

1997

Viola Marie Cameron, Tina Cotton, Kenyon
Cotton v. Gunther's, Inc., Gunther's Comfort Air,
Lennox, Inc., Frank Robinette, Wayne Viehwig, Pat
Viehwig, Does 1-10 : Brief in Opposition to
Certiorari

Utah Court of Appeals

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NO. 970216

IN THE UTAH SUPREME COURT

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

Plaintiffs/Appellants,

vs.

GUNTHER'S, INC., a Utah corporation
d/b/a GUNTHER'S COMFORT AIR;
LENNOX, INC., an Iowa corporation; and
FRANK ROBINETTE,

Defendants/Appellees

WAYNE VIEHWIG; PAT VIEHWIG; and
DOES I through X,

Defendants.

Case No. 970216

**BRIEF OF LENNOX INDUSTRIES, INC., IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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FILE

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF JURISDICTION	iii
STATUTORY AND CONSTITUTIONAL PROVISIONS OF CENTRAL IMPORTANCE ..	iii
CONTROLLING LAW	iii
STATEMENT OF THE CASE	iii
ARGUMENT	1
I. INTRODUCTION	1
II. PETITIONERS PRESENT NO ISSUE APPLICABLE TO LENNOX	1
III. PLAINTIFFS FAILED TO MEET THE CONSIDERATIONS OF RULE 46 ..	3
IV. STATEMENT OF JOINDER OF ARGUMENT	4
V. CONCLUSION	5
ADDENDUM	6

TABLE OF AUTHORITIES

CASES

<u>DeBry v. Noble</u> , 889 P.2d 428 (Utah 1995)	1
<u>Hebertson v. Willow Creek Plaza</u> , 923 P.2d 1389 (Utah 1996)	1

STATUTES AND RULES

Rule 9(c)(7), Utah Rules of Appellate Procedure	4
Rule 46, Utah Rules of Appellate Procedure	3

STATEMENT OF JURISDICTION

This appellee does not contest the jurisdictional statement of the appellants and agrees that Rule 45 applies.

STATUTORY AND CONSTITUTIONAL PROVISIONS OF CENTRAL IMPORTANCE

No statutes or constitutional provisions have been identified which would control the decision of whether to grant certiorari other than the general principles for the court's consideration contained in Rule 46.

STATEMENT OF THE CASE

The plaintiffs have a statement of the case in their Petition for Writ of Certiorari that covers several pages of the Petition. Much of this material borders on argument in its characterization of evidence presented at trial. As this brief focuses on the argument that even if the plaintiffs were granted the requested relief, such relief would not be applicable to Lennox Industries, there is no cause to set forth another version of stated facts. A statement of the case is hereby omitted as allowed by Rule 24(b), Utah Rules of Appellate Procedure.

ARGUMENT

I.

INTRODUCTION

Lennox Industries, Inc. (hereinafter “Lennox”) prevailed at trial with the jury finding a no cause of action in its favor. This brief explains that Lennox ought not to be a participant in any further appeal on the grounds that the issues raised in the Petition for Writ of Certiorari are logically not connected to the result of the trial with respect to Lennox. This brief also explains that there are reasons to not grant the Petition for Writ of Certiorari that are common to all of the appellees.

II.

PETITIONERS PRESENT NO ISSUE APPLICABLE TO LENNOX

On certiorari, the role of the Utah Supreme Court is to review the decision made by the Utah Court of Appeals and not the decision of the trial court. Hebertson v. Willow Creek Plaza, 923 P.2d 1389 (Utah 1996). The scope of this review is to examine only the questions identified in the Petition. DeBry v. Noble, 889 P.2d 428 (Utah 1995). Taking these principles into account, a question raised by this Petition is whether issues have been framed which would require this appellee to respond should the writ be granted.

Examination of the Petition for Writ of Certiorari shows that it would be illogical and inappropriate for Lennox to be involved further in any appellate activity. While Lennox believes that the Petition should not be granted with respect to all defendants, Lennox should not be required to participate in a further review by this court should the court be inclined to grant the Petition with respect to some defendants.

