

2002

William G. Ercanbrack v. Oakwood Mobile Homes, Inc., Homes by Oakwood, Inc. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

WILLIAM G. ERCANBRACK,

Plaintiff,

v.

OAKWOOD MOBILE HOMES, INC. (a
North Carolina corporation) and HOMES
BY OAKWOOD, INC. (a North Carolina
corporation),

Defendants.

Appeal No: 20020690-SC

BRIEF OF APPELLANT

**Appeal from a Jury Verdict and Judgment in the Third Judicial District Court
of Summit County, State of Utah
The Honorable Robert Hilder, District Court Judge**

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ED
SUPREME COURT

DEC - 3 2003

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LIST OF PARTIES

The parties to this proceeding are: plaintiff: William G. Ercanbrack; and defendants: Oakwood Mobile Homes, Inc.; Homes by Oakwood, Inc.; SS Supply Inc.; Summit Propane (collectively referred to as “SS Supply”); Union Pacific Resources Co.; Eaton Metal Products, Inc.; Flare Construction, Inc.; and Natural Gas Odorizing.

The only parties to this appeal are plaintiff, William G. Ercanbrack and defendants Oakwood Mobile Homes, Inc. and Homes by Oakwood, Inc. (collectively referred to as Oakwood). The other defendants settled with plaintiff prior to trial and are not parties to the appeal.

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JURISDICTIONAL STATEMENT

The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j).

ISSUES

I. Did the trial court err in allowing plaintiff's expert to testify at trial when his scientific testimony was not reliable or supported by facts in the record?

(Preserved at 3771-72; 3787-3861; 5499-5512; 6695; 6698; 7007:234, 236; 7008:168)

Standard of Review: A trial court's determination as to an expert's qualifications and opinions is reviewed for abuse of discretion. See Patey v. Lainhart, 1999 UT 31, ¶15, 977 P.2d 1193.

II. Should all expert testimony be subject to some minimum threshold standard in order to be admissible at trial? (Preserved at 3771-72; 3787-3861; 5499-5512; 6695; 6698; 7007:234, 236; 7008:168)

Standard of Review: Whether a trial court correctly selected the applicable law and interpreted a prior judicial opinion is a question of law, reviewed for correctness. See Jensen v. IHC Hospitals, Inc., 2003 UT 51 ¶56, __ P.3d __; 4447 Assocs. v. First Sec. Fin., 973 P.2d 992, 995 (Utah Ct. App. 1999).

III. Did the trial court err in denying Oakwood's Motion for a Directed Verdict and J.N.O.V. on the issue of causation? (Preserved at 6807-59; 6925-43; 6964-65; 7008:168; 7011:5-17)

Standard of Review: On appeal from a denial of a directed verdict, this court views the evidence in the light most favorable to the party moved against, and will sustain the denial if reasonable minds could disagree with the ground asserted for directing a verdict. See Mahmood v. Ross, 1999 UT 104, ¶16, 990 P.2d 933; Walker v. Parish Chemical Co., 914 P.2d 1157, 1159 (Utah Ct. App. 1996) (J.N.O.V.).

IV. Did the trial court err in allowing evidence contrary to plaintiff's admissions to be introduced at trial after Oakwood had relied on the admissions in its opening statement to the jury? (Preserved at 5887-88; 6694:24-30; 7000:60-61)

Standard of Review: A trial court's decision under Rule 36(b) is reviewed under a "conditional" discretionary standard. See Langeland v. Monarch Motors, Inc., 952 P.2d 1058, 1060-61 (Utah 1998).

V. Did the trial court err in not granting Oakwood a new trial as a result of plaintiff's improper and inflammatory remarks during closing arguments? (Preserved at 7012:19-22, 70, and also reviewed for plain error. See State v. Medina Juarez, 2001 UT 79, ¶18, 34 P.3d 187).

Standard of Review: Improper remarks during opening and closing statements constitutes an irregularity in proceedings, entitling a party to a new trial, which is viewed with discretion to the trial court. See Child v. Gonda, 972 P.2d 425, 429 (Utah 1999). "A district court has broad discretion in deciding whether to grant or deny a motion for a new trial." Green v. Louder, 2001 UT 62, ¶¶13, 35, 29 P.3d 638.

VI. Did the trial court err in not instructing the jury that SS Supply was a proximate cause of the injuries and in not informing the jury of the amount of SS Supply's settlement with plaintiff? (Preserved at **5159; 5164-69; 6994:24-30, 49-52**)

Standard of Review: A trial court's jury instructions are reviewed for correctness. See Green v. Louder, 2001 UT 62, ¶14, 29 P.3d 638.

VII. Were the six errors discussed above coupled with additional errors sufficient to constitute cumulative error and deny Oakwood Due Process?

