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

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiffs/Appellants,

Case No. 970216

vs.

(CA No.: 960328-CA)

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,

(Dist. Court No.: 920400345)

Defendants/Appellees.

**BRIEF OF APPELLEE GUNTHER'S, INC., IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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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.

II. TABLE OF CONTENTS

	<u>Page</u>
I. LIST OF PARTIES	i
II. TABLE OF CONTENTS	ii
III. TABLE OF AUTHORITIES	iv
IV. JURISDICTION	1
V. ISSUES	1
VI. DETERMINATIVE CONSTITUTIONAL OR STATUTORY PROVISIONS	1
VII. STATEMENT OF THE CASE	1
A. <u>NATURE OF THE CASE AND COURSE OF PROCEEDINGS</u>	1
B. <u>STATEMENT OF PERTINENT FACTS</u>	2
1. FACTS CONCERNING GENERAL DAMAGES	2
2. FACTS RELATING TO THE EXCLUSION OF RAMONA HOPKINS' TESTIMONY	6
3. FACTS RELATING TO EXCLUSION OF REBUTTAL EVIDENCE	11
VIII. ARGUMENT	11
A. <u>THERE IS NO IMPORTANT OR SPECIAL REASON TO GRANT THE PETITION FOR WRIT OF CERTIORARI</u>	11
B. <u>THE COURT OF APPEALS CORRECTLY DETERMINED THERE IS NO RULE MANDATING AN AWARD OF GENERAL DAMAGES IF THE JURY AWARDS SPECIAL DAMAGES</u>	12

C.	<u>THE COURT OF APPEALS CORRECTLY FOUND THE TRIAL COURT WAS WITHIN ITS DISCRETION TO EXCLUDE RAMONA HOPKINS' TESTIMONY</u>	15
D.	<u>THE COURT OF APPEALS CORRECTLY FOUND THE TRIAL COURT WAS WITHIN ITS DISCRETION TO LIMIT REBUTTAL EVIDENCE</u>	20

III. TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<u>Anton v. Thomas</u> , 806 P.2d 744 (Utah Ct. App. 1991)	19
<u>Cunningham v. Conner</u> , 309 A.2d 500 (D.C. App. 1973)	13
<u>Domann v. Pence</u> , 325 P.2d 321 (Kan. 1958)	13
<u>Giddings v. Wyman</u> , 177 N.E.2d 641 (Ill. 1961)	13
<u>Hinson v. King</u> , 603 So.2d 1104 (Ala. App. 1992)	12, 13
<u>Langton v. International Transport, Inc.</u> , 491 P.2d 1211 (Utah 1971)	13, 14
<u>Randle v. Allen</u> , 862 P.2d 1329 (Utah 1993)	20
<u>State v. Rimmasch</u> , 775 P.2d 388 (Utah 1989)	15, 16
<u>Steffensen v. Smith’s Management Corp.</u> , 862 P.2d 1342 (Utah 1993)	19
<u>Ute-Cal Land Dev. Corp. v. Slather</u> , 605 P.2d 1240 (Utah 1980)	14
<u>Viterbo v. Dow Chemical Co.</u> , 826 F.2d 420 (5th Cir. 1987)	15
<u>Whitehead v. American Motors Sales Corp.</u> , 801 P.2d 920 (Utah 1990)	19
<u>Witt v. Martin</u> , 672 P.2d 312 (Okla. App. 1983)	13
<u>Statutes</u>	
Utah Code Ann. § 78-2-2(5)	1

Rules and Regulations

Rule 103, Utah Rules of Evidence	20
Rule 403, Utah Rules of Evidence	20
Rule 45, Utah Rules of Appellate Procedure	1, 11

Other

<u>Validity of Verdict Awarding Medical Expenses to Personal Injury Plaintiff,</u> <u>but Failing to Award Damages for Pain and Suffering, 55 A.L.R. 4th 186, § 5</u> <u>(1987 and Supp. 1993)</u>	13
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IV. JURISDICTION

This Court has jurisdiction under Rule 45, Utah Rules of Appellate Procedure, and Utah Code Ann. § 78-2-2(5).

V. ISSUES

Should this Court grant plaintiffs/appellants' Petition for Writ of Certiorari on any of the following issues that were decided against them by the Utah Court of Appeals:

- A. Must the jury award general damages if it awards special damages?
- B. Was the trial court within its discretion to exclude Ramona Hopkins' testimony?
- C. Was the trial court within its discretion to limit plaintiffs' rebuttal case?

VI. DETERMINATIVE CONSTITUTIONAL OR STATUTORY PROVISIONS

None.

VII. STATEMENT OF THE CASE

A. NATURE OF THE CASE AND COURSE OF PROCEEDINGS.

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 trial 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 trial court denied plaintiffs' post-trial motions and entered Judgment on the verdict.

Plaintiffs raised nine issues on appeal. The Utah Court of Appeals, in an unpublished three and one-half page opinion, affirmed the Judgment. Plaintiffs raise three of those issues in its Petition for Writ of Certiorari.

B. STATEMENT OF PERTINENT FACTS.

1. FACTS CONCERNING 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. 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 was not overwhelming, and the jury agreed plaintiffs had not incurred substantial pain and suffering.

Dr. Richard D. Stewart, gave the following opinions:

--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, 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. No evidence existed that she had 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, or 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 gave the following opinions:

--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.

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

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

Dr. Kevin Tracy McCusker, 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, gave the following opinions:

--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 gave the following opinions:

--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 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 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. She had never 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 conducted in her Ph.D thesis, entitled “Memory for Novel and Familiar Spatial, Linguistic, and Geographical Temporal Distance Information in Hypoxic Subjects.” 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.¹ 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);

--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

¹This 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.

