

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**THOMAS WILMES AND SHARON
WILMES**

APPELLANTS,

**v.
CONSUMERS OIL COMPANY OF
MARYVILLE**

RESPONDENT.

DOCKET NUMBER WD78247

DATE: November 10, 2015

Appeal From:

Nodaway County Circuit Court
The Honorable Glen A. Dietrich, Judge

Appellate Judges:

Division Three: Joseph M. Ellis, Presiding Judge, Karen King Mitchell, Judge and Gary D. Witt,
Judge

Attorneys:

Richard J. Zalasky and Dale R. Funk, St. Louis, MO, for appellants.

Laurel E. Stevenson, Springfield, MO and Matthew R. Rosek, Pro Hac Vice, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
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**THOMAS WILMES AND SHARON
WILMES,**

APPELLANTS,

v.

**CONSUMERS OIL COMPANY OF
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RESPONDENT.

No. WD78247

Nodaway County

Before Division Three: Joseph M. Ellis, Presiding Judge, Karen King Mitchell, Judge and Gary D. Witt, Judge

Appellants Thomas and Sharon Wilmes ("the Wilmeses") appeal from the grant of summary judgment in favor of Respondent Consumers Oil Company of Marysville ("Consumers Oil") on their petition arising from injuries sustained by Thomas after a propane explosion on the Wilmeses' property. The Wilmeses' petition alleged Consumers Oil was negligent in numerous respects and that such negligence was the cause of injuries sustained by Thomas.

WE REVERSE AND REMAND.

Division Three holds:

(1) The affirmative defense of Section 323.060.4 does not bar recovery by the Wilmeses as a matter of law because Consumers Oil failed to meet its burden to prove that Thomas's actions fell within any of the activities in the statute that operate to cut off the liability of Consumers Oil.

(2) The trial court misapplied the spoliation doctrine when it applied the doctrine without finding any act of fraud, deceit, bad faith, or a desire to suppress the truth by the Wilmeses. In addition, even assuming the spoliation doctrine were applicable, the adverse inferences granted to Consumers Oil would not preclude the Wilmeses, as a matter of law, from proving all the elements of their case. Further, there remains a genuine issue of material fact precluding summary judgment in favor of Consumers Oil.

(3) The trial court erred in granting summary judgment in favor of Consumers Oil based on a finding that the Wilmeses' actions constituted an intervening or superseding cause, thereby relieving Consumers Oil of liability, because there remains a genuine issue of material fact as to whether Consumers Oil's actions contributed to the Wilmeses' injuries.

(4) The trial court erred in granting summary judgment on the Wilmeses' "failure to warn" claim because it misconstrued the claim as a claim grounded in strict liability rather than a claim alleging general negligence for Consumer Oil's failure to warn regarding deficiencies in the Wilmeses' particular propane system. Because genuine issues of material fact remain regarding the general negligence of Consumers Oil for failure to warn, Consumers Oil was not entitled to summary judgment on the claim.

(5) The Court declines to review the Wilmeses' claim that Consumers Oil failed to comply with the briefing requirements found in Rule 74.04 because reversal on the merits is necessary.

Opinion by Gary D. Witt, Judge

November 10, 2015

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