Standard of Review: "Under the cumulative error doctrine, we will reverse only if 'the cumulative effect of the several errors undermines our confidence . . . that a fair trial was had.'" State v. Dunn, 850 P.2d 1201, 1229 (Utah 1993).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

Rule 403 of the Utah Rules of Evidence

Rule 702 of the Utah Rules of Evidence

Rule 703 of the Utah Rules of Evidence

Rule 36 of the Utah Rules of Civil Procedure

Rule 56 of the Utah Rules of Civil Procedure

Rule 4-501 of the Utah Rules of Judicial Administration

Rule 3.4 of the Utah Rules of Professional Conduct

United States Constitution XIV Amend. § 1

Utah Const. Art. 1, § 7

Utah Code Ann. § 78-15-6(3)

(Each of these provisions is set forth verbatim in the addendum.)

STATEMENT OF THE CASE

This wrongful death case arises out of an explosion at the Ercanbrack's manufactured home. As is typical in a massive explosion, the remaining evidence was scattered across the Ercanbrack's property. The fundamental problem facing all involved was determining what could have caused the massive explosion. Despite the lack of any physical evidence pointing to a specific cause, the trial court allowed plaintiff to present to the jury plaintiff's experts' conjured up a version of events, without regard to the facts in evidence. Plaintiff's theory was linked to a manufacturing standard for gas pipes. The only expert witness on the issue of standards for the mobile home industry, however, testified that standard was not enforced. Nevertheless, plaintiff argued to the jury it was the federal agency's lack of enforcement which caused shoddy manufacturing practices in the industry. This poor quality, plaintiff argued, is what ultimately caused the explosion. Notwithstanding the fact that punitive damages were not requested, plaintiff asked the jury to "send a message" to the federal agency via a large verdict against Oakwood that these practices would not be tolerated. The jury returned a verdict of \$8,953,600.00.

STATEMENT OF FACTS

Prior to delivery, the Ercanbrack's home was manufactured in Fort Morgan, Colorado. (R. at 6698:82-83) The construction of manufactured homes is governed by

HUD, who has issued a set of regulations followed by Oakwood. (R. at 7004:80-82, 94, 97). Each home has a document referred to as a “traveler” which is a check list and a quality control document for each home. (R. at 7004:62, 66-67, 77) Each home is inspected and tested to ensure compliance with HUD standards. (R. at 7004:62, 66-67, 77)

In assembling the gas piping in its homes, Oakwood starts by cutting and threading the steel pipe which is then installed in the subfloor of the home. (R. at 7004:69-71, 162-63) The pipes are secured to the floor with thin metal straps which allow the pipe to be adjusted. (R. at 7004:156) In the Ercanbrack home, two risers came up from the gas piping beneath the floor to connect to the stove and furnace located in the living area. (R. at 7004:72) The holes through the floor are initially located and cut from floor prints. (R. at 7004:73) Importantly, if for some reason the hole does not line up properly with the pipe joint, then the pipe can be adjusted, the pipe can be unstrapped or the hole in the floor can be redrilled to allow the riser to be inserted through the hole properly. (R. at 7004:74, 154, 156, 166-67; 7009:148-49) After the pipe and hole are lined up, the risers are inserted from the top through the hole and into the pipe below. (R. at 7004:164)

Once the assembly of the gas line is complete, the entire gas piping system is inspected to make sure it meets the applicable HUD standards governing manufactured homes. (R. at 7004:80-82, 94) Under the HUD standards, the gas lines are pressure tested

to determine if the entire system is gas tight. (R. at 7004:91-92, 106) The HUD standard requires a high and low pressure test of the gas system to determine it will not leak. (R. at 7004:123-24). The Ercanbrack home passed both the high and low pressure tests and did not leak when it left the Oakwood facility in Colorado. (R. at 7004:124)

On or about July 9, 1997, Oakwood delivered the Ercanbrack's home to their property located in Clarks Canyon in Summit County. (R. at 7000:7, 12, 154) The home was delivered in two halves which Oakwood puts together on top of footings which plaintiff had contracted with Flare to construct. (R. at 7000:13, 123-24, 131 158, 161-62) After setting up the home, Oakwood's has no further involvement with the connection of the outside propane source. (R. at 7000:160-65)

In addition to constructing the footings, Plaintiff contracted with Flare to construct a cinder block skirting around the base of his home. (R. at 741). Also, plaintiff contracted with SS Supply to deliver a propane tank and to connect the home to the propane tank. (R. at 741, 741-42, 744, 7009:17-49)

