

1996

Viola Marie Cameron and Tina Cotton v.
Gunther's Inc., a Utah corporation dba Gunther's
Comfort Air; Lennox, Inc., an Iowa corporation;
Frank Robinette; Wayne Viehwig, Pat Viehwig; and
Does I-X : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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DOCKET NO. 960328

VIOLA MARIE CAMERON, and
TINA COTTON, individually,
and as the Guardian for
Kenyon Cotton, a minor,

Case No. 960328

PRIORITY 15

Plaintiffs/Appellants,

vs.

GUNTHER'S, INC., a Utah
corporation dba Gunther's
Comfort Air; LENNOX, INC.,
an Iowa corporation; FRANK
ROBINETTE; WAYNE VIEHWIG;
PAT VIEHWIG; and Does I-X,

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Defendants/Appellees.

BRIEF OF APPELLEE GUNTHER'S, INC.

Appeal from the Fourth Judicial District Court of Utah County,
Honorable Ray M. Harding Presiding

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FILED

JUL 31 1996

COURT OF APPEALS

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I. LIST OF PARTIES

Viola Marie Cameron, Tina Cotton, Kenyon Cotton, plaintiffs/
appellants.

Gunther's, Inc., Lennox, Inc., Frank Robinette, Wayne Viehwig,
Pat Viehwig, defendants/appellees. Wayne and Pat Viehwig settled
with plaintiffs before trial.

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IV. JURISDICTION

The Court has jurisdiction under Rules 3, 4 and 42, Utah R. App.P., and Utah Code Ann. §§ 78-2-2(3)(j) and -2(4), and 78-2a-3(2)(k).

V. STATEMENT OF ISSUES

A. Did plaintiffs waive a right to complain that the jury did not award general damages, by failing (1) to request an instruction mandating such an award, (2) to object to the instructions given, or (3) to object after the jury had awarded no general damages?

B. Assuming no waiver:

1. Must the jury award general if it awards special damages?

2. Did the evidence support the jury's verdict on general damages?

C. Did the evidence support the jury's distribution of fault?¹

D. Was Robinette properly on the verdict form?

¹Gunther's addresses this issue except as to the claim that a verdict of no fault as against Lennox was against the weight of the evidence, which Lennox addresses.

E. Was the court within its discretion to exclude Ramona Hopkins' testimony?

F. Was the court within its discretion to limit plaintiffs' rebuttal case?

G. Was the court within its discretion to admit quantitative MRI data?

H. Was plaintiffs' punitive damages claim properly kept from the jury?

VI. GOVERNING LAW

Common law; Rule 51, Utah R.Civ.P.

VII. STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION BELOW.

Plaintiffs sued Gunther's for claimed injuries from exposure to carbon monoxide ("CO"), which resulted from Gunther's retrofit of a gas for an oil furnace in plaintiffs' home. They added negligence claims against their landlords and the City inspector.

They sued the furnace manufacturer separately, and the cases were consolidated. Plaintiffs settled with the landlords before trial.

The trial lasted most of November 1994. The court dismissed the punitive damages claim against Gunther's at the close of

plaintiffs' case. The jury found at fault defendants Gunther's 35%, Robinette 35%, Viehwigs 10% and Lennox 0%, and plaintiff Cameron 20%. The jury awarded special damages totaling \$17,700, for medical expenses for plaintiffs' temporary, CO-induced flu-like symptoms, and no general damages. The jury concluded plaintiffs had suffered no permanent injury and no substantial pain and suffering. The court denied plaintiffs' post-trial motions.

B. STATEMENT OF FACTS.²

1. DAMAGES ISSUES.

a. PLAINTIFFS' WAIVERS.

The jury returned without having completed the verdict form. It had included amounts for special damages but left blank the lines for general and total damages. Plaintiffs asked the court to direct the jury to award general damages since it appeared it might award special damages. The judge instead told the jury to "complete the form as to damages General damages may be completed in such sums, if any, you feel is appropriate. As to what constitutes general damages, I would again refer you to Instruction No. 47." Vol. 15, 2-11.

²Gunther's sets forth the facts in order of the issues and arguments raised in appellants' Brief. Because plaintiffs failed to marshal the evidence, Gunther's does so in support of the portions of the verdict appellants challenge on a claim of insufficiency of evidence.

Instruction 47 provided:

[It] will be your duty to determine the amount of Plaintiffs' damages, if any, as you may find from a preponderance of the evidence will reasonably and adequately compensate Plaintiffs for any injury and loss Plaintiffs may have sustained as a result of the incident and injuries complained of by Plaintiffs.

In determining such damages, you may consider the nature and extent of the injuries sustained by the Plaintiffs, the degree and character of Plaintiffs' suffering, both mental and physical, its probable duration and severity, and the extent to which Plaintiffs had been prevented from pursuing the ordinary affairs of life theretofore enjoyed. You may also consider lost wages as well as lost future wages. If you find the plaintiff has suffered a loss of earning capacity, you should award the present cash value of earning capacity reasonably likely to be lost in the future as a result of the injury in question.

Pain and mental and physical suffering have no market value. They are not capable of being exactly or accurately determined, and there is no fixed rule or standard whereby damages for them can be measured. You may however make such award for pain and mental and physical suffering as will provide reasonable compensation for such injuries and suffering.

You may also consider whether any of the above will, with reasonable certainty, continue in the future.

You are not permitted to award Plaintiffs speculative damages by which term is meant compensation for detriment which, although possible, is remote, conjectural or speculative.

R. 2227-26 (emphasis supplied).

Instruction 47 was virtually identical to plaintiffs' proffered damages instructions. R. 2008.³ Plaintiffs did not object to Instruction 47 or except to the court's failure to give plaintiffs' proffered instruction. Nor did plaintiff proffer an instruction that directed the jury to award some amount in general damages if the jury awarded special damages. Vol. 13, 107-12; R. 1995-2035, 2053-64. The jury deliberated further, put "0"s on the lines for generals and totaled the damages. Plaintiffs did not object to the verdict as irregular or insufficient. The jury was dismissed. Vol. 15, 12-18.

b. FACTS SUPPORTING NO GENERAL DAMAGES.

Plaintiffs were exposed to CO at differing degrees over different periods of time. None lost consciousness. They experienced flu-like symptoms, drove to the hospital and were treated. The acute symptoms resolved shortly after plaintiffs had left the CO environment.

³Plaintiffs also sought this instruction:

If you find the issues in favor of the Plaintiffs and against the Defendant[s], then it is your duty to award the Plaintiffs such damages, if any, that you find, from a preponderance of the evidence, will fairly and adequately compensate Plaintiffs for the injury and damage sustained.

(This instruction, page 27 of Plaintiffs' Proposed Jury Instructions, was omitted from the Record and should be included between R. 2008 and 2009.)

The principal general damages question was whether plaintiffs had suffered anything more than temporary flu-like symptoms. Plaintiffs claimed they had suffered permanent brain, heart and lung damage and that their pain and suffering had lasted longer and in a greater degree than one might experience with flu. Evidence they had not was overwhelming. The jury concluded plaintiffs had failed to prove the existence of substantial pain and suffering, even though they were entitled to payment of medical expenses.

Dr. Richard D. Stewart, a nationally renown doctor of internal medicine, testified concerning his research on the short- and long-term effects of CO exposure, which utilized a sophisticated environmental chamber, and in which he and many of his colleagues and students volunteered as subjects to high levels of exposure. He had published 20-40 articles about CO and its effects. Vol. 9, 78-104, 110, and Exhibit 79. His opinions were:

--he was unaware of anyone involved in his CO studies who had suffered any long-term effects. Vol. 9, 104.

--Kenyon Cotton experienced an acute exposure to CO which, at the level measured, would have caused headache, possible

visual disturbance, nausea, and possible vomiting. By the next day, all symptoms would have been gone with no long-term sequelae. Vol. 9, 128-130.

--Tina Cotton experienced an acute exposure to CO which, at the level measured, would have caused headache, nausea, probable vomiting, visual disturbance and achy muscles. Within 24 hours of removal of the excessive CO from her system (half-life was five to six hours without oxygen supplement and about one and one-half hours with), all acute systems would have been gone permanently, with no long-term sequelae. There was nothing in the medical literature to suggest a connection between CO exposure without loss of consciousness and pulmonary emboli. Tina Cotton had not been diagnosed with restrictive cardiomyopathy, but in any event, nowhere did the medical literature suggest that CO was causally connected to restrictive cardiomyopathy. Vol. 9, 131-34.

--Marie Cameron experienced an acute exposure to CO which, at the level measured, would have caused similar symptomology to what Tina experienced, but with greater intensity. There is no evidence that she sustained permanent heart injury from the exposure. She had pre-existing angina and underlying coronary

heart disease. There was no evidence of a causal connection between the CO exposure and her later need for an angioplasty. There was no evidence of permanent injury due to the CO exposure, but there was a host of pre-existing complaints, starting with white matter disease--possibly MS--which caused functional overlay of anxiety depression syndromes, atypical migraines, confusion and memory problems. Vol. 9, 134-39.

Dr. Erin David Bigler testified concerning his extensive education, research, clinical experience, publications, teaching certifications and associations in the area of neuropsychology and neuroimaging. He had consulted extensively with patients who had CO exposure. Vol. 9, 197-209 and Exhibit 80. His opinions were:

--Kenyon Cotton had a normal MRI scan, including the regions of the brain believed susceptible to anoxic injury. Vol. 10, 15-25, 171-72, 174-77.

--His full-scale IQ, post-CO exposure, fell in the above-average range. Kenyon predictably would have scored in the normal range absent CO exposure, and he scored in the normal range on other neuropsychological tests and exceptionally well on

others, which had to do with myriad complex brain functions.

Vol. 10, 25-59, 184-86.

--Kenyon's testing indicated no problems with memory, learning or attention concentration. Vol. 10, 59-60.

--Kenyon may have Deficit Hyperactivity Disorder, which predated and was unrelated to the exposure. Vol. 10, 63-64.

