State of New Hampshire
Supreme Court

NO. 2008-0160

2008 TERM

AUGUST SESSION

Kathleen Wass

v.

Carolyn Fuller

RULE 7 APPEAL OF FINAL DECISION OF
LACONIA DISTRICT COURT

BRIEF OF DEFENDANT CAROLYN FULLER

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QUESTIONS PRESENTED

1. Did the court err in finding Ms. Fuller liable under the landlord/tenant statute when the tenant's gas was cut off because the tanks were empty, and not because of any wilful action on the part of Ms. Fuller?
   Trn. *passim*; MOTION FOR RECONSIDERATION (Feb. 21, 2008)

2. Did the court err in not recognizing that the tenant was capable of having gas anytime she wished by paying for it?
   Trn. *passim*; MOTION FOR RECONSIDERATION (Feb. 21, 2008)

3. Did the court err in its calculation of damages?
   Trn. *passim*; MOTION FOR RECONSIDERATION (Feb. 21, 2008)

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Carolyn Fuller owns a small colonial house in Belmont, New Hampshire. Above the detached garage there is an apartment which Ms. Fuller had let to her tenant Kathy Wass. The parties' rental agreement was for $200 weekly, with the tenant responsible for her own utilities.[1]

I. *Fuller v. Wass*, 07-LT-325 – Writ of Possession for Unpaid Rent

After a period in which the tenant did not pay rent, in October 2007 Ms. Fuller gave the tenant a formal demand for rent. DEMAND FOR RENT (Oct. 17, 2007), *Appx.* at 20. When the tenant still did not pay, Ms. Fuller began eviction proceedings. EVICTION NOTICE (Oct. 22, 2007), *Appx.* at 32; AFFIDAVIT OF DAMAGES AND STATEMENT OF CLAIM (Nov. 15, 2007), *Appx.* at 23 (specifying weekly rent and damages of $767 as of November 14, 2007). In mid-November, Ms. Fuller filed a landlord action in the Laconia District Court seeking eviction and the rent money. LANDLORD AND TENANT WRIT (Nov. 1, 2007), *Appx.* at 24.

The tenant filed an appearance dated November 27, 2007.[2] In it she advised the court and Ms. Fuller that "I am moving as soon as my new apartment is ready. As of right now it's going to be approximately 3 weeks." APPEARANCE (Nov. 27, 2007), *Appx.* at 25 (grammar, spelling, and abbreviations corrected). Ms. Fuller thus understood that her tenant would be leaving the apartment sometime in late December.

In her appearance the tenant also counterclaimed on the grounds that the water was not potable. *Id.* After a hearing, the court found the action was "based upon non-payment of rent"

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[1]No lease between the parties was entered in the record below.

[2]Ms. Wass's November appearance is *pro se*, but a pleading filed in December reveals she was assisted by an attorney. *See* MOTION FOR DISCRESIONARY [sic] STAY (Dec. 31, 2007), *Appx.* at 32.

and that the "tenant has not paid the rent as required." NOTICE OF JUDGMENT (Dec. 5, 2007), *Appx.* at 27. The court then adjourned for two weeks to resolve the water issue. On the day of the adjourned hearing, the tenant filed a request to continue, claiming she had emergency dental problems. On December 27 the court denied the motion because medical records showed the tenant had left the hospital several hours before the hearing. ORDER (Dec. 27, 2007), *Appx.* at 28; LAKES REGION GENERAL HOSPITAL EMERGENCY DEPARTMENT RECORD (Dec. 19, 2007), *Appx.* at 29. Ms. Fuller was present, however, and submitted laboratory testing data showing the water was safe to drink. MICROBIOLOGY COLLECTION DATA AND TEST REPORT (Dec. 11, 2007), *Appx.* at 30. On December 27, the court thus dismissed the tenant's counterclaim, awarded Ms. Fuller the $767 back rent, and provided for payment of rent to the court. NOTICE OF JUDGMENT (Dec. 27, 2007), *Appx.* at 31.