On August 7, 1997, SS Supply went to the Ercanbrack home to set up the propane tank and to hook it up to the home. (R. at 7009:17) When SS Supply examined the gas system, the SS Supply employee testified a stub-out pipe had already been installed onto the pipe built by Oakwood underneath the home. (R. at 7009:20) With respect to the installation of this stub-out, nobody is sure who installed it. (R. at 7000:168, 170)

SS Supply conducted a pressure test of the entire gas piping system in the home. (R. at 7009:20-24) As part of this pressure test, it was necessary for the SS Supply employee to physically pull the stove out to disconnect the gas line to the stove. (R. at 7009:21) In conducting this test and pulling the stove out, SS Supply does a visual inspection of gas pipes for any irregularities. (R. at 7009:30) The employee of SS Supply testified the system appeared proper, the riser did not come out of the floor at an improper angle and he could not observe any irregularities in the system. (R. at 7009:31-32) The system was pumped to ten pounds of pressure, well in excess of approximate half pound of pressure the system would experience during normal use. (R. at 7009:21) The system was left at 10 pounds of pressure for approximately 20 to 30 minutes. (R. at 7009:22-23) The pressure test did not indicate any leak in the gas system. (R. at 7009:23-24)

After the home was hooked to the propane tank, SS Supply conducted another pressure test and inspection of the entire gas system, including the appliances in the living space. (R. at 7009:27-28) Referred to as a line-block test, SS Supply determined the appliances functioned properly, the regulators properly lowered the pressure to the home and the entire gas piping system was gas tight. (R. at 7009:28) As part of this final test, another pressure test was done on the system. Again, the system held pressure, indicating it was gas tight. (R. at 7009:29) After SS Supply converted the appliances and hooked the system to the propane tank, it functioned properly and was gas tight. (R. at 7009:34-35)

Finally, SS Supply relocated the tank further away from the house. (**R. at 7000:172-75; 7009:39**) Because the flexible line had to be replaced, SS Supply conducted another line-block test. (**R. at 7009:39**) This test indicated the gas system was still gas tight. (**R. at 7009:39**)

After delivery of the home on July 9th, completion of the propane hookup on or about August 7th and completion of the cinder block skirting and landscaping, plaintiff and his family moved into the home on September 2, 1997. (**R. at 7001:61**) The Ercanbracks lived in the home without incident from September 2, 1997 until January 31, 1998. On January 31, 1998, a massive explosion occurred at the Ercanbrack's home, killing plaintiff's wife and two children (**R. at 7000:17, 20**)

With respect to the standards governing manufactured homes, HUD establishes the requirements applicable to the manufactured home industry. (**R. at 7007:234-36, 249-54; 7009:162**) The only expert offered regarding the applicability of standards to the manufactured home industry was Michael Slifka. (**R. at 7007:249, 280; 7009:139**) In fact, plaintiff's expert relied on Slifka to establish the standards governing the manufactured home industry. (**R. at 7007:249, 280**) Although plaintiff introduced substantial evidence regarding threading and insertion standards under ANSI and ASME and HUD's reference of these standards, the only expert testimony on the standard governing gas piping in manufactured homes was that the homes needed to be gas tight. (**R. at 7009:142-44**) Specifically, the HUD standard provides if an installed gas system

passes pressure tests and does not leak, it has passed the only governing standard. (R. at 7009:144) Based on the testimony of Oakwood's employees on manufacturing and testing of the Ercanbrack home and the SS Supply employee who pressure tested the system, the Ercanbrack home, as manufactured, met the applicable regulations. (R. at 7010:61-64)

Plaintiff relied on the expert testimony of three expert's at trial in an attempt to show Oakwood negligently manufactured the home. (R. at 7005:203, *et seq.* (Richard Thatcher); 7007:97, *et seq.* (Joe Romig); 7007:278, *et seq.* (Dr. Frank Alex)). First, Thatcher and Rommig testified that the gas which caused the explosion could not have come from a source outside the Ercanbrack's home and crawl space. (R. at 7006:138-56 (Thatcher); 7007:152-180 (Romig)) Additionally, Thatcher testified that the gas piping under the home did not have any small leaks capable of causing the explosion, that significant amounts of propane accumulated in the crawl space under the home and in the living area of the home and that the dryer was the likely ignition source for the explosion. (R. at 7006:38, 77-80, 169-75, 193-94; 7007:73)