--Marie's hippocampus was unchanged from before to after exposure, based on pre- and post-MRIs. Other than the preexisting white matter disease, her post exposure scan showed no problems and was within normal limits. The white matter disease affected the functioning of the brain by blocking primary pathways and preventing proper connection. The white matter lesions would have affected complex reasoning, problem solving, judgment, aspects of memory, attentional and emotional regulation, perceptual functioning, language, visual/spacial and the like. Such problems were documented in medical records which predated the exposure. Vol. 10, 66-79, 179-81, 186-88.

--the neuropsychological results were consistent with Marie's preexisting problems. Vol. 10, 79-90.

--Tina Cotton's MRI scan showed nothing abnormal. Her neuropsychological tests showed she would have performed at the

average to low average range prior to exposure, which was normal. Her post-exposure testing was consistent with where she would have tested without exposure. One result suggested malingering. Because of differences in results of tests taken post exposure, factors such as functional overlay were likely, which could have included stress, depression, anxiety and the like. Vol. 10, 90-100.

--in Dr. Bigler's experience, full recovery occurred in all cases involving people who had not become comatose from exposure. Vol. 10, 103.

--Tina Cotton and Marie Cameron experienced no brain damage from the exposure. Vol. 10, 104.

Dr. Kevin Tracy McCusker, an internist specializing in pulmonary disease, Vol. 10, 206-08 and Exhibit 96, testified that:

--Tina Cotton had a very mild form of asthma, there was nothing in the medical literature to tie it to the exposure, and the exposure was unrelated to her asthma. Vol. 10, 210-11.

--the medical literature did not connect CO exposure to pulmonary emboli, and there were other causative factors, such as inactivity due in part to obesity. Tina Cotton's exposure had

nothing to do with her pulmonary emboli, which was treated and resolved without incident. Vol. 10, 211-15.

Dr. Stephen R. Thom, a board certified M.D., Ph.D, and researcher on the pathophysiology of CO, was on faculty at medical schools, and had a large practice which involved seeing patients who had been exposed to CO. Vol. 11, 3-7, and Exhibit 97. His opinions were:

--the accepted medical view concerning patients who do not become comatose from exposure is they suffer no permanent damage. Vol. 11, 7.

--many patients who become comatose from exposure recover completely. Vol. 11, 8.

--one of his studies concluded that people with exposure who do not lose consciousness return to normal within a short time, with no long-term sequelae. Some older patients take longer to normalize. There is no correlation between the duration of CO exposure and risk of delayed neurological sequelae. Vol. 11, 8-28.

--plaintiffs suffered no brain injury from the CO exposure. Vol. 11, 29.

--the medical literature does not suggest a connection between CO and asthma, pulmonary emboli or restrictive cardiomyopathy, and Tina Cotton could not have suffered pulmonary emboli from her exposure. Vol. 11, 30-32.

--Tina Cotton and Marie Cameron suffered no permanent heart injury as a result of their CO exposure, and the exposure did not contribute to angina after the CO had dissipated. Vol. 11, 30, 33, 68-69.

Dr. Neil Shadoff testified concerning his education, training, experience, research, board certifications in internal medicine and cardiovascular diseases and publications. Vol. 11, 78-86. His opinions were:

--Tina Cotton did not suffer from restrictive cardiomyopathy, and no heart damage as a result of her CO exposure, and there was no support in the medical literature to suggest CO causes restrictive cardiomyopathy. Vol. 11, 86-94, 122-33, 163.

--Tina Cotton did not suffer pulmonary emboli from her exposure. Vol. 11, 133-35.

--Marie Cameron suffered no permanent heart damage from her exposure and the exposure did not cause ongoing angina in Marie Cameron. She had preexisting heart problems which were not

aggravated, other than with temporary angina during the exposure, as a result of the exposure. Vol. 11, 135-58, 163.

--there was no reason from a cardiology standpoint that Tina Cotton or Marie Cameron could not be employed, or that Tina Cotton could not lead a normally active life. Vol. 11, 162.

2. FACTS SUPPORTING ASSESSMENT OF FAULT.

a. MULTIPLE PROXIMATE CAUSES: ALLEGATIONS AND INSTRUCTIONS.

The consolidated cases alleged the fault of Gunthers, Lennox, Robinette and the Viehwigs combined to cause plaintiffs' injuries. R. 166-79.⁴ The Second Amended Complaint alleged breaches of legal duties by all defendants, defendants' collective acts and omissions combined to cause injuries and each defendant's breach was a proximate cause. R. 169-70.

Plaintiffs sought a standard instruction relating to multiple proximate causes, which the court gave in substance without objection. R. 2018, 2256. The court also gave a standard instruction concerning superseding cause, without objection. R. 2251; Vol. 13, 107-12.

⁴See also Case 930400597 PI, R. 1-13, the Complaint in the consolidated cases.

b. ROBINETTE'S FAULT.

(1) ALLEGATIONS AND INSTRUCTIONS.

Plaintiffs alleged:

Defendant Frank Robinette is an independent contractor for the City of Nephi who inspected the Demised Premises, the Furnace and Gunther's installation of the Furnace before the Furnace was connected to the Nephi city [sic] gas line. . . .

Defendant Robinette had the duty to determine that the Furnace was properly installed and the Furnace Room was properly ventilated before he approved the Demised Premises as being ready for connection to the city gas line. . . .

Robinette negligently failed to analyze whether the Furnace Room was vented in accord with industry standards and would provide the Furnace with the requisite combustion air. The Furnace Room was all but air tight when Robinette approved Gunther's installation and permitted the city gas line to be connected. . . .

R. 173-74; Case 930400597 PI, R. 1-13.

Plaintiffs' proffered jury instructions provided that Mr. Robinette's conduct should not be considered a superseding cause of the other defendants' conduct. The Court gave that instruction. R. 2271-72. The Court also gave an instruction, at plaintiff's request, that Robinette's approval of the installation did not approve any Gunther's violations. R. 170, 177; Case 930400597 PI, R. 1-13.

Having sued and prayed for damages against Mr. Robinette, plaintiffs did not object to his inclusion on the verdict form, but during the instruction phase raised a defense on his behalf that he should not be held to a negligence standard. Vol. 13, 110-12.

(2) EVIDENCE OF INSPECTOR'S FAULT.

Mr. Robinette was responsible for inspecting the furnace installation. Vol. 2, 206-08. His responsibility was not to unlock the gas meter and permit the furnace to go into operation if it was unsafe. Vol. 2, 240-41. He was negligent for failing to determine compliance with the Uniform Mechanical Code and insufficiency of combustion air, and permitting the furnace to be operated. Vol. 9, 13-14, 36, 63-67.

There were several oversights. The room in which the furnace was located was a "confined space" within the meaning of the Code, requiring a minimum of two permanent combustion air openings. Vol. 2, 212, 269; Vol. 3, 413-14, 470-71, 544. There was only one combustion air opening in the furnace room, which did not comply with the Code in terms of number or size, and the intake end was latently blocked by wood or concrete during a previous remodel. Vol 2, 213-16, 242-43, 249-52, 254-56, 270-73;

Vol. 3, 414-17, 456-59, 470-71; Vol. 9, 63-67. There was another vent which terminated in the house but was not a combustion air vent. Vol. 3, 417-20, 544. And there were gaps around pipes in the furnace room and under the door, which did not qualify as vents. Vol. 3, 420-21. Despite Robinette's belief that sufficient combustion air openings existed, in part because the furnace room had accommodated the prior furnace, there was insufficient combustion air. Vol. 3, 420-21, 479; Vol. 9, 63-67. The installation failed to meet current Code. Vol. 3, 453-54, 461, 480-81, 264-67; Vol. 9. 13, 63-67.

c. FAULT OF VIEHWIGS.

(1) ALLEGATIONS AND INSTRUCTIONS.

Plaintiffs alleged:

As landlord, Defendants Viehwig owed their tenant and her family a duty to exercise reasonable care in undertaking to improve the Demised Premises generally and, in particular, by replacing the oil furnace previously used in the Demised Premises with a new gas furnace, and breached that duty through the actions of Gunther's, and by failing to properly install and inspect the Furnace.

R. 173; Case 930400597 PI, R. 1-13.⁵

⁵Consistent with this allegation, the court gave the following instruction to which plaintiffs did object:

A landlord has a duty to exercise reasonable care to see that the leased premises are reasonably safe and suitable for intended uses. A landlord

(2) EVIDENCE OF LANDLORDS' FAULT.

The landlords were negligent for failing to alert Gunther's or the inspector that the oil burning furnace had smoked and made residents ill. This would have alerted Gunther's and the inspector to combustion air problems. Vol. 2, 193-94, 243-44, 247-48; Vol. 8, 242-44.

The landlords were negligent for failing to alert Gunther's or the inspector that the combustion air vent had been blocked. Had it not been blocked, or had Gunther's been made aware of this problem and resolved it, there would have been no exposure. Vol. 2, 196-97, 213-16, 242-43, 249-52, 254-56, 270-73; Vol. 3, 414-17, 456-59, 470-71; Vol. 9, 63-67.

The landlord's brother, an architect acting on behalf of the landlords with respect to the installation of the furnace, failed to stress to the occupants the importance of keeping the furnace room door open until Gunther's could resolve it. Vol. 8, 228-34.

has a duty to exercise reasonable care to see that the premises are free of defects or dangerous conditions created by the landlord, or of which the landlord was aware, and which the landlord should reasonably foresee would expose others to an unreasonable risk of harm.

R. 2245; Vol. 13, 110. After settling with the landlords, plaintiffs objected to their inclusion on the verdict form. Vol. 13, 112.

d. FAULT OF MARIE CAMERON.

(1) INSTRUCTIONS.

Plaintiffs sought the following jury instruction:

If you find that any of the Defendants were negligent, you must decide if any of the Plaintiffs were also negligent. If a Plaintiff was negligent and that Plaintiff's negligence was a proximate cause of that Plaintiff's own injuries, that Plaintiff's negligence must be compared to the negligence of the Defendants.

. . .

Each Defendant is liable to pay compensation based on that Defendant's own percentage of fault.

R. 2017.⁶

(2) EVIDENCE OF MARIE CAMERON'S FAULT.

The prior oil burning furnace had created problems with fumes. Vol. 2, 248, 297-98; Vol. 7, 86, 107-08; Vol. 8, 242-44. No one alerted Gunther's or the inspector that the oil burning furnace had smoked and made residents ill. Vol. 2, 192-93, 243-44, 247-48; Vol. 8, 242-44. This would have informed Gunther's and the inspector of combustion air problems.