The court's December 27 order also specified that a writ of possession would issue 8 days later – January 4, 2008 – unless the tenant took an appeal to this Court. *Id.*; WRIT OF POSSESSION (Jan. 23, 2008), *Appx.* at 34. The tenant initially indicated her intent to appeal, NOTICE OF INTENT TO APPEAL (Dec. 31, 2007), *Appx.* at 35, but never followed through. UNCAPTIONED FILING #1 (Jan. 29, 2008), *Appx.* at 36; CLERK'S NOTE TO FILE (Feb. 4, 2008), *Appx.* at 37. *See also*, ORDER, 07-LT-361 (Jan 23, 2008), *Appx.* at 42 (court "ordered that a writ of possession issue on January 4, 2008."). The tenant occasionally paid her rent to the court. NOTICE OF DEFAULT ON APPEAL (Jan. 23, 2008), *Appx.* at 38.

The effect of the tenant's claim of an intent to appeal and her occasional payments was that the issuance of a writ of possession was delayed from 8 days until the end of the 30-day appeal period. *Id.*; SUP.CT.R. 7.

The tenant, however, did not send Ms. Fuller copies of several documents she filed; rather Ms. Fuller accidently discovered them on February 8, 2008, while asking the court clerk an unrelated question. *See* UNCAPTIONED FILING #2 (Feb. 11, 2008), *Appx.* at 39. This made Ms. Fuller ignorant for several weeks of the tenant's appeal-based delay of the writ of possession, her apparent intention to extend her tenancy beyond the new year, *see* MOTION FOR DISCRESIONARY [sic] STAY (Dec. 31, 2007), *Appx.* at 32, and other matters.

A writ of possession finally issued on February 22, 2008. WRIT OF POSSESSION (Feb. 22, 2008), *Appx.* at 41. It was not appealed, but forms the context for the matter before this Court. Moreover, the tenant still owes Ms. Fuller a substantial amount of money for rent not paid.

II. *Wass v. Fuller*, 07-LT-361 – Empty Gas Tanks

On Ms. Fuller's property there are three propane gas tanks: One is to heat a portion of Ms. Fuller's garage to prevent freezing water lines, and the other two supply the tenant's apartment above the garage.

Ms. Fuller is a standard gas customer – Amerigas fills her tank, and later sends a bill in the mail. The tenant, however, had a separate arrangement with the company – for her Amerigas required cash-on-delivery. *Trn.* at 11, 13-14; ORDER (Jan 23, 2008), *Appx*. at 42-43.

On December 21, the Friday before Christmas, *Trn.* at 9, Ms. Fuller phoned Amerigas, and requested a refill of her tank. She requested Amerigas make the delivery after the new year because she knew she would not need gas until then, she wanted to spread out her payments, and because she knew Amerigas required at least a one-week notice for deliveries. *Trn.* at 9; ORDER (Jan. 23, 2008), *Appx.* at 43.

Under the belief that the tenant would be out of the apartment by January 4 in accord with the writ of possession, *Trn.* at 9, 12-13, 16, and aware that the gauges on the tanks serving the apartment were registering zero, Mr. Fuller also told Amerigas that she would probably also want gas in those tanks so that she would be able to show the apartment to potential new tenants. *Trn.* at 9, 12-13.

During the December 21 call Ms. Fuller informed Amerigas that the apartment's gas gauges indicated empty. *Trn.* at 14. Amerigas told Ms. Fuller that when propane tanks are empty, standard procedure is to lock the tanks pursuant to a test of the system. *Trn.* at 10, 14, 17. A blank form provided to Ms. Fuller by Amerigas and submitted to the court below confirms that is Amerigas's practice, SERVICE INTERRUPTION NOTICE No. 277499 (Jan. 23, 2008), *Appx.* at 57, which in accord with national safety codes. *See generally*, NATIONAL FUEL GAS CODE HANDBOOK § 4.2 (1999), *Appx.* at 58 (Leak test "is conducted when … [a]n out-of-gas condition occurs"). Once locked, there is a $85 fee to conduct the leak test, unlock the tank, and reactivate the system. *Trn.* at 12.

Amerigas came early. Even though Ms. Fuller asked for service after the new year, on December 27 – coincidentally the same day as the court's order in the rental non-payment case – Amerigas came and filled Ms. Fuller's tank. Seeing the truck, the tenant approached the driver and was told that her tanks had been locked. *Trn.* at 6.

The tenant believed that the lock-out was as a result of Ms. Fuller telling Amerigas to change the name on the apartment's account from the tenant's to Ms. Fuller's. *Trn.* at 15. Ms. Fuller was told that the lock-out was as a result of the empty tank condition, and that it could not be unlocked until the re-connection fee was paid. *Trn.* at 14, 18-19.

Nobody from Amerigas testified, but four company documents submitted to the court do not match the tenant's explanation.