Relying on Thatcher and Romig's conclusion that the source of the propane leak was not outside of the Ercanbrack's home, Dr. Alex concluded the source had to be one of three fractured pipes located in the crawl space under the Ercanbrack's home. (R. at 3852-53; 6698:85-86; 7008:15-16, 104-05) Dr. Alex reached his conclusion prior to conducting any tests or examination of the fracture surfaces (R. at 6698:84-86), prior to

investigating or eliminating any other sources within the home or crawl space (**R. at 6698:153-59**), and without any understanding or evidence of Oakwood's manufacturing process. (**R. at 6695:15-18; 6698:83; 7008:82-84**) Dr. Alex testified that because of the manner in which the pipe was threaded and inserted into the pipe joints, Oakwood had forced the pipe into place which caused a latent non full thickness crack to develop in the pipe. (**R. at 3852-53**) Subsequently, some unknown force caused the partial crack to develop into a full crack which led to explosion. Dr. Alex, however, stated he has no actual knowledge of what subsequent force caused the full thickness crack to form which led to the explosion. (**R. at 6698:76; 7008:65-66**)

Oakwood brought several motions seeking to exclude Dr. Alex's testimony. First, Oakwood filed a Motion to Exclude Dr. Alex's Opinion Regarding Causation. (**R. at 3771-72, 3787-3861**) This court heard this motion on September 4, 2001, including testimony of Dr. Alex. (**R. at 6695**) The court concluded issues of fact precluded it from making a ruling at that time to exclude his testimony. (**R. at 6695:70**)

Prior to trial, Oakwood renewed its efforts to preclude Dr. Alex from testifying regarding the cause and origin of the explosion. (**R. at 5499-5512**) On March 25, 2002, the court conducted a Rimmasch hearing and after Dr. Alex's testimony and the argument of counsel, the court concluded it would allow Dr. Alex to testify provided certain foundation was set forth by other expert and lay testimony. (**R. at 6698:150-52**) Specifically, the trial court required foundation concerning the migration of propane

which eliminated a source outside of the Ercanbrack home and foundation regarding how Oakwood manufactures the gas piping system in its homes. (R. at 6698:150-52) The court ruled if the evidence indicated that Oakwood would not force its pipes into place, it would be inclined to strike Dr. Alex's testimony. (R. at 6698:150-52) Although the uncontradicted evidence from Oakwood's employees at trial indicated it would not force pipes into place as Dr. Alex believed, Dr. Alex was allowed to testify at trial. (R. at 7004:73-74, 120-21, 156-58, 166-67; 7007:278, *et seq.*)

On or about January 18, 2002, plaintiff submitted answers to Oakwood's Requests for Admissions. (R. at 5887-88) The last two admissions read:

REQUEST FOR ADMISSION NO. 12: Admit that you reported the explosion to the Summit County Sheriff at 6:05 p.m. on January 31, 1998 as recorded in the Summit County Sheriff LAW Incident Table (a copy of is attached hereto as Exhibit 2).

RESPONSE TO REQUEST FOR ADMISSION NO.12:
Admit.

REQUEST OF ADMISSION NO. 13: Admit that approximately 50 minutes elapsed between the time you discovered the explosion and the time you reported the explosion to the Summit County Sheriff's Office.

RESPONSE TO REQUEST FOR ADMISSION NO. 13:
Deny.

(R. at 6697:24-25, 28)

During opening statements, Oakwood represented to the jury that certain facts were admitted by plaintiff. (R. at 7000:60-61) Specifically, Oakwood relied on the

sheriff's log and the admission to show that plaintiff did not call in the explosion until 6:05 p.m. that night. (R. at 7000:61) On the other hand, plaintiff indicated he arrived at his home by approximately 4:45 p.m. (R. at 7000:60-61) After making this opening statement, Oakwood learned that plaintiff intended to offer evidence to show the police record was incorrect. (R. at 6697:24-27) Furthermore, the evidence plaintiff intended to offer had not been disclosed to Oakwood prior to its reliance on the admissions in its Opening. (R. at 6697:28-29) After opening statements, the trial court ruled the admissions were ambiguous, and plaintiff was entitled to introduce evidence contrary to the admission to explain his response to the admission. (R. at 6697:29-30) Based on this ruling, plaintiff introduced evidence contrary to the admission. (R. at 7004:39-42; 7007:257-59)

After Oakwood relied on the admission in its Opening and presented it to the jury as fact, and after the trial court allowed evidence in to contradict the admission, plaintiff's counsel used this turn-of-events in his closing argument, stating:

No. 2 The Time Discrepancy they talked about. Remember, they said, gee, we're going to prove to you there was an hour out there. Bill was up at that scene. Well, before he called 911, is that what you got out of the evidence? And just what were they trying to imply that Bill did? What were they saying? Bill was at the scene for an hour unaccounted for. What do you think they were implying? They want to put Bill on trial with you because Oakwood's not going to be liable. We'll do anything they say in order to escape liability. We'll even tell you what Bill did do and imply that something was wrong with that. They never proved that, did they? What they did was, they changed in mid stream. They made their

opening statement and then all of a sudden they changed because they had to, because the police officers are like, no, that's all wrong. . . . They're clutching at straws. They'll take anything in order to make a point with you regardless of what it is.