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.²

--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. 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”

²Ms. 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.

as a group (six).³ She concluded that the hypoxic event had caused a reduction in the hippocampus size.⁴ H. 122-29, and Exhibits 2-4 thereto.

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.⁵ H. at 69-89. Ms. Hopkins also agreed that the testing she conducted was subjective.⁶ 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.

³Although she was not trained or licensed as a radiologist, she purported to read the MRI scans and to measure the hippocampuses.

⁴She 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.

⁵She 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.

⁶People 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 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, 130-133.⁷ Without the underlying data, Gunther’s could not validate Ms. Hopkins’ guesswork or conclusions.

⁷The 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.

3. FACTS RELATING TO EXCLUSION OF REBUTTAL EVIDENCE.

Plaintiffs sought to call Kerri Seaver, plaintiff Marie Cameron's personal secretary. Her testimony would have related to Marie's conduct prior to and after her exposure to carbon monoxide. Ms. Seaver was called to refute the testimony of Erin Bigler, Ph.D. (Trial Transcript Vol. XIII, pp. 27-28.) Dr. Bigler had testified about the effects of white matter disease on the brain. The court ruled that Ms. Seaver's testimony was not appropriate rebuttal testimony because it was not sought to refute, modify, explain, minimize or nullify the effect of Dr. Bigler's scientific testimony and Ms. Seaver should have been called as a witness in the plaintiffs' case in chief. (Trial Transcript Vol. XIII, pp. 30-31.)

VIII. ARGUMENT

A. THERE IS NO IMPORTANT OR SPECIAL REASON TO GRANT THE PETITION FOR WRIT OF CERTIORARI.

The Court of Appeals' decision falls within none of the "special and important" reasons identified in Rule 45, Utah Rules of Appellate Procedure, in particular because the Court of Appeals was correct in its ruling. There is no conflicting ruling from another panel of the Court of Appeals, the ruling is not in conflict with a decision of this Court, the Court of Appeals rendered a reasoned decision that does not depart from the usual course of judicial proceedings or invoke this Court's supervisory powers, and because of the ruling's correctness, there is no reason for this Court to settle the questions of law.

B. THE COURT OF APPEALS CORRECTLY DETERMINED THERE IS NO RULE MANDATING AN AWARD OF GENERAL DAMAGES IF THE JURY AWARDS SPECIAL DAMAGES.

Plaintiffs incorrectly claim Utah has a rule requiring an award of general damages if the jury awards special damages. 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.

The logical flaw is plaintiffs' assumption that if sufficient proof exists of special damages, plaintiffs necessarily suffered a compensable quantum of general damages. 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 1106-07.⁸

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 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).

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

⁸See 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).

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. 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 1215.⁹

Ute-Cal Land Dev. Corp. v. Slather, 605 P.2d 1240 (Utah 1980), also says no such thing. That case involved land that had been used as collateral for a loan, and it, 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 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.

⁹The 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.

C. THE COURT OF APPEALS CORRECTLY FOUND THE TRIAL COURT WAS WITHIN ITS DISCRETION TO EXCLUDE RAMONA HOPKINS' TESTIMONY.

Aside from Ms. Hopkins' study, plaintiffs' proffer established nothing that would not have been 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." This 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. . . .¹⁰

In setting the standard for admission of scientific evidence, this Court explained that "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 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.

¹⁰"[W]ithout 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).

This 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.¹¹ 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

¹¹As 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 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.

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.

Plaintiffs could not meet the threshold reliability for admissibility of Ramona Hopkins' testimony. It was junk science and properly excluded.

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

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).

D. THE COURT OF APPEALS CORRECTLY FOUND THE TRIAL COURT WAS WITHIN ITS DISCRETION TO LIMIT REBUTTAL EVIDENCE.

Rebuttal evidence is evidence which tends to refute, modify, explain or otherwise minimize and nullify the effect of the opponent's evidence. Randle v. Allen, 862 P.2d 1329, 1338 (Utah 1993). A trial court has discretion to limit rebuttal evidence if it is duplicative or if it does not refute or explain an opponent's testimony. Further, Rule 403 of the Utah Rules of Evidence allows a trial court to limit duplicative or cumulative testimony and, absent a showing that the excluded testimony affected a substantial right of the party attempting to introduce the evidence, no error will be found. (See generally Rule 103, Utah Rules of Evidence.)

The trial court has discretion to limit repetitive and cumulative testimony on rebuttal if it is not being presented to refute, nullify, minimize or explain an opponent's testimony. The court's decision will not be disturbed absent the finding of an abuse of discretion, nor without showing that a substantial right of plaintiff was affected by limiting the testimony. The trial court acted appropriately here. Kerri Seaver was not an appropriate rebuttal witness, and no substantial rights of the plaintiff were affected by the court's ruling.

DATED this 6 day of June, 1997.

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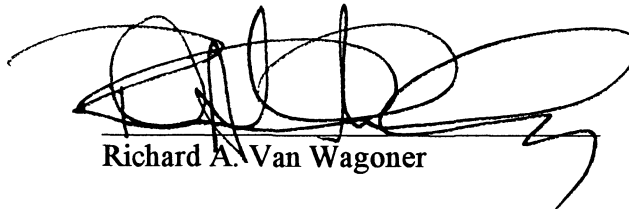
CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on the 10th day of June, 1997, I caused two (2) copies of the foregoing Brief of Appellee Gunther's, Inc., in Opposition to Petition for Writ of Certiorari to be served by first class mail upon the following parties:

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