The landlord's brother informed Ms. Cameron there was insufficient combustion air and she should leave the door to the furnace room open until Gunther's could resolve the problem,

⁶This instruction was given in substance without objection. R. 2253-52; Vol. 13, 107-12.

which she failed to do. Had she done so, there would have been sufficient combustion air. Vol. 8, 228-34.

3. FACTS RELATING TO THE EXCLUSION OF RAMONA HOPKINS' TESTIMONY.

Plaintiffs proffered Ms. Hopkins' testimony at Vol. 6, 187-89, which identified nothing she could have added to the testimony of Drs. Weaver and Nilson, except her study, discussed below, and otherwise did not establish scientific reliability. Moreover, the experience from which she would have testified was based mostly on her dissertation which suffered from foundational and scientific reliability problems.

Ms. Hopkins held no license as a psychologist or neuropsychologist (see Utah Code Ann. § 58-61-101), nor could she qualify for such a license because she lacked the clinical experience and post-doctoral training, and was precluded from diagnosing brain injury. Vol. 6, 177-186. H. 15-20.⁷ She had never been qualified as an expert in any court. H. 34-35. She wanted to opine that plaintiffs sustained permanent brain injury as a result of CO exposure, despite their never losing consciousness. She based her opinions upon research she had

⁷Gunther's refers to Ms. Hopkins' deposition as "H."

conducted in her Ph.D thesis, entitled "Memory for Novel and Familiar Spatial, Linguistic, and Geographical Temporal Distance Information in Hypoxic Subjects."⁸ H. Exhibit 2.

She began her study by selecting two groups. The first group included 11 "Hypoxic Subjects." Plaintiffs Marie Cameron and Tina Cotton were among them. Criteria for qualifying as an "Hypoxic Subject" were:

--The person had a "significant" hypoxic event. If a doctor said the person had had a "significant" hypoxic event, that satisfied this criterion;

--The person scored at least one standard deviation below the "norm" on portions of the Denman memory test.⁹ Ms. Hopkins agreed, however, that within the un-brain-damaged population, certain people will score at least one standard deviation below and a certain number will score at least one standard deviation above the "norm" ("bell curve" in the normal population);

⁸Why Ms. Hopkins' testimony lacked foundation and was unreliable requires more extensive explanation because of the technical nature of her study.

⁹This criterion assumed a causal relationship between the undefined hypoxic event and the low test score. Ms. Hopkins had each person sign a consent form, entitled "Memory Performance in Cerebral Cortex Damaged Patients Consent Form," which assumed brain damage, and informed the participant she had brain damage and as a result thereof were participating in a study of brain damaged people. H. Exhibit 2.

--The person had no previous history of neurologic disorder, alcohol or drug abuse, or psychiatric disturbance. The results of testing a person who had such a history would be unreliable because of probable functional overlay. Further, it could skew the results as to that person and/or as to the group as a whole, particularly when dealing with such a small sampling.¹⁰

--The person had no current untreated psychological problems which could skew the results as to that person and/or as to the group as a whole, particularly when dealing with such a small sampling. H. 11-12, 14-15, 69-85, 93-107, 110-15, 117-20, and Exhibits 2, 3 and 4 thereto.

The second group included 11 "Control Subjects." Ms. Hopkins matched these 11 persons with the 11 "Hypoxic Subjects" by age, gender and levels of education, but not by body size, cranium size, body weight, smoking, alcohol use, or any other factor such as degree of depression, or subjective motivations to do poorly on the tests. One other criterion was that the person scored at or above the "norm" on the Denman memory test.

¹⁰Ms. Hopkins failed to obtain an adequate history of the study participants. She learned after the study of Ms. Cameron's extensive neurological history which predated the hypoxic event and, admittedly, could have skewed the results with, among other things, various functional overlay. She testified that had she known of Ms. Cameron's prior neurological problems (white matter disease), she would not have used her in the study. H. 98-100, 110-15.

Ms. Hopkins purposely excluded from the "Control Subjects" that segment of the un-brain-damaged population who would naturally score below the "norm." Otherwise, there were no statistical standards for determining whether the selection of the control group was a fair cross section of the population. H. 118-20, 68-90, 95-97, 102-07, 115-18, and Exhibit 2 thereto.

Ms. Hopkins conducted MRI scans on six of the 11 "Hypoxic Subjects" and on the matching six "Control Subjects." The MRI scans focused on the hippocampus, which is believed to be involved in short term memory and information processing and sensitive to anoxic injury. Using a controversial method for measuring the physical dimensions of the hippocampus, she concluded that the "Hypoxic Subjects" as a group (six) had smaller hippocampuses than the "Control Subjects" as a group (six).¹¹ She concluded that the hypoxic event had caused a reduction in the hippocampus size.¹² H. 122-29, and Exhibits 2-4 thereto.

¹¹Although she was not trained or licensed as a radiologist, she purported to read the MRI scans and to measure the hippocampuses.

¹²She agreed that the research method for measuring the hippocampus was subject to some controversy and had not been accepted for clinical or diagnostic use. She also agreed that there was a more advanced method available for measuring the hippocampus than the one she had used. H. 122-29.

Ms. Hopkins then conducted certain tests on each person in the "Hypoxic" group and the same tests on each person in the "Control" group. She had developed some of the tests herself, which were not standardized or generally accepted for this specific application in the scientific community, and were not developed for "reliability" and validity. She concluded that in some areas involving short-term memory and information processing, the "Hypoxic Subjects" as a group scored statistically significantly lower than did the "Control Subjects" as a group. From this, she concluded that the hypoxic event had caused the differences.¹³ H. at 69-89. Ms. Hopkins also agreed that the testing she conducted was subjective.¹⁴ H. 95-97.

¹³She assumed a causal relationship between the hypoxic event and the lower test scores. She agreed, however, that within the un-brain-damaged population, a certain number of people will score statistically significantly different than the "norm." Ms. Hopkins had no way of knowing whether each "Hypoxic Subject" would have scored the same prior to the hypoxic event. She had no way of knowing whether un-brain-damaged people who score at least one standard deviation below the "norm" on the Denman memory tests would also score poorly on the tests she developed for the study. She had no way of knowing whether un-brain-damaged people who naturally have smaller hippocampuses would naturally score poorly on the tests she had developed. E.g., H. 117-18 and Exhibit 2 thereto. Therefore, an assumption that the hypoxic event caused the lower scores was not causally connected, scientifically justified or valid.

¹⁴People who took the tests on one day might achieve different results on another day. Factors affecting one's test score might include something as simple as a poor night's sleep, one's desire to do well, or emotional problems such as depression which may be unrelated to purported brain damage. H. 95-97.

Ms. Hopkins could not say whether Marie Cameron's history of neurological disorders and psychiatric and psychological problems had skewed the results as to the "group" or Marie. Ms. Hopkins agreed that people with preexisting neurological problems should have been excluded from her study because the results of testing such people would be unreliable. H. 64-66, 93-95, 98-102, 110-12, 113-15.

Nonetheless, Ms. Hopkins concluded that the hypoxic event had caused permanent damage to the hippocampal region of the brain in the Hypoxic Subjects as a group. However, the study did not purport to state that any specific person in the "Hypoxic" group experienced permanent brain damage to the hippocampus. Her study compared only "group" results. H. Exhibit 2.

Ms. Hopkins personally never saw Kenyon, tested him or evaluated him. Based on her review of Kenyon's psychometric testing data and information such as school records, she concluded that Kenyon's exposure caused him permanent brain damage. H. 205-07.

Ms. Hopkins refused to produce the raw data underlying her testing and conclusions from which she drew her conclusions as to the groups or to any individuals, except as to Tina and Marie.

H. 121-22, 130-133.¹⁵ Without the underlying data, Gunthers could not validate Ms. Hopkins' guesswork or conclusions.

4. ADMISSION OF QUANTITATIVE MRI BRAIN IMAGING DATA.

Gunther's offered a videotape containing MRI sheets Dr. Bigler had taken of each plaintiff. Plaintiffs had been provided copies of those sheets at Dr. Bigler's deposition. Marie Cameron had a pre-exposure MRI scan in 1990, which was in plaintiffs' possession. A comparison of the pre- and post-exposure scans, showing Marie Cameron's hippocampal size, was offered as illustrative of Dr. Bigler's testimony that there had been no significant change. A comparison of the plaintiffs' MRIs to certain norms was included as illustrative. During Dr. Bigler's deposition, he testified concerning this quantitative approach and a paper he had submitted for publication which more fully

¹⁵The underlying data was critical to validate and understand her study. Because of the extremely small sampling of people in the study, unusual test results or measurements with respect to a very few people could skew the group results. "Hypoxic Subjects" who had been rendered unconscious may have skewed the group results, particularly for those who had not lost consciousness. A few people in the "Hypoxic" group could have scored unusually low on the tests (which is entirely normal within the un-brain-damaged population). A few people in the "Control" group could have scored unusually high on the tests (which is entirely normal within the un-brain-damaged population). Some of the people in the "Hypoxic" group may have had naturally smaller physical dimensions, while some in the "Control" group may have had larger dimensions (entirely normal within the un-brain-damaged population). Because of the small sampling of participants, relatively slight differences could skew the group results. Without the data, Gunther's had no way of knowing.

explained the analysis, a copy of which plaintiffs did not request. Plaintiffs were given the quantitative information before trial, and had inquired about it during deposition. The court had not ordered exchange of exhibits. Thus, the information had not been "sprung on [plaintiffs] on the ninth day of trial." Vol. 10, 5-14.

5. PUNITIVE DAMAGES CLAIM.

Gunthers had no previous occurrence of an installation resulting in CO exposure. Vol. 3, 368. The installer here had 19 years experience with Gunthers and had never had any complaints that his work had caused CO problems. Vol. 2, 184, 196. The installer knew of the furnace's combustion air needs, specifically looked for combustion air sources, and assumed there was sufficient combustion air because to his knowledge that the room had accommodated the combustion air needs of the furnace he was replacing. He did not know the west wall vent had been blocked by a remodel. Vol. 2, 184-97.