(R. at 7012:9-10)

Prior to trial, SS Supply settled with plaintiff, Nevertheless, plaintiff's own allegations and admissions indicated SS Supply supplied a defective and unreasonably dangerous propane storage tank. **(R. at 5159, 5164-69; 5887-88; 6994:24-26)**. Based on plaintiff's admissions, it was conclusively established:

- (1) SS Supply sold a propane storage tank that contained rust at the time it was sold **(R. at 5887-88; 6994:25)**;
- (2) The rust in the propane tank caused complete depletion of the ethyl mercaptan in the propane **(R. at 5887-88; 6994:25)**;
- (3) The propane tank was defective and unreasonably dangerous **(R. at 5887-88; 6994:25)**;
- (4) Traces of propane were found in the blood of plaintiff's wife and daughter after the explosion; **(R. at 5887-88; 6994:25)**

In addition to these admissions, plaintiff submitted a statement of undisputed facts in a Motion for Summary Judgment against SS Supply. **(R. at 2973-78; 5159; 5164-69)** Specifically, plaintiff alleged as undisputed facts that: (1) ethyl mercaptan is used to odorize propane and to warn consumers of leaking propane in order to avoid injury or death; (2) since at least 1987, it had been known throughout the propane industry that rust in tanks caused ethyl mercaptan to oxidize and lose its "distinctly recognizable odor;"(3) the propane supplied contained ethyl mercaptan; (4) the rust in the tank would

have completely removed the odor within 35 days; (5) SS Supply did not warn the Ercanbracks of odor fade; (6) a propane leak occurred on January 31, 1998 at the Ercanbrack home; (7) propane leaked into the living space of the Ercanbrack home to be detectable had the odor not faded; (8) had the Ercanbracks been able to smell propane they could have “escaped danger;” and (9) toxicology reports indicated propane was present in at least two of the three family members; and (10) tanks containing rust are defective products. (**R. at 2976-77; 5159; 5167-68**)

Oakwood argued the admissions and allegations of plaintiff conclusively established SS Supply was a proximate cause of the accident. As part of its motion for summary judgment, Oakwood incorporated all of plaintiff’s statement of undisputed facts. (**R. at 5159**) In his reply, plaintiff did not comply with Rule 4-501 of the Rules of Judicial Administration and dispute these facts. (**R. at 6994:26; 5367-68**) Plaintiff merely stated it disputed any fact which said SS Supply was the cause of the explosion as the explosion and resulting injuries were caused by Oakwood’s acts. (**R. at 5368**)

On or about September 17, 2001 and prior to a ruling on plaintiff’s Motion for Summary Judgment against SS Supply, plaintiff settled with SS Supply for \$3,250,000, and the claims against SS Supply were dismissed. (**R. at 4691-93; 6994:30**)

Despite the allegations and admissions on this issue, the court ruled it would only instruct the jury that the tank was defective and unreasonably dangerous. (**R. at 6994:49**) The court reserved the issue of whether it would instruct the jury that SS

Supply was a proximate cause of the injuries. (**R. at 6994:50**) In fact, jury instruction number 48 only instructed the jury that the tank was defective and unreasonably dangerous. (**R. at 7011:41-43**) The jury was not instructed that SS Supply was a proximate cause of injuries. (**R. at 7011:41-43**)

In conjunction with SS Supply's fault and settlement with plaintiff, Oakwood requested the jury be informed of the settlement and the amount of the settlement. (**R. at 6471-6525**) Because SS Supply had supplied a defective and unreasonably dangerous product as a matter of law and due the large amount of the settlement (\$3.25 million), Oakwood argued this was a rare instance necessitating disclosure of the settlement amount to the jury. The court ruled the jury would be instructed that SS Supply had settled, but the amount would not be disclosed to the jury. (**R. at 6698:19**)

On the issue of causation, Oakwood argued plaintiff had no physical evidence and his expert testimony lacked foundation and reliability. (**R. at 3864-4018**) In allowing Dr. Alex's testimony at trial, the trial court also denied the motions for summary judgment on causation. (**R. at 6695:71**) On the lack of evidence establishing proximate cause, Oakwood renewed its motion at the close of plaintiff's case-in-chief. (**R. at 7008:168**) On April 10, 2002, Oakwood presented this motion, and the court denied this motion. (**R. at 7011:5-17**) Finally, in its post-trial motions for J.N.O.V. and related relief, Oakwood again argued plaintiff had produced insufficient evidence to prove causation.