- A receipt generated in Ms. Fuller's name by Amerigas on December 27, the day of the delivery to the "APT OVER GARAGE," indicates (in handwriting not appearing to be that of any party), "Locked off tanks… Out of propane." AMERIGAS RECEIPT (Dec. 27, 2007), *Appx.* at 53.

- A computer printout generated by Amerigas indicates that as of December 31, 2007, at 2:00 PM, the account was in the name and phone number[3] of the tenant, not Ms. Fuller. AMERIGAS CUSTOMER SCREEN (Dec. 31, 2007), *Appx.* at 54 ("Name KATHLEEN WASS").

- A tag hung on the property and filled out by delivery technician "Mike G." when service was ultimately restored indicates that the "Customer Name" is "Kathy Wass" rather than Ms. Fuller, and informs that service was interrupted because: "We found your tank empty when we delivered gas." Amerigas SERVICE INTERRUPTION NOTICE No. 277263 (Jan. 23, 2008), *Appx.* at 55.

- An Amerigas receipt says "25 Gallons only. Lit Pilots. Pressure test. Hooked up and unlocked 1 120 Gal tank." AMERIGAS RECEIPT No. 644979 (Jan. 23, 2008), *Appx.* at 56.

Collectively these documents clarify two issues. First, the cause for the service interruption was empty tanks. Second, although the account was in Ms. Fuller's name on December 27, after December 31 at 2:00 PM it was in the tenant's name. *See also*, *Trn*. at 18-19.

It is not disputed that Amerigas came a week earlier than Ms. Fuller requested. *Trn.* at 13, 16. Apparently Amerigas recognized some error in this and according to Ms. Fuller offered its cooperation to resolve the problem. *Trn.* at 16. Despite Ms. Fuller's attempts, she and the tenant were unable to get in touch with each other, *Trn.* at 17-19, and the problem persisted.

Thus, on December 27, 2007 – again the same day as the order in the rental non-payment case – the tenant filed a petition alleging that Ms. Fuller caused the gas to be shut off, and

[3]The phone number on the printout, "603 524-0783," belonged to the tenant when she lived at the premises.

requesting immediate restoration. PETITION UNDER RSA 540-A:4 (Dec. 27, 2007), *Appx.* at 46. The tenant later amended the petition to include a claim for damages and also a claim that her rights were violated when Ms. Fuller entered the apartment to take a water sample after the tenant had earlier alleged the water was not potable. MOTION TO AMEND 540A FORM (Dec. 31, 2007), *Appx.* at 47.[4]

On the same day, the court scheduled a hearing and issued temporary *ex parte* orders which provided:

> [Ms. Fuller] is ordered to immediately restore and maintain all utility services as provided by the tenants rental agreement with the owner. Tenant must be able to have tank filled and use the gas in the tank."
>
> [Ms. Fuller] must provide gas for heat until the writ of possession authorized on 12/29/07 is executed.

TEMPORARY ORDERS AND NOTICE OF HEARING (Dec. 27, 2007), *Appx.* at 48.

A hearing was held on January 23, during which both Ms. Fuller and the tenant testified. In its decision the court held that Ms. Fuller violated RSA 540-A:3, I, and awarded $1,000-per-day damages pursuant to RSA 358-A:10 in the amount of $27,000. ORDER (Jan. 23, 2008), *Appx.* at 42.

This appeal followed.

[4]The impermissible entry claim was not pursued below and did not result in any order.

SUMMARY OF ARGUMENT

After setting forth the facts, Ms. Fuller notes that to be liable under the landlord/tenant statute, the court must find that Ms. Fuller willfully caused the interruption of utilities. She then argues that any interruption was an error caused by the gas company delivering ahead of schedule, by confusion over the name on the account for the gas tanks serving the apartment, and by the tenant allowing her tanks to run dry.

Ms. Fuller also points out that although she may not have complied with the court's temporary *ex parte* orders, those orders were beyond the authority of the court. Finally, she notes that the court awarded damages for time when there was no wilful interruption, and during time when the tenant was free to have gas had she paid for it.

Ms. Fuller thus asks this court to reverse the judgment of the court below.

ARGUMENT

I. Statute Bars Wilful Interruption of Utilities

New Hampshire's landlord/tenant statute provides:

> No landlord shall ***willfully*** cause, directly or indirectly, the interruption or termination of any utility service being supplied to the tenant including, but not limited to water, heat, light, electricity, gas, telephone, sewerage, elevator or refrigeration, whether or not the utility service is under the control of the landlord.