Plaintiffs did not allege the conduct of any defendant alone caused their injuries. Plaintiffs and their expert identified many factors which they claimed combined to cause injuries. It was the unusual combination of many factors which resulted in

circulation of CO through the home. It was a close line between safe and unsafe operation of the furnace. Plaintiffs' expert agreed that had any of the many contributing factors been different, the outcome would likely have been different, and plaintiffs would not have been injured. Vol. 4, 614-15. The combining factors included:

--preexisting leakage in the return-air duct work which caused a negative pressure in the furnace room and allowed combustion gasses to infiltrate circulating air. An installer normally would not inspect the duct work of others unless he was on notice of a problem. Vol. 3, 479-83; Vol. 4, 574, 588; Vol. 9, 13.

--a preexisting blockage of a combustion air vent in the furnace room. The blockage could be found only by taking down the grate, and inserting one's head deep inside the opening in the concrete wall to peer through louvers. Mr. Bambenek testified that had the vent been unobstructed, sufficient combustion air would likely have existed and the accident probably would not have occurred. Mr. Robinette testified that absent the latent blockage sufficient combustion air would have existed to operate the furnace safely as did Gunther's expert who

conducted tests to make that determination. Vol. 2, 213-16, 242-43, 249-52, 254-56, 298-99; Vol. 3, 532, 541-43, Vol. 4, 589-90; Vol. 9, 14-17, 71-72, 75-76.

--the assumption by Gunther's installer that because sufficient combustion air existed for the preexisting oil furnace, sufficient combustion air existed for the replacement furnace, and his failure otherwise to meet code requirements. The assumption was rational and consistent with what others in the industry would have naturally assumed, including the inspector, who held myriad local, national and international building official certifications, was a promulgator of the Uniform Building and Mechanical Codes, instructed concerning the Uniform Mechanical Code, was the Chief Building Inspector for ten years in Utah County and chaired Utah's Education Licensing Committee for four years. He testified that if the old installation complied with the codes that were then in existence, the mechanical system's use could be continued with a change out. If such assumptions were incorrect, they were not maliciously so. Vol. 2, 213-14, 219-26, 231-36, 244-45, 253-54; Vol. 8, 248. Expert testimony attributed criticism to whoever had previously blocked the vent. Vol. 9, 14.

--a hidden opening in the return air system which created negative pressure. Vol. 9, 37.

--the manner of the installer's draft test. Vol. 9, 13.

--the manner of inspection, including the assumption of sufficiency of combustion air, and the failure to confirm Code compliance. Vol. 2, 213; Vol. 3, 543-44; Vol 4, 591; Vol. 9, 13.

--the design and/or manufacturing characteristics of the Lennox furnace:

--leakage in the combustion chamber, creating negative pressure in the furnace room and allowing combustion gasses to infiltrate the circulating air.

Vol. 3, 514-19, 521-23, 540; Vol. 4, 573-79, 592-97, 599-605.

--the excessive temperature setting and location of the spill switch, which should have shut off the furnace. Vol. 3, 504-06, 540; Vol. 4, 579-83, 599, 605, 608-10; Vol 9, 20-33, 67-71, 73-75.

--the excessive temperature setting of the roll-out switch, which should have shut off the furnace. Vol. 3, 506-14; Vol 4, 605, 608-10.

--insufficient delay between when the thermostat calls for heat (which begins burner operation and allows the heat

exchanger an opportunity to warm up before the blower starts), and the blower starting. Sufficient delay would have allowed the stack to warm up and draw combustion products up the flue. Actual delay was 23 seconds, instead of the represented 45 seconds. Vol. 3, 526-27.

--keeping the door to the furnace room closed, instead of opened as Mr. Viehwig had instructed Ms. Cameron. Vol. 2, 263-64, 292; Vol. 3, 537; Vol. 8, 231-34.

VIII. SUMMARY OF ARGUMENT

Plaintiffs waived a right to complain that the jury should have awarded general damages for three reasons. First, plaintiffs obtained a damages instruction that gave the jury discretion to award no general damages. Second, plaintiffs did not seek an instruction directing the jury to award general damages upon any condition. Third, plaintiffs waived the objection by failing to raise the claimed insufficiency and irregularity of the verdict before the jury was discharged.

There is no fixed rule requiring an award of general damages if the jury awards special damages.

Plaintiffs claim the verdict is not supported by the evidence in two respects, the jury's failure to award general

damages and the jury's apportionment of fault. Plaintiffs failed to marshal the evidence supporting the verdict. This Court should therefore assume the correctness of the verdict and the trial court's judgment.

Overwhelming evidence supports a finding of no general damages in that plaintiffs' only injury was they temporarily experienced flu-like symptoms as a result of their exposure which resolved shortly after they left the environment.

The evidence supports the jury's assessment of fault of Robinette, the Viehwigs and Ms. Cameron, and Mr. Robinette was properly placed on the verdict form for an assessment of his proportionate share of fault.

Ms. Hopkins' proposed testimony was cumulative. It also suffered serious problems with foundation and scientific reliability. The court properly excluded the testimony.

Plaintiffs were not surprised by the quantitative MRI data, and the court properly admitted it.

Finally, the court properly dismissed the punitive damages claim for lack of a prima facie case.

IX. ARGUMENT

A. GENERAL DAMAGES.

1. PLAINTIFFS WAIVED THE GENERAL DAMAGES CLAIM.

a. INSTRUCTIONS.

Rule 51, Utah R.Civ.P., provides: "no party may assign as error the giving or the failure to give an instruction unless he objects thereto." Objections "must be made before the instructions are given to the jury; otherwise, objections may be made to the instructions after they are given to the jury, but before the jury retires to consider its verdict." Plaintiffs proffered instructions which gave the jury discretion whether to award general damages and failed to object to Instruction 47 before the jury began deliberations. See Fuller v. Zinik Sporting Goods Co., 538 P.2d 1036 (Utah 1975).

The court in Wheeler v. Huston, 605 P.2d 1339, 1346. (Or. 1980), explained:

[I]f the evidence . . . is such that reasonable people could not disagree that the defendant is legally liable for any injuries sustained by the plaintiff . . . the plaintiff should appropriately request that the jury be instructed that the defendant's liability has been established. In the absence of such a request, a verdict for the defendant is immune from attack by the plaintiff on the ground that the trial court failed to instruct the jury that the defendant's liability had been established and that the defendant was liable for

all injuries resulting from the defendant's fault. There is no reason why the question of the plaintiff's right to recover general damages or uncontroverted special damages should be treated any differently. We hold, therefore, that if the plaintiff claims that the right to recover general damages has been established as a matter of law, and that the jury must therefore award some general damages if they find the defendant liable, the plaintiff should request that an appropriate instruction be given to that effect.

Plaintiffs failed to address this issue in the instruction phase and waived it.

b. INSUFFICIENCY OR IRREGULARITY OF THE VERDICT.

When the jury returned the first time, the verdict was incomplete. Plaintiffs asked the court to direct the jury to return a verdict awarding general damages after plaintiffs had learned the jury would likely award special damages. The court instead directed the jury to the original damages instructions. It was unknown what the jury would do because their deliberations were not completed; it was also unknown whether the jury would award some amount in general damages. After the jury returned, had placed "0"s next to the lines for general damages and totaled the amounts, plaintiffs did not object to an "insufficiency" or "irregularity." They waived any right to object.

As the Court explained in Ute-Cal Land Dev. Corp. v. Sather, 605 P.2d 1240 (Utah 1980), "[i]t is the rule in Utah that a failure to object to a verdict, informal or insufficient on its face, before the jury is discharged, constitutes a waiver of that objection." The rationale for this was partly explained in Langton v. International Transport, Inc., 491 P.2d 1211, 1215 (Utah 1971):

If counsel be permitted to remain mute when a verdict is insufficient or informal, he gains an unfair strategic advantage, which the instant case clearly illustrates. The evidence of defendant's negligence was weak; the issue of whether the asserted negligence of plaintiff's injuries was weaker. The evidence of plaintiff's contributory negligence was considerable. It would be most advantageous to plaintiff to be granted a new trial, particularly if it were limited to the issue of damages. In either event, he would have an opportunity to present his case to a new jury. On the other hand, if the court had sent the jury out for further deliberation, with additional instructions setting forth clearly that the law does not permit the jury to compromise liability and that under the facts of this case the plaintiff, if entitled to special damages, must also receive compensation for his pain and suffering and lost wages, there was a real possibility that the verdict might have been in favor of the defendant. The silence of plaintiff's counsel, upon hearing the verdict, is comprehensible, he could reasonably have concluded that the jury was unsympathetic to his cause or parsimonious, and he would, of course, prefer a new jury. There must be reasonable rules to control the termination of litigation, if counsel has an opportunity to correct error at the time

of its occurrence and he fails to do so, any objection based thereupon is waived.

Id. at 1215.¹⁶

2. THERE IS NO RULE MANDATING GENERAL DAMAGES IF THE JURY AWARDS SPECIAL DAMAGES.

Plaintiffs claim Utah has a rule requiring an award of general damages if the jury awards special damages. Utah has no such rule. Such a rule makes no sense where the issue is whether plaintiffs suffered general damages, and substantial evidence shows plaintiffs were temporarily inconvenienced but suffered no permanent or long-term effects or substantial pain and suffering. Such a rule would invade the jury's fact-finding prerogative and direct a verdict on a fact-intensive inquiry.

The logical flaw is plaintiffs' assumption that if sufficient proof exists of special damages, plaintiffs necessarily suffered a compensable quantum of general damages. Case law and logic do not support such an extreme position, and

¹⁶See also Cohn v. J.C. Penney Co., 537 P.2d 306, 311-12 (Utah 1975), where the Court explained:

The verdict was deficient in form, and counsel had an opportunity to have the jury sent back for further deliberations. This he did not do, perhaps fearing that the jury might either award some nominal amount or even change the verdict and award nothing to the plaintiff. It would be a smart trial tactic if he could have had a new trial on damages only before a jury which would not be acquainted with the weakness of plaintiff's cause of action.

as discussed below, there is no Utah case creating such a rule. Courts properly hold that plaintiff must prove the amount, if any, of special and general damages to which she is entitled. If sufficient proof exists of special damages, but insufficient proof exists of general damages, a rule mandating an award of general damages would undermine both the fact finder's role and the burden of proof. Many courts have affirmed verdicts that awarded medical expenses but no general damages because the proof failed to show the existence of substantial pain and suffering.