(R. at 6807-59; 6925-43) These post-trial motions were denied. **(R. at 6964-65)**

As briefly alluded to, the trial in this matter started March 28, 2002 and proceeded for 12 days, concluding with closing arguments on April 11, 2002. Originally, the trial was set for 9 days with plaintiff allocated five days. **(R. at 6994:7)** As the trial progressed, however, it became evident plaintiff would need more than five days to present his case-in-chief. On the eighth day of trial on April 5, 2002, the court addressed the issue of time. **(R. at 7007:217-220)** Importantly, the court required the parties to complete the trial by April 11th, leaving Oakwood a fraction of the time allotted to plaintiff. **(R. at 7007:217:220)** In the middle of the ninth day of trial, plaintiff rested his case-in-chief. **(R. at 7008:168)** Oakwood was given basically three days to present its entire case. **(R. at 7008:168 through R. at 7011)** Furthermore, on April 8th and 9th, Oakwood did not have an entire day to present testimony. **(R. at 7008:168, et seq.; 7009)**

On April 11, 2002, each side presented its closing arguments. During plaintiff's closing, plaintiff's counsel made numerous inappropriate remarks. First, plaintiff's counsel argued the jury should "send a message" to Oakwood and to HUD, who regulates manufactured housing, to ensure certain standards are enforced. **(R. at 7012:19)**

Additionally, plaintiff's counsel commented on the credibility of the witnesses on this issue. For example, counsel stated: "They say it couldn't have happened. It didn't happen. We wouldn't have done it. It did. It happened. Again,

you're lying eyes are going to tell you so. Just look at the pipe, listen to the experts." (R. at 7012:20-21) During his rebuttal, plaintiff's counsel went so far as to suggest the standards are applicable as a matter of law. Specifically, plaintiff's counsel referred to the fact that the case was not thrown out is proof that the standards are applicable. (R. at 7012:69) "If there were no standards that Oakwood had to obey we wouldn't be here. As a matter of law then, under the circumstances, this would have been thrown out, we wouldn't have been talking about it, because then there would have been no law and Mr. Plant would have said, gee, under the circumstances there is no law here, there is no applicable law, there is no applicable standards, they proved nothing." (R. at 7012:69-70)

SUMMARY OF ARGUMENTS

This appeal presents several issues which individually are discrete legal arguments, but as the record indicates, each ruling impacted the other issues. Had some of the errors below been isolated, the impact may have been softened, and perhaps, harmless. On the other hand, some of the trial court's rulings undermined the trial on their own. Collectively, the trial court's rulings on the issues presented in this appeal had the effect of precluding a fair trial and resulted in a jury verdict unsupported by Utah law and the evidence in the record. Additionally, the amount of the jury's verdict was dictated by passion and prejudice rather than an objective view of the evidence. The end result was a verdict far in excess of typical jury verdicts in Utah.

Specifically, Oakwood has challenged the admissibility of plaintiff's expert, Dr. Alex. Dr. Alex's testimony is inadmissible because it is not supported by a proper foundation, did not use a proper scientific methodology and is contrary to facts and witness testimony set forth at trial. Without Dr. Alex's testimony, plaintiff's claim fails as a matter of law because no causal connection exists to show Oakwood manufactured a defective product. On this issue, this court should reverse the trial court and enter a judgment in favor of Oakwood as a matter of law.

If this court determines plaintiff sustained his burden on the issue of causation, the trial court also committed other reversible errors which warrant a new trial. Specifically, the trial court allowed in evidence contrary to plaintiff's sworn admissions after Oakwood had relied on the admissions in its opening statement. The effect of the trial court's ruling was extremely prejudicial to Oakwood and alone warrants a new trial. Additionally, plaintiff's counsel made prejudicial and inflammatory remarks during closing arguments which raised the ire of the jury and lead to an unsupportable verdict against Oakwood. Finally, the trial court improperly instructed the jury regarding the liability and settlement of a co-defendant who settled prior to trial. The cumulative effect of all the errors undermined the jury's verdict, warranting a new trial.

ARGUMENT

I. Dr. Alex's Opinion Is Not Supported by Facts in the Record, Witness Testimony, Physical Evidence or Scientific Principles and Accordingly Does Not Have the Requisite Foundation or Reliability Required for Expert Testimony.

Because Dr. Alex's testimony lacks the requisite foundation and reliability, the trial court erred in denying Oakwood's Motion to Exclude his testimony (**R. at 6695:70-71**) and in ruling he satisfied the requirements for scientific testimony as set forth in State v. Rimmasch, 775 P.2d 388, 397-98 (Utah 1989). (**R. at 6698:54, 151-52**). As this court indicated in State v. Rimmasch, "it can be said 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. (quoting Utah R. Evid. 702).

