it foreclosed Robert's ability to recover damages for pain and suffering. The amount of compensation Robert should receive, if any, is a question reserved for the finder of fact. At this stage of the litigation, it is sufficient that Citizens and Love Heating may have negligently caused Robert's injuries.

Judgment affirmed in part, reversed in part, and remanded.

MATHIAS, J., and BARNES, J., concur.