In Hinson v. King, 603 So. 2d 1104, 1106-07 (Ala. App. 1992), the jury awarded medical expenses, but no general damages. The court explained:

[W]e must review the tendencies of the evidence most favorably to the prevailing party and indulge all inferences that the jury was free to draw. . . .

The evidence is conflicting as to whether Hinson suffered permanent injury. Although we might agree that Hinson may be in discomfort, we cannot invade the province of the jury under these circumstances. A reviewing court can substitute its judgment for that of the jury on the question of damages only if the amount is so grossly inadequate in that it failed to give substantial compensation for substantial injuries. In the absence of evidence of substantial injuries in this

case, we cannot substitute our judgment for that of the jury.

Id. at 1106-07.¹⁷

Moreover, both the instruction requested by plaintiffs and that given by the court without objection were permissive, not mandatory, conveying the proper implication that damages were within the jury's discretion. See Witt v. Martin, 672 P.2d 312, 317-18 (Okla. App. 1983) (finding that plaintiff's own instruction was couched in terms of the permissive "may" rather than a mandatory "shall," which in part was the cause of a verdict awarding specials but no general damages). In this regard, the question of damages is properly left to the jury:

Pain and suffering have no known dimensions, mathematical or financial. There is no exact relationship between money and physical or mental injury or suffering, and the various factors involved are not capable of proof in dollars and cents. For this very practical reason the only standard for evaluation is such amount as reasonable persons estimate to be fair compensation for injuries suffered, and the law has entrusted the administration of this criterion to the impartial

¹⁷See also Cunningham v. Conner, 309 A.2d 500 (D.C. App. 1973) (affirming verdict which had awarded special but no general damages because the injuries "were not of a serious nature"); Giddings v. Wyman, 177 N.E.2d 641 (Ill. 1961) ("This jury may well have believed that plaintiffs' injuries here were most minimal, to the point of being incapable of evaluation, and that plaintiffs would be fairly compensated if they only received their specials"); Annot., Validity of Verdict Awarding Medical Expenses to Personal Injury Plaintiff, but Failing to Award Damages for Pain and Suffering, 55 A.L.R. 4th 186, § 5 (1987 and Supp. 1993) (summarizing many such cases).

conscience and judgment of jurors, who may be expected to act reasonably, intelligently and in harmony with the evidence.

Domann v. Pence, 325 P.2d 321, 325 (Kan. 1958);¹⁸

There is some level of discomfort which is so mild and temporary as not reasonably to warrant compensation. Plaintiffs were content with an instruction which left that issue to the jury, and appropriately so.

Cases plaintiffs cite in support of an inflexible rule are inapposite. In Langton v. International Transport, Inc., 491 P.2d 1211 (Utah 1971), plaintiff sustained head injuries, a concussion and lacerations. He was hospitalized for two days and could not work for nearly a month. He had dizziness, loss of balance and headaches which were consistent with a brain stem injury. His doctor testified he was not medically sound to work, had a 50% chance of recovery and any recovery would take two to three years. Unlike this case, whether plaintiff in Langton had sustained general damages did not appear to be in dispute. The jury returned a verdict awarding special but no general damages.

¹⁸See also Brown v. Richards, 840 P.2d 143 (Utah Ct. App. 1992), cert. denied, 853 P.2d 897 (Utah 1993); Alger v. City of Mukilteo, 730 P.2d 1333 (Wash. 1987) (trial court should not substitute its view of appropriate damages for that of the jury and if verdict falls within range of proven damages, it should not be set aside).

When polled, two jurors indicated it was not their verdict, six indicated it was, but one of the six declared it was a compromise. No one objected and the jury was dismissed. The Court concluded that plaintiff had waived any right to object. In dicta, the Court found that "under the facts of the case," plaintiff would have been entitled to general damages upon an award of special damages, but also explained that if the jury found liability and awarded special damages, and the court had sent them back to deliberate further on general damages, "there was a real possibility that the verdict might have been in favor of the defendant." Id. at 1215.¹⁹

Ute-Cal Land Dev. Corp. v. Slather, 605 P.2d 1240 (Utah 1980), also cited by plaintiffs as authority for this fixed rule, says no such thing. Instead of personal injury, the case involved land that had been used as collateral for a loan. This case, too, focused on waiver, and not on whether plaintiff in fact was entitled to general damages. The Court quoted Langton at length because of the similarity of waivers, but nowhere did

¹⁹The issue in Langton was not whether plaintiff had suffered general damages, but whether the jury had rendered an inconsistent or incomplete verdict for some improper reason and whether plaintiff had preserved or waived the right to complain about it. Because plaintiff's liability case was so weak, the jury had compromised the verdict, and plaintiff's silence before the jury was discharged resulted in a waiver.

the Court express the general view that if there had been no waiver an award of general damages was mandatory where there was an award of special damages.

3. THE EVIDENCE SUPPORTS THE JURY'S AWARD OF NO GENERAL DAMAGES.

a. STANDARD OF REVIEW AND MARSHALING THE EVIDENCE; IN THE FACE OF APPELLANTS' FAILURE TO MARSHAL THE EVIDENCE, THE COURT SHOULD ASSUME THE CORRECTNESS OF THE VERDICT AND THE TRIAL COURT'S JUDGMENT.

Plaintiffs moved for j.n.o.v. or new trial. Here they challenge only the denial of the new trial motion. This Court reverses only when discretion is abused. Hansen v. Steward, 761 P.2d 14 (Utah 1988). This Court must consider the evidence in the light most favorable to sustaining the verdict. Id. at 17-18. The standard of review for denial of a new trial motion which amounts to an attack on the sufficiency of the evidence requires appellant to "'marshal all the evidence supporting the verdict' and then show that the evidence cannot support the verdict," before the appellate court can determine whether the trial court abused its discretion. Id. (citations omitted); Selvage v. J.J. Johnson & Assoc., 910 P.2d 1252 (Utah Ct. App. 1996); Steenblik v. Lichfield, 906 P.2d 872 (Utah 1995); Anton v. Thomas, 806 P.2d 744, 747 (Utah Ct. App. 1991).

This Court explained in Christensen v. Munns, 812 P.2d 69 (Utah Ct. App. 1991):

[A]ppellants have failed to marshal the evidence as required by our standard of review. When appellant attacks the evidence, we begin our analysis with the trial court's finding of fact, not with an appellant's view of the way the trial court should have found. Ashton v. Ashton, 733 P.2d 147, 150 (Utah 1987). . . . Due to appellant's lack of compliance with our rules on this issue, we assume the correctness of the trial court's judgment.

Id. at 72-73 (citing Rule 24(a)(5), Utah R. App. P.).²⁰

Appellants failed to marshal the evidence, instead arguing how the court should have found based on what they consider to be their better evidence. Therefore, this Court should assume the correctness of the verdict and the trial court's judgment.

b. THE EVIDENCE SUPPORTS A VERDICT OF NO GENERAL DAMAGES.

Plaintiffs cannot meet their difficult burden in challenging the sufficiency of the evidence. Evidence which strongly supports the verdict is that plaintiffs' only injury was they temporarily experienced flu-like symptoms as a result of their

²⁰See also Allred v. Brown, 893 P.2d 1087, 1090 (Utah Ct. App. 1995) ("Brown does not address the supporting evidence and merely renews his argument that the evidence weighs more in his favor"; trial court's findings upheld); Phillips v. Hatfield, 904 P.2d 1108 (Utah Ct. App. 1995) (Court declined to consider the merits of appeal and affirmed judgment of trial court where appellant failed to satisfy marshaling requirement) (and cases cited therein).

exposure which resolved shortly after they had left the environment, and plaintiffs suffered no permanent injury. This testimony came from Drs. Stewart, Bigler, McCusker, Thom and Shadoff. Damages are within the jury's sound discretion. They were properly instructed they could not award damages based on a lack of proof or speculation or conjecture. On this evidence, the jury properly could find, as it did, that plaintiffs were entitled to payment for their hospital bills but had failed to prove any quantum of compensable general damages. The trial court clearly had a reasonable basis to deny plaintiffs' motion for new trial and therefore did not abuse its discretion. See Crookston v. Fire Ins. Exchange, 860 P.2d 937, 938 (Utah 1993).

B. THE JURY'S DISTRIBUTION OF FAULT AMONG THE DEFENDANTS AND ONE PLAINTIFF WAS SUPPORTED BY THE EVIDENCE.

1. STANDARD OF REVIEW AND MARSHALING THE EVIDENCE.

See discussion concerning standard of review and marshaling the evidence, above. This Court should assume its correctness and that of the trial court's judgment.

2. THE EVIDENCE SUPPORTS THE JURY'S DISTRIBUTION OF FAULT.

There may be multiple proximate causes of an injury. Plaintiffs alleged against Robinette breach of a duty of care and

proximate causation, prayed for damages against him and submitted instructions concerning his fault and superseding cause. Proof of his fault was presented to the jury. Evidence of the inspector's fault was very similar to what plaintiffs presented as Gunther's fault, except that he had ultimate authority to approve or disapprove the installation. The inspector was responsible not to unlock the gas valve and permit the furnace's operation if the installation was unsafe. He failed to discover the inadequacy of the combustion air. He made the same assumption Gunther's installer had made concerning adequacy of combustion air for safe operation because the room had accommodated the oil burning furnace, which would have had similar or identical combustion air requirements. The jury agreed with plaintiffs' allegations, finding Robinette at fault and that his fault was one of several contributing causes.

Evidence concerning Marie Cameron's fault was two-fold. First, she failed to inform Gunther's or the inspector of any prior problems with the oil burning furnace. Second, she was warned to keep the furnace door open until Gunther's could resolve the combustion air issue, which she failed to do.

Finally, the landlords had a duty to provide safe living quarters for their tenants, which they failed to satisfy. They failed to discover or disclose to Gunther's the latent blockage of the combustion air vent. They failed to disclose to Gunther's any prior combustion air problems with the oil burning furnace. The landlord's brother, who was acting in his brother's behalf, failed to stress to Ms. Cameron the importance of keeping the furnace room door open until Gunther's could resolve the combustion air problem.