More importantly as applied to this case, even if the court determines the scientific principles or techniques are inherently reliable, the court must also "make a separate determination that there is an adequate foundation for the proposed testimony, i.e., that the scientific principles or techniques have been properly applied to the facts of the particular case by qualified persons and that the testimony is founded on that work." Id. at 398 n.7¹; see also E.I. du Pont de Nemours and Co., Inc. v. Robinson, 923 S.W.2d

¹ The trial court's duty under Rule 702 also implicates Rule 403 of the Utah Rules of Evidence in that it requires a balancing of probativeness versus prejudice. See also Ostler v. Albina Transfer Co., Inc., 781 P.2d 445, 448 (Utah Ct. App. 1989) (noting

549, 556 (Tex. 1995).

In a nutshell, Dr. Alex attributes negligence to Oakwood by asserting that during the construction of the home Oakwood forced the gas pipes into place, which caused a latent non full thickness crack to develop. Later, Dr. Alex states that some unidentified force, which he believes may have been thermal expansion and contraction, caused the partial crack to develop into a full crack. This crack is the source of the leak which caused the explosion. As is set forth below, Dr. Alex's theory suffers from two major gaps in logic and evidentiary support: (A) Dr. Alex has no evidence other than the explosion and Richard Thatcher's opinions to eliminate other possible sources of the leak; and (B) the evidence in the record regarding Oakwood's manufacturing procedure is contrary to Dr. Alex's story.

A. Dr. Alex Has No Basis to Identify the Pipes in the Crawl Space as the Source of the Leak.

Dr. Alex first conceived his story regarding the cause of the explosion in a report dated November 30, 2000. (**R. at 3852**). Although he subsequently modified his story to a limited extent, Dr. Alex's story remains essentially the same:

First accepting the premise that the initial and major explosion occurred below the floor of the home in the crawl

"relevant" expert testimony may still be excluded if its probative value is outweighed by the danger of unfair prejudice). Accordingly, the more reliable the scientific principles and foundation the more probative the testimony is. Expert testimony based on weak science or foundation is less probative and should be carefully examined for its prejudicial effects. State v. Rimmasch, 775 P.2d 388, 398 n.8 (Utah 1989).

space we must agree that there was an escape of propane from the piping system below the floor that caused an accumulation of propane sufficient to cause an explosion.

(**R. at 3852** (emphasis added)) Dr. Alex relies on Richard Thatcher to eliminate possible sources of the explosion. (**R. at 6698:85-86; 7008:15-16**) Importantly, however, Richard Thatcher does not identify or eliminate any sources within the Ercanbrack home as the cause of the explosion. Dr. Alex, however, adopts Thatcher's opinion that the gas could not have migrated from an outside source and then proceeds to make a speculative leap to his premise that one of three fractured pipes recovered after the explosion was the cause. (**R. at 7008:16, 21**) Without investigating or eliminating any other potential sources, Dr. Alex identifies the source of the leak and proceeds to make up a story on how it might have happened. "An expert who is trying to find a cause of something should carefully consider alternative causes." E.I. du Pont de Nemours and Co., Inc. v. Robinson, 923 S.W.2d 549, 559 (Tex. 1995)

Thatcher testified that a significant amount of gas accumulated in the crawl space beneath the Ercanbrack home. (**R. at 7006:38**) Both Thatcher and Romig also testified that no source existed in the crawl space to ignite the gas and that significant amounts of gas had to accumulate in the living space of the Ercanbrack home. (**R. at 7006:193-194; 7007:73** (Thatcher); **7007:182** (Romig)) Thatcher states he believes the clothes dryer in the Ercanbrack home provided the ignition source for the explosion. (**R. at 7006:169-72**) Finally, Thatcher eliminates the possibility of a slow leak from the

joints of the gas piping system as a possible source. (R. at 7006:77-80)

Based on the tests he conducted, Thatcher concludes no small leak existed, the leak causing the explosion was large and the leak only existed for approximately twenty-four hours prior to the explosion. (R. at 7006:172-75)

Accordingly, nothing in Thatcher or Romig's testimony identifies the three fractured pipes recovered after the explosion as the source of the leak that caused the explosion. The court allowed Thatcher to testify as to migration of gas and that he eliminated the possibility of a small leak from the pipe joints. (R. at 6698:156-57, 159) Thatcher, however, is neither a metallurgist nor qualified to do failure analysis (R. at 6698:153), and accordingly, the court precluded his testimony as to the source of the leak or the cause of the leak. (R. at 6698:159)

The rules of evidence and scientific reasoning do not allow the speculative leap made by Dr. Alex. As this court has stated: "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." State v. Rimmasch, 775 P.2d 388, 403 (Utah 1989). In this case, it is the first link in the chain that is a problem, as Dr. Alex conclusively determines without any foundation, one of the three fractures has to be the source of the leak:

Second accepting Thatcher's premise that the rate of gas escape was fairly large and more than would escape from the threaded area of the pipe joints (of which I now have no reservations) we must assume that this escape was from a broken pipe or joint of which we have three

(**R. at 3852** (emphasis added)) The rules of evidence and scientific reasoning do not allow assumptions where the assumption is on the ultimate issue, i.e. source and causation.