Appellants raise three arguments in their Petition. The first argument is that the court should decide “the important issue of whether general damages in some amount must be awarded if special damages are awarded.” This issue has no application to Lennox.

Lennox prevailed at trial completely. The jury found zero fault in the resulting verdict on the part of Lennox. If one were to assume that this court granted the Petition and found in favor of the plaintiffs, it would have no bearing at all on Lennox. No special damages were awarded against Lennox, and there is no cause to discuss whether general damages should have been awarded against Lennox. Plaintiffs can obtain no relief from this court which would apply to Lennox on this damage issue.

Similarly, plaintiffs’ second issue would not be applicable to Lennox even if the court were inclined to grant the Writ and ultimately find in favor of the plaintiffs. This second issue is that the court erred in excluding a certain scientific expert, Dr. Ramona Hopkins. The Petition explains in some detail, beginning at page 13, that if Hopkins had testified, she would have explained cause and permanency of plaintiffs’ injuries. There is no suggestion that this excluded expert would have testified about furnace design and operation in support of warranty and product liability theories asserted against Lennox. Instead, it is clear from the Petition that the expert was to talk about carbon monoxide and its effect on the plaintiffs.

A witness testifying about the permanency of an injury would have no application to a no cause verdict in favor of Lennox. The witness is obviously intended to support the scope of the injury through her neurological testing results that were excluded by the court. Testimony of degree of injury would not change the finding of zero percent fault.

The third issue raised by the plaintiffs in their Petition is that the court erred in improperly limiting the plaintiffs' rebuttal case. The error is alleged to be the failure of the court to allow Kerri Seaver, a secretary to one of the plaintiffs, to testify. Plaintiffs explain on page 17 of their Petition that "Ms. Seaver was prepared to testify concerning the dramatic change that occurred in Marie Cameron . . . after the carbon monoxide poisoning . . ." Once again, it is apparent as a matter of simple logic that a resolution of this issue in favor of Ms. Cameron would do nothing to change the finding of no fault on the part of Lennox. Taking plaintiffs at their word, this alleged additional information would only bear on the degree and scope of the injury received, not on the proximate cause issue upon which Lennox prevailed.

In summary, the three issues presented for review by the court would not apply conceptually to the no cause verdict in favor of Lennox. Lennox should not be required to file an additional brief or prepare and present oral argument on issues that would not affect the verdict against it.

III.

PLAINTIFFS FAILED TO MEET THE CONSIDERATIONS OF RULE 46

Rule 46, Utah Rules of Appellate Procedure, provides that certiorari is granted as a matter of judicial discretion "for special and important reasons." Utah has no meaningful case law to determine what constitutes a special and important reason. Certainly, the court ought to take into account whether the plaintiffs themselves really consider the issues presented to be special and important.

This appeal was originally filed in the Utah Supreme Court and was "poured over" to the Utah Court of Appeals. Referral to the Court of Appeals was certainly consistent with the

position taken by the plaintiffs in their Docketing Statement Plaintiffs' Docketing Statement has been reproduced in the Addendum without all of the exhibits that were originally attached On page 8 of the Docketing Statement, plaintiffs write the following

7 The issues presented by this appeal are appropriate for decision by either the Utah Supreme Court or the Court of Appeals

This statement was, of course, fulfilling the plaintiffs' responsibility under Rule 9(c)(7) This rule requires that the Docketing Statement in a case subject to assignment to the Court of Appeals contain reasons why the Supreme Court should decide the case The rule itself lays out as example whether the case presents substantial issues that ought to be resolved by the state's highest court Plaintiffs' Docketing Statement makes clear that when the appeal was originally filed, they did not consider the issues to be of such importance that the Utah Supreme Court could only decide them What has happened is that they have lost in the Court of Appeals and suddenly remembered how important the issues are for Supreme Court resolution This court ought to accept the representation of the plaintiffs in their Docketing Statement that these issues could be adequately decided in the Utah Court of Appeals

IV.