Proximate cause is a fact question for the jury. Apache Tank Lines, Inc. v. Cheney, 706 P.2d 614 (Utah 1985); Harris v. Utah Transit Authority, 671 P.2d 217 (Utah 1983). The court clearly had a reasonable basis for denying plaintiffs' new trial motion and therefore did not abuse its discretion. Crookston v. Fire Ins. Exchange, 860 P.2d 937, 938 (Utah 1993).

C. ROBINETTE WAS PROPERLY ON THE VERDICT FOR AN ASSESSMENT OF HIS FAULT

Plaintiffs' claim that Robinette was immune from suit is raised for the first time here and should not be considered. Plaintiffs objected to the court's failure to instruct that Mr. Robinette could not be liable unless there were bad faith or malice within the meaning of the Mechanical Code.

Plaintiffs sued Robinette for negligence, prayed for damages and submitted instructions concerning his fault. The jury heard proof of his fault.²¹ During the instruction phase, plaintiffs objected to the issue of his negligence going to the jury,²² but not to his inclusion on the verdict. The jury found that his conduct constituted fault and was one of several proximate causes. Plaintiffs waived a claim of immunity as to Robinette.

Another problem with plaintiff's argument is that the Nephi Mechanical Code upon which plaintiffs rely to assert Robinette's immunity, could not and did not amend Tort Reform to reintroduce joint and several liability or require Gunther's to pay more than its proportionate share. A municipality has no such power. See Algood v. Larson, 545 P.2d 530, 531 (Utah 1976); Lark v. Whitehead, 502 P.2d 557 (Utah 1972); Murray City v. Hall, 663 P.2d 1314, 1317 (Utah 1983).

²¹The Court explained in Occidental/Nebraska Federal Savings Bank v. Mehr, 791 P.2d 217, 220 (Utah Ct. App. 1990):

Generally, in the legal proceedings a party with knowledge of the facts will not be allowed to take a position, pursue that position to fruition, and later, with no substantial change in circumstances, return to attack the validity of the prior position or the outcome flowing from it.

²²During the instruction phase, plaintiffs attempted to raise affirmative defenses to their negligence claims against Robinette.

Under Utah Code Ann. § 78-27-37 et seq., Robinette was properly on the verdict for an assessment of his fault. "No defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant." Id. § 78-27-38. Indeed, "the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant." Id. § 78-27-40.

If Robinette were immune from suit, or could be held liable only under some lower standard of care, it would make no difference to the assessment of fault. Regardless of whether Robinette must pay for his fault, it still was properly assessed. See Sullivan v. Scoular Grain Co., 853 P.2d 877 (Utah 1993).

D. THE COURT PROPERLY EXCLUDED RAMONA HOPKINS' TESTIMONY.

Aside from Ms. Hopkins' study, plaintiffs' proffer established nothing that would not be repetitive of the testimony of Drs. Weaver and Nilson. Thus, the court did not abuse its discretion in excluding the evidence as cumulative.

Absent an abuse of discretion, the Court will not disturb the trial court's determination concerning whether a witness has

adequate qualifications and whether the proffered testimony exceeds the witness' qualifications. Rule 104, Utah Rules of Evidence, provides: "preliminary questions concerning . . . the admissibility of evidence shall be determined by the court." The Court explained in State v. Rimmasch, 775 P.2d 388, 396 (Utah 1989):

One danger being guarded against is the tendency of the finder of fact to abandon its responsibility to decide the critical issues and simply adopt the judgment of the expert despite an inability to accurately appraise the validity of the underlying science. . . . ²³

The trial court admitted the evidence over objection, apparently on the erroneous assumption . . . that the lack of foundation went to the weight, not to the admissibility of the evidence. As a result, a foundation demonstrating the necessary reliability is entirely lacking. We are therefore forced to conclude that the trial court erred in permitting the experts to give opinions of abuse based on their purportedly scientific appraisals of the daughter's truthfulness when she made her allegations. This testimony should have been excluded under rule 702.

Rimmasch involved the question whether the State's "expert" should be permitted to testify concerning a profile purportedly typical of abused children. In setting the standard for admission of scientific evidence, the Court explained that

²³"without more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible." Viterbo v. Dow Chemical Co., 826 F.2d 420, 424 (5th Cir. 1987).

"evidence not shown to be reliable cannot, as a matter of law, 'assist the trier of fact to understand the evidence or to determine a fact in issue' and, therefore is inadmissible." Id. at 397-98. Thus, the proponent must establish the inherent reliability of the evidence. As to this threshold, the Court stated:

[T]here is a continuing need for a threshold reliability requirement applicable to scientific evidence to ensure that trial courts do not uncritically accept as sufficiently trustworthy for submission to the trier of fact the supposedly scientific assertions of anyone who can qualify as an expert in a particular field of scientific endeavor . . .

We remain wary of the potential of such evidence to distort the fact-finding process by reason of its superficial plausibility and its potential for inducing the fact-finders to accept the experts' judgments of critical issues rather than making their own. And we are convinced that trial courts sometimes admit "scientific" evidence without scrutinizing its foundations carefully. It is for these reasons that we have imposed the threshold reliability requirement.

Id. at 397 n.6, 399. The proponent of the evidence must meet the threshold in one of two ways: (1) a request that the trial court take judicial notice of the "inherent reliability" of the foundational principles or techniques or, (2) "request that the trial court determine that these principles or techniques are

inherently reliable after an evidentiary hearing addressing the issue." Id. at 398.²⁴

The Court noted that "a very high level of reliability is required before judicial notice can be taken." Id. Judicial notice of "inherent reliability" is available only to methodology or science as to which there is general acceptance in the scientific community as a reliable means for determining the condition at issue. Id. Ms. Hopkins' purported means for determining the fact, type and degree of brain damage to a small sampling of persons who had differing and unspecified hypoxic events had never been determined reliable by the scientific community. She could point to no consensus in the scientific community which supported her methodology, conclusions or assumptions. Indeed, this was the subject of a dissertation, which by definition purported to explore new territory.

Plaintiffs could not show her principles or techniques were inherently reliable. As the Rimmasch Court explained:

In fine, the trial court should carefully explore each logical link in the chain that leads to the expert testimony given in court and determine its reliability. Only with such information can the overall decision on admissibility be made intelligently. In the absence of

²⁴Plaintiffs' proffer did neither.

such showing by the proponent of the evidence and a determination by the court as to its threshold reliability, the evidence is inadmissible.

Id. at 403.

The trial court properly found gaps and assumptions in the "logical link in the chain" that led to Ms. Hopkins' conclusions. Beyond the fact that the scientific community had not validated her conclusions, Ms. Hopkins admitted to factors in her techniques and methodology which showed that neither the science nor her conclusions were inherently reliable. She opined that (1) people with hypoxic events have smaller hippocampuses than people without such events, (2) people with hypoxic events test below people who have not had such events, and (3) those people have permanent brain damage as a result of the hypoxic events.

She gave these opinions despite the lack of logical links. Under the most rudimentary principles of logic, her testimony could not meet the threshold standard of scientific reliability:

--The "Hypoxic Subjects" had differing types and degrees of hypoxic events (cardiac or pulmonary arrest, CO), some were rendered unconscious; others were not;

--The "control subjects" were matched only by age, gender, and levels of education; they were not matched by body size, cranium size, lifestyle or any other factor;

--Ms. Hopkins assumed a causal relationship between the hypoxic event and the low Denman memory test score: one could not be in the study as an "Hypoxic Subject" unless she scored low on the test. Yet she agreed that a certain number of people within the un-brain-damaged population will score at least one standard deviation below and a certain number will score at least one standard deviation above the "norm." She had no way of knowing whether each person in her study, or any of them, would have scored at least one standard deviation below the "norm" on the Denman memory test prior to the hypoxic event;

--She agreed she had no way of knowing whether the "Hypoxic Subjects"' hippocampus size was the same pre- and post-hypoxic event;

--Ms. Hopkins agreed that the method for measuring the physical dimensions of the hippocampus was controversial, had not been accepted for clinical or diagnostic use and there was a more advanced method;

--Un-brain-damaged people in the general population have different body sizes, different cranium sizes and different hippocampus sizes;

--She agreed she could not rule out that people in the un-brain-damaged population who naturally score at least one standard deviation below the "norm" on the Denman memory test may have smaller hippocampuses than people who score within the "norm";

--She admitted she had developed many of the tests, they were not standardized or generally accepted for the specific application in the scientific community and they were not developed for "reliability";

--She assumed a causal relationship between the hypoxic event and the lower scores on the tests she had developed for the study;

--She did not know whether each person in her study, or any of them, would have scored the same prior to the hypoxic event. She did not know whether un-brain-damaged people who score at least one standard deviation below the "norm" on the Denman memory test would also score poorly on the tests she had developed. She did not know whether un-brain-damaged people who

naturally have smaller hippocampuses would naturally score poorly on the tests she developed;

--She agreed that her testing was subjective, people who took the tests on one day might achieve different results on another day, factors affecting one's test score might include something as simple as a lack of sleep, one's desire or lack of desire to do well, or emotional problems such as depression which may be unrelated to brain damage;

--She could not say whether Ms. Cameron's history of neurological, psychiatric and psychological problems skewed the results as to the "group" or as to Marie, and she agreed that people with neurological problems should not have been "subjects" because the results were unreliable;

--She refused to produce the data underlying her conclusions, with the exception of data on Tina and Marie.

--The study did not purport to state that any specific person in the "Hypoxic" group experienced permanent brain damage to the hippocampus. She compared only "group" results.

Yet, she concluded that plaintiffs were brain damaged. Plaintiffs could not meet the threshold reliability for

admissibility of Ramona Hopkins' testimony. It was junk science and properly excluded.

Courts review the adequacy of a factual basis for an expert opinion to determine its admissibility, and reject the evidence if the factual or theoretical basis is without probative force and reliability. Rules 104, 401, 403, 702 and 703, Utah R.Evid., provide the court the mandate, means and justification for such an inquiry. The quality of facts an expert relies upon and the assumptions made in arriving at an opinion are subject to judicial review.

