MARTIN v. CAMDEN GAS COMPANY.

Opinion delivered May 6, 1929.

1. GAS—NEGLIGENCE IN DISTRIBUTION.—It can make no difference in a gas company's liability for negligence in distribution of gas to customers that it purchased the gas from another company, since it must answer for its negligence or want of care in the distribution of gas to the same extent as though it had produced and piped the gas from the gas fields or had manufactured it.
2. GAS—DEGREE OF CARE REQUIRED.—A gas company must use a degree of care commensurate with the danger which it is its duty to avoid; and if it fails to exercise such degree of care, and injury results from such negligence, it is liable, if the person injured is free from contributory negligence.
3. GAS—EXPLOSION CAUSING FIRE—CONTRIBUTORY NEGLIGENCE.—In an action by an ice company against a gas company on the theory

that it was negligent in locating a defective gas meter near fire boxes under the ice company's boilers, and that by reason of excessive gas pressure the meter exploded and the building was completely destroyed, testimony that the ice company's engineer feared that the pressure was dangerously high when he left the boiler room, and that there was a cut-off on the gas line which, if used by him, would have cut off the flow of gas, *held* not to establish contributory negligence as matter of law, where the cut-off was put there by the gas company with instructions to the ice company's employees not to use it, and where the gas meter did not advise the engineer that the pipes were carrying an excessive pressure.

4. TRIAL—ABSTRACT INSTRUCTION.—An instruction as to contributory negligence *held* abstract.

Appeal from Ouachita Circuit Court, Second Division; *W. A. Speer,* Judge; reversed.

STATEMENT BY THE COURT.

The Camden Ice & Coal Company and certain fire insurance companies, named, brought suit against the appellee, Camden Gas Company, for damages for the alleged destruction of said company's ice manufacturing plant by fire.

R. S. Martin and Clyde Farr, doing business under the name of the City Delivery Company, brought suit for the destruction of certain personal property owned by them in the fire which consumed the ice plant. The suits were consolidated for a hearing, and from the judgment in favor of the defendant, appellee gas company, this appeal is prosecuted.

The fire which destroyed all the property was caused from an explosion of defendant's gas meter located in the building of the ice company. The grounds for negligence alleged were that the gas company was negligent in locating its meter for measuring the gas furnished the ice company directly in front of and within four feet of the fire-boxes under the boilers, and in providing an old, weak, defective and out-of-repair meter unfit to withstand the gas pressure of the gas necessary to be used in the manufacture of the ice; that, immediately prior to the explosion of the meter, defendant company

and its agents and servants in charge of the distribution of gas to its customers "negligently or carelessly increased the gas pressure, or negligently permitted the same to be increased through the pipes and meter which supplied the gas to its furnaces and boilers, to an extent which rendered it unsafe and dangerous, and which dangerous and excessive pressure the defective gas meter could not withstand," and within a few minutes after the gas in the fire-boxes was lighted, for making steam, the defective gas meter exploded because of the excessive and dangerous pressure of gas in the pipe, and the escaping gas was ignited, setting the building on fire and completely destroying it.

It was also alleged that the property was covered by insurance, that the insurance companies had paid the losses under their policies and taken an assignment of the ice company's right of action against the gas company for the negligent destruction of its property.

The defendant denied all the allegations of the complaint and any negligence in supplying a defective gas meter or furnishing excessive pressure of gas in its mains; alleged that the fire originated from sources having no connection with the meter and the gas furnished through it which could in no wise have been effective in creating the fire. It also alleged that the gas it furnished its customers in the city of Camden was purchased from and delivered to it from the Arkansas Natural Gas Corporation at a point just south of the corporate limits of the city; that it purchased the gas under a written contract; and, although it denied liability for damages resulting from the fire, alleged that, if there was such liability, it was against the Arkansas Natural Gas Corporation, since it would be the fault of that corporation in furnishing the gas. It alleged further that said corporation should be made a party and bound by any judgment against it.

It appears from the testimony that the meter at the ice plant had been removed from the alley outside the building to a place inside, where it was located at the

time of the fire, and that it had been defective, and had been repaired, and, when new, was recommended by the factory to stand a 50-pound pressure, and so branded; that it would not register or show any pressure above 50 pounds; and also that the natural gas corporation was only supposed, under its contract for furnishing gas, to supply a gas pressure of 50 pounds in the mains and pipes for distribution in the city. On the day of the explosion of the meter and the burning of the building the undisputed testimony showed there was a pressure of 78 pounds in the mains.

There was a cut-off between the gas main and the meter that was put there for the benefit of the natural gas company in the measurement of gas, and the cut-off between the meter and the fire-boxes was for regulation by the operator of the plant of the supply of gas to the furnaces. The engineer, on the morning of the fire, had lighted the gas in the furnaces and turned the gas on full, since the pressure was low; after it came up, and showed 50 pounds pressure, he left the engine-room and went out to change his clothes, and, during the five minutes he was away, the meter exploded, and the gas escaped and ignited and destroyed the plant.

There was some testimony tending to show that the engineer feared it was dangerous to remain in the engine-room when the pressure was beyond the limit shown by the gauge, and remained away because of that.

The testimony also showed that the damage suffered by the destruction of the plant and the property belonging to the delivery company as well, was paid by the insurance companies under their policies.