STATEMENT OF JOINDER OF ARGUMENT

A separate brief in opposition to the Petition for Writ of Certiorari is being filed by co-defendant and appellee, Gunther's, Inc In the interest of keeping the briefing in this action simple, notice is hereby given that Lennox joins in those arguments raised by Gunther's in their brief which explain why a Writ of Certiorari should not be granted

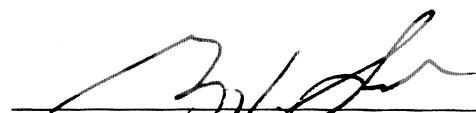
CONCLUSION

Petitioners failed to show substantial reasons that the writ should be granted with respect to Lennox. Even should the writ be granted and the issues resolved in favor of the plaintiffs, Lennox would still be out of the lawsuit on remand. The issues raised address damage questions, and Lennox prevailed at trial. Any reconsideration because of damages would not logically apply to Lennox.

Additionally, petitioners failed to show that there are some important issues which justify review in addition to that of the Utah Court of Appeals. They had no concern about which court decided the case when they submitted their Docketing Statement. The Court of Appeals showed that the issues presented are not substantial when it made its decision without oral argument and in an unpublished opinion. The granting of a writ of certiorari at this point would only prolong expense to Lennox that has now completely prevailed on two levels. That a jury found some liability and damages with respect to co-defendants yet found no fault on the part of Lennox, combined with an unpublished Court of Appeals opinion, is a signal to plaintiffs that they have nothing meaningful to present against Lennox in fact or in law. This court is respectfully requested to deny the Petition for Writ of Certiorari with respect to Lennox and allow the judgment in its favor to finally be final.

DATED this 22nd day of May, 1997.

KIPP AND CHRISTIAN, P.C.



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ADDENDUM

Docketing Statement	A-1
Rule 9(c)(7)	A-10
Rule 46	A-12

DOCKETING STATEMENT

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IN THE UTAH SUPREME COURT

VIOLA MARIE CAMERON, and)	
TINA COTTON, individually,)	DOCKETING STATEMENT
and as the Guardian for)	(SUBJECT TO ASSIGNMENT
KENYON COTTON, a minor,)	TO THE COURT OF APPEALS)
)	
Plaintiffs/Appellants,)	
)	
-vs-)	
)	
GUNTHER'S, INC., a Utah)	
corporation d/b/a Gunther's)	
Comfort Air, FRANK ROBINETTE,)	
LENNOX, INC., an Iowa)	
corporation, WAYNE)	
VIEHWIG, PAT VIEHWIG,)	
and DOES I through X,)	Case No.
)	Trial Court No. 920400345
Defendants/Appellees)	
)	

Plaintiffs/Appellants Viola Marie Cameron and Tina Cotton, individually and as the Guardian for Kenyon Cotton, a minor (hereinafter "Appellants") hereby file their Docketing Statement in the above-captioned appeal, pursuant to Rule 9, Utah Rules of Appellate Procedure.¹

¹ Pursuant to Rule 9(d), Utah Rules of Appellate Procedure, Appellants have appended to this Docketing Statement as Exhibits "A" through "D", respectively, a copy of the final Judgment entered on April 4, 1995; Plaintiffs' Motion for New Trial, JNOV or Additur; a copy of the Order Denying Plaintiffs' Motion for New Trial; and a copy of Appellants' Notice of Appeal.

DOCKETING STATEMENT

1. This is an appeal from a final Judgment and an Order denying Plaintiffs' Motions for New Trial Judgment Notwithstanding the Verdict and Additur, entered by the Honorable Ray M. Harding, Fourth Judicial District Court, on April 4, 1995 and September 21, 1995 respectively. There have not been any motions filed pursuant to Rules 50(a), 52(b) or 54(b) of the Utah Rules of Civil Procedure and Appellants' motions filed pursuant to Rules 50(b) and 59 of the Utah Rules of Civil Procedure were denied as of the date of the trial court's September 21, 1995 Order. Appellants filed their Notice of Appeal on October 3, 1995.