The factual basis for Ms. Hopkins' opinions was completely lacking.²⁵ This was a classic example of presupposing a conclusion by including people in the study who satisfied the conclusion.²⁶ Ms. Hopkins assumed that because an accident had

²⁵Many courts reject expert opinion in whole or part because certain facts were assumed by the expert without sufficient foundation. See Nichols Constr. Corp. v. Cessna Aircraft Co., 808 F.2d 340 (5th Cir. 1985); Washington v. Armstrong World Industries, Inc., 839 F.2d 1121, 1123-34 (8th Cir. 1988) (citing Soden v. Freightliner Corp., 714 F.2d 498, 502 (5th Cir. 1983)); Owens v. Bourns, Inc., 766 F.2d 145 (4th Cir.), cert. denied, 474 U.S. 1038 (1985); Andrews v. Metro North Commuter Ry. Co., 882 F.2d 705, 708 (2d Cir. 1989); Hull v. Merck & Co., 758 F.2d 1474, 1477 (11th Cir. 1985); Cunningham v. Rendevious, Inc., 699 F.2d 676, 678 (4th Cir. 1983); Merit Motors v. Chrysler Corp., 569 F.2d 666, 673 (D.C. Cir. 1977).

²⁶See Olympia Equip. Leasing v. Western Union Telegraph, 797 F.2d 370, 382 (7th Cir. 1986), cert. denied, 480 U.S. 934 (1987). In Olympia, an anti-trust case, the court determined that the "the expert in this case dazzled the jury with 'an array of figures conveying a delusive impression of exactness'--delusive because the figures had no relation to reality." In essence, the "expert"

occurred in some unspecified degree, it caused brain damage. She then embarked on a series of assumptions to find a causal relationship between the unspecified "significant" hypoxic event and purported neuropsychological deficiencies exhibited by the people she hand selected; yet, people who did not exhibit those deficiencies were excluded from her study.²⁷ Her testimony could not be of the type reasonably relied upon by experts in the field. Rule 703. Her opinions lacked foundation and scientific reliability, were prejudicial, would have been of no assistance to the trier of fact and were properly excluded. Thus the court did not abuse its discretion in excluding her testimony. See Steffensen v. Smith's Management Corp., 862 P.2d 1342 (Utah 1993); Whitehead v. American Motors Sales Corp., 801 P.2d 920 (Utah 1990); Anton v. Thomas, 806 P.2d 744 (Utah Ct. App. 1991).

selectively identified factors and made improper assumptions which supported his presupposed conclusion, then incorporated them into his estimate. The court concluded that the "record contain[ed] no basis for a rational estimation of [the plaintiff's purported] damages." Id. at 383.

²⁷See, e.g., Ostler v. Albina Transfer Co., 781 P.2d 445 (Utah Ct. App. 1989) (expert testimony concerning "moth phenomenon," offered to explain why driver veered off highway and struck a parked truck, was properly excluded for lack of foundation; there was no evidence that the driver was awake prior to the night-time accident or that parked truck had lights on which would lure driver). cert. denied, 795 P.2d 1138 (Utah 1990); Calhoun v. Honda Motor Co., 738 F.2d 126 (6th Cir. 1984) (expert opined that brakes failed because they were wet but there was no evidence that they in fact were wet); Farmers Ins. Co. v. Smith, 549 P.2d 1026 (1976) (opinion that cause of fire was a condition of panel box was rejected where no factual basis existed to support it).

Indeed, the court would have abused its discretion by admitting the testimony.²⁸

Finally, based on the proffer, nothing Ms. Hopkins had to say would have affected the outcome; so even if the court had erred by excluding the testimony, it was harmless. Anton v. White, 806 P.2d 744 (Utah Ct. App. 1991) (harmless error if evidence could not have influenced a different verdict).

E. THE COURT PROPERLY LIMITED PLAINTIFFS' REBUTTAL CASE.

Gunther's adopts the argument of Lennox.

F. THE COURT PROPERLY ADMITTED QUANTITATIVE MRI DATA.

As discussed, the admission and exclusion of evidence is within the trial court's sound discretion. The court did not abuse its discretion by admitting the quantitative MRI data. Plaintiffs had been provided the MRI sheets at Dr. Bigler's deposition. Marie Cameron had a pre-exposure MRI scan in 1990, which was also in plaintiffs' possession. A comparison of the pre- and post-exposure MRI scans, showing Marie Cameron's hippocampus, was offered to support Dr. Bigler's testimony that there had been no structural change. A comparison of the

²⁸Defendants' "scathing and unrelenting effort . . . to exclude her," Appellants' Brief, 48, was not because of the scientific reliability of her testimony. It was because of the opposite.

plaintiffs' MRIs to certain norms was also included. During Dr. Bigler's deposition, he testified concerning this quantitative approach and a paper he had submitted for publication which more fully explained the analysis, a copy of which plaintiffs failed to request. Plaintiffs were provided the quantitative information before trial, and had inquired about it during Dr. Bigler's deposition. The court had set no date or order to exchange trial exhibits.

For these reasons, plaintiffs cannot claim surprise "on the ninth day of trial," or that the court abused its discretion by admitting the evidence.²⁹

G. THE COURT PROPERLY DISMISSED THE PUNITIVE DAMAGES CLAIM.

1. BURDEN OF PROOF AND STANDARD OF REVIEW.

The Court must consider the quantum and quality of proof in light of the "eventual standard of proof at trial on the merits on each element" of plaintiffs' claim--here clear and convincing evidence, Robinson v. Intermountain Health Care, Inc., 740 P.2d 262, 264 (Utah Ct. App. 1987); Utah Code Ann. § 78-18-1. Robinson cites with approval Anderson v. Liberty Lobby, Inc., 477

²⁹Anderson v. Bradley, 590 P.2d 339 (Utah 1979) (there is no surprise when ordinary prudence can guard against it).

U.S. 242 (1986). Anderson was a libel action which had a clear and convincing standard. The Court held:

Just as the "convincing clarity" requirement is relevant in ruling on a motion for directed verdict, it is relevant in ruling on a motion for summary judgment.... [A] trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under New York Times. For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence.

Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden. This conclusion is mandated by the nature of this determination.... It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standard.

Id. at 254-55.

There was "no reasonable probability" that plaintiffs could have prevailed on their punitive damage claim. See Snyder v. Merkley, 693 P.2d 64 (Utah 1984). Under the standard of proof, the law governing punitive damages and the facts, the court properly granted a directed verdict. Any factual disputes did not rise to the level of materiality under applicable rules of law. See Norton v. Blackham, 669 P.2d 857 (Utah 1983).

2. PRIMA FACIE CASE OF PUNITIVE DAMAGES.

The Utah Supreme Court stated, "punitive damages are the exception rather than the rule and should be imposed cautiously, if at all," Behrens v. Raleigh Hills Hosp., Inc., 675 P.2d 1179, 1186 (Utah 1983). Thus, the court plays a significant protective role in a case alleging punitive damages:

In cases properly involving punitive damages claims, it is within the province of the jury to determine the proper amount of punitive damages. The question of the sufficiency of evidence to justify an award of exemplary damages, however, is a question of law for the court.

Alley v. Gubser Dev. Co., 785 F.2d 849 (10th Cir.), cert. denied, 479 U.S. 961 (1986); See also Wilson v. Oldroyd, 267 P.2d 759, 764 (Utah 1954).

The "plaintiff must present sufficient evidence to establish a prima facie case against the defendant in order to have his cause submitted for consideration by the jury." Lindsay v. Gibbons and Reed, 497 P.2d 28, 30 (1972). A prima facie case requires that each element of the cause of action be based in "substantial evidence": "Absent substantial evidence of any proof . . . , 'an inference . . . amounts to nothing more than

impermissible speculation and conjecture.'"³⁰ Gregory v. Fourthwest Investments. Ltd., 754 P.2d 89, 92 (Utah Ct. App. 1988) (citation omitted).

To prevail, plaintiffs had to (1) establish liability, (2) show "that the acts or omissions of [Gunther's was] the result of willful and malicious or intentionally fraudulent conduct, or conduct which manifest[ed] a knowing and reckless indifference toward, and a disregard of, the rights of others," and (3) do so "by clear and convincing evidence."³¹ Utah Code Ann. § 78-18-1. Gunther's conduct in no wise reached this level, and the punitive damages claim was properly dismissed.

The Utah Supreme Court's most thorough analysis of the punitive damages doctrine is in Behrens v. Raleigh Hills Hosp. Inc., 675 P.2d 1179 (Utah 1983):

³⁰This Court defined "substantial evidence" as "evidence . . . which furnishes a substantial basis of fact from which the issues tendered can reasonably be resolved." Gregory v. Fourthwest Investments, Ltd., 754 P.2d 89, 92 n.2 (Utah Ct. App. 1988). The Court affirmed the trial court's directed verdict for defendant, concluding that the fact that a loss occurred is insufficient as a matter of law to support a finding of negligence and causation.

³¹In Greener v. Greener, 212 P.2d 194, 205 (Utah 1949), the Court stated:

For a matter to be clear and convincing to a particular mind it must at least have reached the point where there remains no serious or substantial doubt as to the correctness of its conclusion.

[T]he general rule is that only compensatory damages are appropriate and that punitive damages may be awarded only in exceptional cases. It is not the point to allow punitive damages to be awarded to increase the sorrow that defendants generally suffer when an injury has been inflicted by error or inadvertence, or to give a plaintiff an in terrorem weapon in settlement negotiations. Since punitive damages are not intended as additional compensation to plaintiff, they must, if awarded, serve a societal interest of punishing and deterring outrageous and malicious conduct which is not likely to be deterred by other means

Our cases have generally held that punitive damages may be awarded only on proof of "willful and malicious," conduct or on proof of conduct which manifests a knowing and reckless indifference toward, and disregard of, the rights of others

Id. at 1186. The Court continued:

Punitive damages should be awarded infrequently. Simple negligence will never suffice as a basis upon which such damages may be awarded. "Punitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence." . . . A defendant's conduct must be malicious or in reckless disregard for the rights of others, although actual intent to cause injury is not necessary. . . . That is, the defendant must either know or should know "that such conduct would, in a high degree of probability, result in substantial harm to another," . . . and the conduct must be "highly unreasonable conduct, or an extreme departure from ordinary care, in a situation where a high degree of danger is apparent." . . .