RSA 540-A:3, I (emphasis added). In order for liability to attach, the landlord must willfully interrupt utility service.

This Court has not defined "willfully" under this section, but has in related circumstances involving the same statute. In *Rood v. Moore*, 148 N.H. 378 (2002), the tenant alleged that the landlord "willfully" entered the apartment without the tenant's permission, thereby violating RSA 540-A:2. This court held that "[a] willful act is a voluntary act committed with an intent to cause its results. It is not, by contrast, an accident or an act committed on the basis of a mistake of fact." *Id.* at 379. Because under the circumstances of that case the landlord "could have and did, innocently misunderstand the extent of his right to enter," the landlord's conduct was not wilful.

To the extent that Ms. Fuller's actions had any impact on the gas company's decision to lock off the tenant's gas tanks, the actions were not wilful.

II. Interruption of Tenant's Utilities Was at Most a Mistake

Ms. Fuller called Amerigas in on December 21 and asked the company to take action *after* the time she believed the tenant would be out of the apartment according to the court's order. Ms. Fuller had no control over Amerigas's overly-prompt response, and therefore any interruption was "an accident ." *Rood v. Moore*, 148 N.H. at 379. She also was unaware of the tenant's filing of an intent to appeal – later abandoned – and therefore did not know that the writ of eviction would be delayed. Consequently, the interruption of gas was not wilful.

When Ms. Fuller spoke to Amerigas on December 21, among her requests for action to be taken after the new year was that the account for the apartment be placed in her name. It appears that on December 27 when Amerigas came to the site, it had prematurely made the change. On that same day, Ms. Fuller learned of the error and took immediate steps to correct it. The documents show that by December 31 at 2:00 PM, Ms. Fuller had fixed the problem and that the account was back in the name of the tenant. From that time forward, the tenant could have had gas any time she requested and payed for it. Rather than any wilful interruption of the tenant's utilities, Ms. Fuller took steps to correct the gas company's error so that the tenant could purchase gas.

Amerigas's documents show, in accord with Ms. Fuller's testimony and contrary to the court's finding, that the tenant's gas was shut off because the tanks were empty. The tenant's financial situation, cash-on-delivery arrangement with the gas company, ability to pay for gas, and the risk the tenant took in allowing the tanks to run dry, were not matters within Ms. Fuller's control. The only impact Ms. Fuller had on the gas company shutting off the tenant's tanks was the December 21 phone call that resulted in the too-early visit to the site by Amerigas which

resulted in the company's discovery of the empty condition. The fact that the tanks were empty and the gas company took the code-required safety precaution of locking it off cannot constitute a wilful interruption by Ms. Fuller.

The court asked Ms. Fuller, "did you call the gas company on Monday [December 31] and tell them not to unlock the tanks?" *Trn.* at 18-19. Understandably the gas company did not want to make a vain trip to the site, so Ms. Fuller explained she told Amerigas that "[b]ecause no one was going to be there … no one was going to be able to pay for it." *Trn.* at 19. But by that time, according to the company's documents, the account for the apartment tanks had been restored to the tenant's name. Thus Ms. Fuller understood that the tenant was free to order and pay for the gas and re-connection fee any time she wished. Although Ms. Fuller did not proactively get the tenant's tanks filled, she made clear that she was not standing in the way of the tenant doing so. This demonstrates, not wilful interruption, but that after 2:00 PM on December 31 Ms. Fuller lacked any authority over the account to cause an interruption.

III. Temporary *Ex Parte* Order Was Beyond Authority of Court

The conversation Ms. Fuller had with the gas company may show a violation of the court's temporary *ex parte* order. The landlord/tenant statute, however, does not provide for mandatory fines or any other special remedy such a violation. The statute's remedies provisions apply only when the landlord willfully cases an interruption of utilities. Ms. Fuller did not cause any wilful interruption, and thus the remedies provision does not apply.

Moreover, the court's temporary *ex parte* order was beyond the court's authority. "[T]he district court does not have equity jurisdiction," *Woodstock Soapstone Co., Inc. v. Carleton*, 133 N.H. 809, 816 (1991), and therefore no jurisdiction to reform contractual or real property arrangements between private parties, which is an equitable power. *Matter of Lemieux*, Slip. Op. 2007-227, __ N.H. __, __, 949 A.2d 720, 723 (June 13, 2008); *Dion v. Cheshire Mills*, 92 N.H. 414 (1943) (If plaintiff "desires to have the instrument reformed, he has no remedy at law and must proceed in equity."); *McIsaac v. McMurray*, 77 N.H. 466 (1915) ("mistake in a deed or other written instrument may be rectified in equity"). No known statutory provision authorizes reformation in these circumstances.