2. Pursuant to Rule 3(a) of the Utah Rules of Appellate Procedure, this is an appeal as of right from a final judgment of the District Court.

3. This appeal is from a final Judgment and an Order denying Appellants' Motion for New Trial, both of which issued from the Fourth Judicial District Court.

4. Statement of Facts:

Marie Cameron is the mother of Tina Cotton, and the grandmother of Tina Cotton's teenage son, Kenyon Cotton. In 1991, they were living as a family in Nephi, Utah in a home they rented from their landlords, Defendants Viehwig. Just before the winter of 1991-1992, the Viehwigs hired Gunther's

Comfort Air ("Gunther's") to install a new Lennox gas furnace in Appellants' rented home.

Gunther's completed the furnace installation on November 1, 1991. The next day the landlord's brother, Ross Viehwig, visited the home to take a picture of the newly installed furnace so that he could confirm that Gunther's was entitled to be paid. Unbeknownst to Marie Cameron, her family and the Viehwigs, however, Gunther's had installed the Lennox furnace without making the necessary provisions for combustion air, which caused spillage of carbon monoxide and other combustion by-products. In connection with that spillage, certain defective safety devices on the Lennox furnace failed to shut the furnace off and, in concert with a defective blower compartment seal, permitted the furnace to continue pumping potentially lethal amounts of carbon monoxide into the living space of the home.

Due to Gunther's installation and the flaws in Lennox's furnace, Marie Cameron, Tina Cotton and Kenyon Cotton were exposed to potentially lethal amounts of carbon monoxide for three days and nights, as a result of which they were stricken extremely ill and reported to the Nephi Medical Center emergency room with dangerous and toxic levels of carbon monoxide in their blood. In the months and years following their carbon monoxide poisoning, Appellants suffered and continue to suffer numerous well-known and severe sequelae of carbon monoxide, including memory loss, disturbance of

intellectual functions, damage to their physical health and substantial emotional problems.

After a three week trial, the jury properly found, based on the evidence before it, that negligence proximately caused Appellants' home to be filled with carbon monoxide which, in turn, injured and damaged them. However, the jury's verdict, although it awarded each Appellant special damages, failed to award any general damages.

The district court denied Appellants' motion to supplementally instruct the jury that its award of special damages mandated some award of general damages. Additionally, the testimony was clear and undisputed, from Gunther's own employees who were involved with the installation, that Gunther's bore the sole responsibility for properly and safely installing the furnace. Notwithstanding said testimony, the jury apportioned only thirty five percent of the fault to Gunther's, apportioning the remaining fault to Nephi City Inspector Frank Robinette (35%), Marie Cameron (20%), and landlords Viehwig (10%).² Lennox was not apportioned any fault.

Following the trial Appellants made motions for a new trial, judgment notwithstanding the verdict and additur, all of which were denied. It is from the corresponding judgment and order that Appellants appeal.

² The Viehwigs settled with Plaintiffs before trial.

5. Issues Presented by the Appeal:

(i) Did the District Court err in not granting Appellants a new trial, judgment notwithstanding the verdict or additur?

Under the applicable standard of review, reversal is appropriate if, viewing the evidence in the light most favorable to the prevailing party, the evidence is insufficient to support the verdict. Crookston v. Fire Ins. Exchange, 817 P.2d 789 (Utah 1991); Hansen v. Stewart, 761 P.2d 14 (Utah 1988).

(ii) Did the District Court err in not instructing the jury that if it awarded Appellants special damages, it was also required to award some amount of general damages?

The District Court's refusal to give a requested jury instruction presents a question of law, which the Appellate Court reviews non-deferentially for correctness. Erickson v. Sorensen, 877 P.2d 144 (Utah App. 1994).