Id. at 1186-87(citations omitted).³²

³²In Atkin Wright & Miles v. Mountain States Tel. and Tel. Co., 709 P. 2d 330 (Utah 1985), the Court added the following definition of what it meant by "an

In Gleave v Denver & Rio Grande Western Rv. Co., 749 P.2d 660 (Utah Ct. App.), cert. denied, 765 P.2d 1278 (Utah 1988), this Court summarized Behren's three conjunctive elements of punitive damage claims in Utah, absent actual malice:

[T]he defendant must either know or should know "that such conduct would, [1] in a high degree of probability result in substantial harm to another," . . . and [2] the conduct must be "highly unreasonable conduct or an extreme departure from ordinary care,"³³ [3] in a situation where a high degree of danger is apparent."³⁴

extreme departure from ordinary care" means:

"Gross negligence is the failure to observe even slight care; it is carelessness or recklessness to a degree that shows utter indifference to the consequences that may result." . . . Willful misconduct goes beyond gross negligence in that a defendant must be aware that his conduct will probably result in injury.

Id. at 335-36.

³³In evaluating the type and degree of potential fault in a punitive damage claim, courts conclude that a defendant's exercise of some care to avoid injury generally vitiates, as a matter of law, a plaintiff's claim of "willfulness," "maliciousness," or "'knowing and reckless disregard for the rights of others." Oversight or failure to do what a reasonable person would do under the circumstances may constitute some degree of fault, such as negligence, but does not approach the egregious or outrageous type of conduct necessary to sustain a claim for punitive damages. Thomas v. American Cystoscope Makers, Inc., 414 F. Supp. 255 (E.D. Pa. 1976); Ballenger v. Mobil Oil Corp., 488 F.2d 707 (5th Cir.), cert. denied, 416 U.S. 986 (1974); White v. B. K. Trucking Co., 405 F. Supp. 1068 (W.D. Okla. 1975).

³⁴In Gleave, plaintiff was injured at a railroad crossing. Plaintiff sought punitive damages against the railroad for failure to make appropriate safeguards. The Gleave Court evaluated the three Behrens elements:

(1) High degree of probability. There was uncontroverted testimony that there had been no accidents at this crossing up to the time of UDOT's inspection and evaluation in 1974. After that time, Rio Grande installed stop signs as a temporary measure until

Id. at 670-71.

3. PLAINTIFFS FAILED TO STATE A PRIMA FACIE CASE OF PUNITIVE DAMAGES AGAINST GUNTHER'S.

The court's directed verdict should be examined in light of the above principles, and particularly the mandate that "punitive damages are the exception rather than the rule and should be imposed cautiously, if at all." Behrens, 675 P.2d at 1186.

a. THERE WAS NO EVIDENCE OF A HIGH DEGREE OF PROBABILITY.

At best, plaintiffs could establish only a low degree of possibility, particularly where: (1) there were no CO problems

UDOT upgraded the crossing with flashing red lights. Gleave's attorney claimed he would offer evidence at trial of "near misses" at the crossing, but none was produced. The locality was rural, and the road not heavily traveled. There is no evidence that Rio Grande knew or should have known of facts discovered by Gleave's experts after this accident. In any event, the evidence shows a low degree of probability.

(2) Highly unreasonable conduct or extreme departure from ordinary care. At worst, the evidence shows errors of judgment, i.e., ordinary negligence on the part of Rio Grande, in failing to take steps to reduce the risks at this crossing. There is no evidence of an extreme departure from ordinary care.

(3) High degree of danger apparent. A degree of danger exists at every railroad crossing. The evidence showed the degree of danger at this crossing was high. The crossing was more than ordinarily hazardous. But was the extent of that danger readily apparent prior to this accident? Perhaps reasonable minds could differ concerning this prong of the Behrens test, but the first two prongs remain unsatisfied.

Id. at 671. Two of the three conjunctive elements were missing as a matter of law. Plaintiff could not establish the requisite "willfulness," "maliciousness," or "knowing and reckless disregard for the rights of others."

with Gunther's installations or this installer that would have put Gunther's on notice; (2) this installer had 19 years on the job; (3) he was unaware of latent defects, such as the blocked vent and the hole in the return air system, and he specifically looked for and there appeared to be sufficient combustion air; other industry people agreed the assumption was rational and reasonable; (4) there were no complaints by tenants or the landlords to place Gunther's on notice that the ventilation to the prior furnace was insufficient; (5) the installer conducted a draft test and concluded there was sufficient draw; (6) the installer's work would be and was inspected by a City inspector, who made the same assessment concerning ventilation; (7) safety redundancy was built into applicable codes; (8) the Lennox blower housing door had "unusual" and significant leaks; (9) preexisting duct work had leaks; (10) the safety features of the Lennox heater--the spill switch and roll-out switch--did not shut off the furnace automatically when there was a reverse draft; (11) the blower came on before the stack was adequately heated; (12) Ms. Cameron did not keep the door opened after being instructed to do so; (13) it took a combination of the foregoing to result

in CO spillage; (14) had any of the causative factors been different, the accident would not have occurred.

For these reasons, it could not be said that there was a "high degree of probability" that Gunther's conduct would result in substantial harm.

b. THERE WAS NO EVIDENCE OF HIGHLY UNREASONABLE CONDUCT OR AN EXTREME DEPARTURE OF CARE.

Plaintiffs could not establish this element for two reasons. First, acts or omissions which could be considered "fault" rose only to the level of negligence or inadvertence. Second, precautions taken to prevent or vitiate serious injury show there was no highly unreasonable conduct or an extreme departure of care.

(1) NEGLIGENCE OR INADVERTENCE.

Without any basis in the record, plaintiffs attributed evil motives to Gunther's. Yet, each discrete act or omission could not reasonably be characterized as other than inadvertence or negligence, and combining them did not change their character.

(2) PRECAUTIONS TAKEN.

The evidence did not support a claim of total want of care. Although reasonable minds could have differed on whether

Gunther's should have done something differently, reasonable minds could not differ that the conduct of Gunther's did not rise to the level of "highly unreasonable conduct or an extreme departure of care," particularly in light of the myriad factors that combined to cause the spillage, as discussed above.

Gunther's took precautions to see that sufficient combustion air existed, and but for the combination of other factors, the accident would not have occurred.

c. NO EVIDENCE OF A HIGH DEGREE OF DANGER
PRESENT.

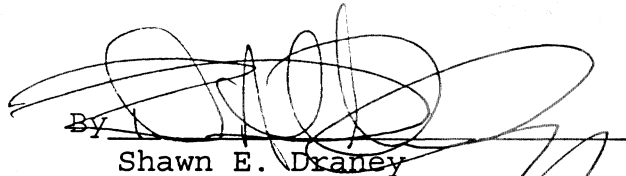
Because of the adequacy of the ventilation system for the prior application (oil furnace), testing procedures, the multiple safety redundancy built into the Lennox furnace, and the reasonable expectation that other non-parties would do their work properly (duct work, vent blockage), this was not a situation where a high degree of danger was present. Indeed, the fact of this accident was highly unusual and occurred only because of a combination of factors attributable to defendants and others.

X. CONCLUSION

The decision of the trial court should be affirmed and plaintiffs' appeal should be dismissed in all respects.

DATED this 31 day of July, 1996.

SNOW, CHRISTENSEN & MARTINEAU


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XI. ADDENDUM

Rule 51, Utah Rules of Civil Procedure.

Rule 51

UTAH RULES OF CIVIL PROCEDURE

for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) Same: Conditional rulings on grant of motion.

(1) If the motion for judgment notwithstanding the verdict, provided for in Subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for a new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the respondent on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than ten days after entry of the judgment notwithstanding the verdict.

(d) Same: Denial of motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as respondent, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the respondent is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Rule 51. Instructions to jury; objections.

At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in said requests. The court shall inform counsel of its proposed action upon the requests prior to instructing the jury; and it shall furnish counsel with a copy of its proposed instructions, unless the parties stipulate that such instructions may be given orally or otherwise waive this requirement. If the instructions are to be given in writing, all objections thereto must be made before the instructions are given to the jury; otherwise, objections may be made to the instructions after they are given to the jury, but before the jury retires to consider its verdict. No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objection. Notwithstanding the foregoing requirement, the appellate court, in its discretion and in the interests of justice, may review the giving of or failure to give an instruction. Opportunity shall be given to make objections, and they shall be made out of the hearing of the jury.

Arguments for the respective parties shall be made after the court has instructed the jury. The court shall not comment on the evidence in the case, and if the court states any of the evidence, it must instruct the jurors that they are the exclusive judges of all questions of fact.

(Amended effective Jan. 1, 1987.)

Rule 52. Findings by the court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) Waiver of findings of fact and conclusions of law. Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

- (1) by default or by failing to appear at the trial;
- (2) by consent in writing, filed in the cause;
- (3) by oral consent in open court, entered in the minutes.

(Amended effective Jan. 1, 1987.)

Rule 53. Masters.

(a) Appointment and compensation. Any or all of the issues in an action may be referred by the court to a master upon the written consent of the parties, or the court may appoint a master in an action, in accordance with the provisions of Subdivision (b) of this rule. As used in these rules the word "master" includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall, in the absence of the written consent of the parties, be made only upon a showing that some exceptional condition requires it.

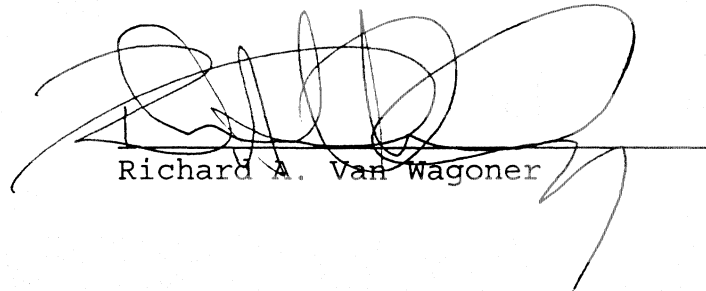
CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on the 31st day of July, 1996, I caused two (2) copies of the foregoing Brief of Appellee Gunther's, Inc. to be served by first class mail upon the following parties:

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