The court instructed the jury, giving, over the objections of appellants, instructions Nos. 14 and 21, as follows:

"No. 14. You are instructed that it was the duty of the plaintiff to exercise reasonable care, commensurate with the danger, in handling and burning of the dangerous gas furnished to it by the defendant. If you find

from a preponderance of the evidence that the plaintiff company, its servants, agents or employees, failed to use such care, and that such negligence on their part, if any, caused or contributed to the fire and the destruction of plaintiff's property, then you are instructed to find for the defendant."

"No. 21. Even though you should find that the gas pressure was too high, if you should further find that the pressure was increased by agent of the Arkansas Natural Gas Corporation, or other persons not employed by the defendant, then you are told that the defendant would not be responsible for such high pressure unless it knew of such condition, and with such knowledge permitted said pressure to continue. And in this regard you are instructed that the defendant was only required to use ordinary care proportionate to the danger, and if you should find that the defendant, by the exercise of ordinary care, and after knowledge that said pressure was being put into the line, could not have prevented the same in time to have prevented the damage to the plaintiff, the defendant would not be liable on account of such pressure."

A verdict was rendered in favor of the defendant and from a judgment thereon this appeal is prosecuted.

McMillen & Scott and *Haynie, Parks & Westfall,* for appellant.

Robinson, House & Moses and *Powell, Smead & Knox,* for appellee.

KIRBY, J., (after stating the facts). Appellant's contention that instruction No. 21 was erroneous must be sustained.

Appellee was engaged in the distribution of gas to inhabitants of the city of Camden under a franchise, and purchased its gas for distribution from the Arkansas Natural Gas Corporation, which was delivered into its pipes by said company at the corporate limits of the city. It can make no difference in its liability for negligence in the distribution to its customers that it pur-

chased the gas from another company or corporation, since it must answer for its negligence or want of care in the distribution of gas to consumers to the same extent as though it had produced and piped the gas from the fields or manufactured it.

In *Pulaski Gas Co.* v. *McClintock,* 97 Ark. 576, 134 S. W. 1189, 32 L. R. A. (N. S.) 825, this court said: "The degree of care required of persons engaged in the manufacture and distribution of gas to guard against injury to persons and property was defined in *Pine Bluff Water & Light Co.* v. *Schneider,* 62 Ark. 109, 34 S. W. 547, where this court said: 'The company must use a degree of care commensurate to the danger which it is its duty to avoid. If it fails to exercise this degree of care, and injury results from such negligence, the company is liable, if the person injured is free from fault contributing to the injury;' citing authorities."

The rule is stated in note to 25 A. L. R. 262, in support of which our cases are cited, as follows: "The rule deducible from the reported decisions is that, in view of the highly dangerous character of gas and its tendency to escape, a gas company must use a degree of care to prevent the escape of gas from its pipes proportionate with the danger which it is its duty to avoid, and if it fails to exercise that degree of care, and injury results therefrom, the company is liable, provided the person suffering injury, either in person or property, is free from contributory negligence." See also 12 R. C. L., § 46, p. 905, and 28 C. J. p. 590, § 56.

The appellee company was delivering gas through its pipes and meter furnished by it, and set up immediately in front of the fire-boxes or furnaces under the boilers of appellant ice company, where gas escaping from a defective meter would necessarily become ignited from the fire when the plant was in operation, and explode, resulting in damage. It is undisputed that the meter was old and defective and only made to withstand a pressure of 50 pounds, and also that the pressure of

gas in the pipes coming through the meter was 78 pounds at the time of the explosion, more than one-half again as great as the meter was expected to withstand. The appellee was distributing its own gas, purchased, it is true, from the Arkansas Natural Gas Corporation, through its own pipes and meter to its consumer, was responsible to it, and bound to the exercise of the care required by law of it in such distribution, without regard to whether some one else was also negligent or whether the gas pressure had been increased to a dangerous point by the gas company from whom it purchased the gas for distribution. In other words, it was distributing its own gas through its own appliances and instrumentalities, and was necessarily responsible for damages resulting from its negligence in so doing. It could make no difference in its liability to its customers that the pressure was increased by the agents of the Arkansas Natural Gas Corporation or other persons not employed by the appellee, since it was bound to the exercise of the degree of care prescribed by law, and to know, under the circumstances of this case, of the condition existing, and the court erred in giving said instruction No. 21, which was erroneous and prejudicial.

There is some testimony indicating that the engineer feared the pressure was dangerously high at the time he left the boiler room, and also that there was a cut-off on the gas line which, if used by him, would have stopped the gas from coming into the meter; but this cut-off was put there by the appellee company for its own use, and the agents of appellant company were directed not to use it. It is true he left the boiler room, where the meter showed the 50-pound pressure, went to change his clothes, and was away for a few minutes, during which time the explosion occurred, but the meter showed the pressure in the pipes at 50 pounds only, which pressure it was originally made to withstand and always had held, and, although the meter was made and limited to not register beyond 50 pounds pressure, and he could not have known

that the pipes were carrying 78 pounds pressure at the time, the majority is of opinion that there was enough testimony to take the case to the jury on the question of contributory negligence, the engineer's knowledge of the condition, and his failure to cut off the supply of gas to the fire or to cut the gas off on the appellee's side of the meter with the cut-off which he had been directed by appellee not to use. It is not complained that he did anything that could have contributed to the explosion and fire, but only that he failed to take some action that might have resulted in preventing it. We do not think therefore, under the circumstances, that the instruction complained about, No. 14, was abstract and should not have been given, although it had been better to use "ordinary" instead of "reasonable" in defining the care required.

For the error designated the judgment is reversed, and the cause remanded for a new trial.

HART, C. J., dissenting.