(iii) Was the jury's failure to award general damages clearly against the weight of the evidence adduced at trial?

Under the applicable standard of review, reversal is appropriate if, viewing the evidence in the light most favorable to the prevailing party, the evidence is insufficient to support the verdict. Crookston v. Fire Ins. Exchange, 817 P.2d 789 (Utah 1991); Hansen v. Stewart, 761 P.2d 14 (Utah 1988).

(iv) Was the jury's apportionment of fault unsupported by sufficient evidence and clearly against the weight of the evidence adduced at trial?

Under the applicable standard of review, reversal is appropriate if, viewing the evidence in the light most favorable to the prevailing party, the evidence is insufficient to support the verdict. Crookston v. Fire

Ins. Exchange, 817 P.2d 789 (Utah 1991);
Hansen v. Stewart, 761 P.2d 14 (Utah 1988).

(v) Did the District Court err in excluding the testimony of Appellants' expert Ramona Hopkins regarding Appellants' injuries and the causation thereof by carbon monoxide poisoning?

The Appellate Court reviews the District Court's decision to exclude expert testimony under the abuse of discretion standard. Steffensen v. Smith's Management Corp., 862 P.2d 1342 (Utah 1993).

(vi) Did the District Court err by not excluding Nephi City Inspector Frank Robinette from the verdict form because he had no liability as a matter of law or, alternatively, by refusing to give Appellants' requested instruction on the applicable standard of care based on the 1991 Uniform Mechanical Code and its codification under U.C.A. § 58-56-49(1)(d)?

The District Court's refusal to give a requested jury instruction presents a question of law, which the Appellate Court reviews non-deferentially for correctness. Erickson v. Sorensen, 877 P.2d 144 (Utah App. 1994);

(vii) Did the Trial Court err in allowing Defendants' expert, Erin Bigler, to testify regarding quantitative brain measurement data notwithstanding the fact that Defendants failed to produce that data in discovery, thereby unfairly surprising Appellants at trial?

Challenges to the District Court's evidentiary rulings are reviewed under the clear error standard. Steffensen v. Smith's Management Corp., 820 P.2d 482 (Utah App. 1991).

(viii) Did the District Court err by denying Plaintiffs' Motions to Compel respecting written discovery to Lennox regarding the subject furnace and by not excluding the testimony of a key Lennox witness who wilfully avoided his long-scheduled deposition?

Challenges to the District Court's evidentiary rulings are reviewed under the clear error standard. Steffensen v. Smith's Management Corp., 820 P.2d 482 (Utah App. 1991).

(ix) Did the District Court err by not giving Appellants' requested instruction on gross negligence and by not permitting Appellants' punitive damage claim against Gunther's to go to the jury?

The District Court's refusal to give a requested jury instruction presents a question of law, which the Appellate Court reviews non-deferentially for correctness. Erickson v. Sorensen, 877 P.2d 144 (Utah App. 1994);

(x) Did the District Court err by improperly restricting Appellants from putting on expert and percipient rebuttal testimony and from rebutting Defendants' surrebuttal testimony?

Challenges to the District Court's evidentiary rulings are reviewed under the clear error standard. Steffensen v. Smith's Management Corp., 820 P.2d 482 (Utah App. 1991).

6. This appeal is subject to assignment to the Court of Appeals.

7. The issues presented by this appeal are appropriate for decision by either the Utah Supreme Court or the Utah Court of Appeals.

8. Appellants contend the following statutory and case law is central to determination of certain of the foregoing issues:

(a) Case Law.

Langton v. International Transport, Inc. 491 P.2d 1211 (Utah 1971).

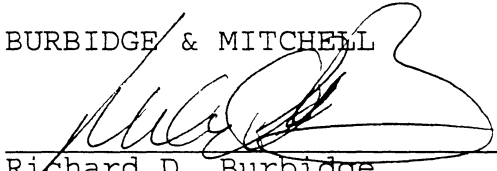
(b) Statutes.