The temporary *ex parte* order included two provisions. The first required Ms. Fuller to "immediately restore and maintain all utility services as provided by the tenants rental agreement with the owner. Tenant must be able to have tank filled and use the gas in the tank." By correcting the initial error caused by Amerigas coming early, Ms. Fuller complied with this portion of the order.

The second provision, however, purported to require that Ms. Fuller "must provide gas for heat until the writ of possession … is executed." TEMPORARY ORDERS AND NOTICE OF

HEARING (Dec. 27, 2007), *Appx.* at 48. There is no dispute that the tenant was responsible for paying for her own gas, on a cash-on-delivery basis. Thus this second provision adjusts the arrangement between the parties – reformation – and was beyond the authority of the court.

IV. Damages Were Caused by Tenant's Inaction, Not by Ms. Fuller

Damages for violations of the landlord/tenant law are governed by statute:

> Any landlord or tenant who violates … any provision of RSA 540-A:3 shall be subject to the civil remedies set forth in RSA 358-A:10. … Each day that a violation continues shall constitute a separate violation.

RSA 540-A:4, IX (a). The referenced section of the Consumer Protection Act provides:

> If the court finds for the plaintiff, recovery shall be in the amount of actual damages or $1,000, whichever is greater.

RSA 358-A:10, I.

The court awarded damages against Ms. Fuller for 27 days beginning on December 27, 2007, and ending on January 23, 2008, for a total of $27,000. ORDER (Jan 23, 2008), *Appx.* at 42, 45.

As noted, the fact that the gas company locked the tanks serving the apartment on December 27 was an unfortunate error caused by a combination of their empty condition, and the driver showing up early. As such, damages should not accrue from that date. Even if Ms. Fuller were liable from December 27, she rectified the error such that the tenant was free to have the tanks filled, upon paying the bill and fee, as of December 31 at 2:00 PM.

After December 31, the tenant was free to fill her tanks as she pleased. There is no evidence in the record that the tenant took the obvious action to fill the tanks – offering Amerigas the re-connection fee and giving the company money to pay for gas. According to her testimony, it appears that the tenant's last contact with the gas company was on or around December 31, when there was still some confusion regarding whose name the account was in. *Trn.* at 4-8, 14-15, 16 ("I made seven calls to the gas company on the day after I came into the Court" – probably

December 28). There is no evidence the tenant took any action on January 1, January 2, January 3, or any of the other 22 weekdays that fell between December 31 and January 23, the day of the hearing. Had the tenant made some effort, rather than waiting for Ms. Fuller or the court, the tenant would have had gas and there would have been no damages.

Even if there were a continuation of the problem and the account erroneously remained in the name of Ms. Fuller (for which there is no evidence), had the tenant encountered such an issue in early January, and then apprised Ms. Fuller of that, Ms. Fuller could have taken action to again correct it. But there is no evidence that the tenant made any attempt to purchase gas between December 31 and January 23, and therefore no evidence that she could not have had gas had she been willing to pay for it.

Finally, even if Ms. Fuller were at fault regarding gas, the tenant testified that she had electric heaters, *Trn.* at 3, and was therefore never without heat.

Accordingly, Ms. Fuller is not liable for any damages.

CONCLUSION

In accord with the foregoing, Ms. Fuller requests that this court reverse the order of the Laconia District Court, find that she did not willfully interrupt her tenant's gas service, and dissolve the damage award against her.

Respectfully submitted,

Carolyn Fuller
By her Attorney,

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Dated: August 17, 2008

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Carolyn Fuller requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the issues raised in this case are novel in this jurisdiction, and because of the substantial fine against Ms. Fuller.

I hereby certify that on August 17, 2008, copies of the foregoing will be forwarded to Kathleen Wass, *pro se,* 15 Rowell St., Laconia, NH 03246.

Dated: August 17, 2008

Joshua L. Gordon, Esq.

APPENDIX

I. *Fuller v. Wass*, 07-LT-325 – Writ of Possession for Unpaid Rent

II. ***Wass v. Fuller*, 07-LT-361 – Empty Gas Tanks**