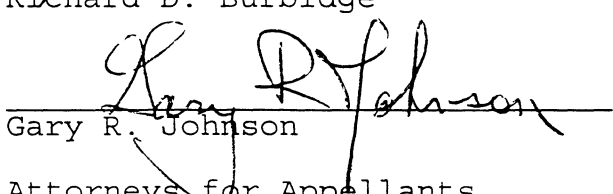
1991 Uniform Mechanical Code and Utah Code Annotated § 58-56-4(1)(d).

9. There are no previous appeals related to this appeal.

Respectfully submitted this 12th day of November, 1995.

BURBIDGE & MITCHELL


Richard D. Burbidge


Gary R. Johnson

Attorneys for Appellants

gm cameron\appeal\doCKET

RULE 9(c)(7)

- (i) a statement of what claims and parties remain before the trial court for adjudication and
 - (ii) a statement of whether the facts underlying the appeal are sufficiently similar to the facts underlying the claims remaining before the trial court to constitute res judicata on those claims.
- (C) If the case contains a claim for damages, the amount of the claim, exclusive of court costs, interests, and attorney fees.
- (3) A concise statement of the nature of the proceeding, e.g., "this appeal is from a final judgment or decree of the _____ court" or "this petition is to review an order of _____ administrative agency."
- (4) A concise statement of facts material to a consideration of the questions presented.
- (5) The issues presented by the appeal, expressed in the terms and circumstances of the case, but without unnecessary detail. The questions should not be repetitious. General conclusions such as "the judgment of the trial court is not supported by the law or facts," are not acceptable. For each issue appellant must state the applicable standard of appellate review and cite supporting authority.
- (6) If the appeal is subject to assignment by the Supreme Court to the Court of Appeals, the phrase "Subject to assignment to the Court of Appeals" should appear immediately under the title of the document, i.e., "Docketing Statement."
- (7) If the appeal is subject to assignment by the Supreme Court to the Court of Appeals, the appellant may set forth concisely in not more than two pages why the Supreme Court should decide the case. The Supreme Court may, for example, consider whether the case presents or involves one or more of the following:
- (A) a substantial constitutional issue not yet decided and, if so, what the issue or issues are;
 - (B) an issue of first impression in the state and of substantial importance in the administration of justice;
 - (C) a conflict in Court of Appeals decisions that needs to be resolved by the Supreme Court;
 - (D) any other persuasive reason why the Supreme Court should resolve the issue.
- (8) Citations to statutes, rules, or cases believed to be determinative of the respective issues stated.

RULE 46

Rule 46. Considerations governing review of certiorari.

(a) Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for special and important reasons. The following, while neither controlling nor wholly measuring the Supreme Court's discretion, indicate the character of reasons that will be considered:

(1) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law;

(2) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of the Supreme Court;

(3) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision; or

(4) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by the Supreme Court.

(b) After a petition for certiorari has been filed, the panel that issued the opinion of the Court of Appeals may issue a minute entry recommending that the Supreme Court grant the petition. Parties shall not request such a recommendation by motion or otherwise.

(Amended effective October 1, 1992; July 1, 1994.)

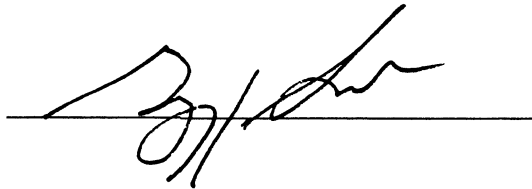
CERTIFICATE OF MAILING

I hereby certify that on the 23rd day of May, 1997, I caused that two true and correct copies of the foregoing Brief of Lennox Industries, Inc., in Opposition to Petition for Writ of Certiorari be mailed, postage prepaid, to the following:

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A handwritten signature in black ink, appearing to read "Frank Robinette", is written over a horizontal line.