Dr. Alex's application of failure analysis to the evidence in this case did not employ the requisite scientific process to obtain a reliable opinion. Here, Dr. Alex admitted he reasoned backwards from the explosion to explain what he believes occurred. (R. at 7008:79)² As this court stated: "[c]oming to a firm conclusion first and then doing research to support it is the antithesis of [science]." Brewer v. Denver & Rio Grande Western R.R., 2001 UT 77, ¶27, 31 P.3d 557 (citation omitted); see also E.I. du Pont de Nemours and Co., Inc. v. Robinson, 923 S.W.2d 549, 559 (Tex. 1995). In Brewer, defendant challenged plaintiff's expert's conclusion that workplace conditions caused plaintiff to develop Carpel Tunnel Syndrome. See Brewer, 2001 UT 77 at ¶¶27-31. Defendant argued plaintiff's expert reached his conclusion before conducting the proper analysis. See id. at ¶27. First, the court set forth the steps used in conducting the NIOSH methodology to determine the cause of a medical problem. See id. at ¶21. In affirming the trial court's decision to allow the expert's testimony, this court noted the

² Additionally, Dr. Alex was repeatedly questioned on what evidence he had to support his conclusions. Dr. Alex stated he knew something failed to have caused the explosion, so from a scientific standpoint it had to be one of the three pipes recovered after the explosion. (**R. at 6698:66-78; 7008:15-16**) When asked by the court what evidence exists to support his opinion, Dr. Alex states: "First of all, we know we had an explosion and it's tied to the house." (**R. at 6698:71-72**)

evidence in the record which indicated the expert had followed the required steps and which supported his methodology:

[I]t is clear from the record that the trial court possessed a sufficient foundation to determine that Dr. Harrison had in fact properly applied the fifth step of the 1979 NIOSH methodology to the facts of Brewer's case by first examining his medical records; assessing and observing the relevant risk factors, including posture; ruling out any possible nonoccupational causes; and then coming to his ultimate conclusion.

Id. at ¶28. This court went on to note that plaintiff's expert "possessed detailed information" and had examined several photographs before arriving at his conclusions.

See id. at ¶29. Importantly, the court found a sufficient factual foundation existed for the expert's opinions and that he had properly eliminated other possible causes. See id. at ¶¶27-29.

Like the NIOSH methodology, failure analysis requires certain steps; these steps include: 1) description of the failure situation; 2) visual examination; 3) mechanical design analysis (stress analysis); 4) chemical design analysis; 5) fractography; 6) metallographic examination; 7) identification of properties pertinent to the design; and 8) failure simulation. See Charlie R. Brooks and Ashok Choudhury, Metallurgical Failure Analysis 5-6 (1993). In arriving at a properly supported conclusion, all expert opinions, whether using NIOSH, failure analysis or other methodology should be formed like a pyramid with "a large foundation of facts and evidence at the bottom, which support a few conclusions at the top." Randall Noon, Engineering Analysis of Fires and Explosions

2 (1995).

In contrast to Brewer's expert, Dr. Alex concluded it had to be one of the three fractured pipes based on the circumstantial coincidence that three pipes located after the explosion had been fractured. Dr. Alex did not review any literature on causes of explosions or any literature linking deviations from ANSI or ASME standards to propane explosions, review or observe Oakwood's manufacturing process for its homes, analyze the fracture surfaces with a scanning electron microscope or otherwise document the surfaces of the fractured pipe to show how it was consistent with his conclusions, determine the possible causes of the explosion and eliminate other possible causes. (**R. at 3852-53; 4265, 4321-27; 6695:16-17; 6698:15-18, 64-78, 82-83; 7008:15-16, 81-84; 7010:82**) In fact, one cause and origin expert used Dr. Alex's methodology as a text book example of faulty reasoning:

For example, consider the following case. It is true that propane gas systems are involved in some explosions and fires. A particular house that was equipped with a propane system sustained an explosion and subsequent fire. The epicenter of the explosion, the point of greatest explosive pressure, was located in a basement room which contained the propane furnace. From this information, the investigator concludes that the explosion and fire was caused by the propane system and in particular, the furnace.

However, the investigator's conclusion is based on faulty logic. There is not sufficient information to firmly conclude that the propane system was the cause of the explosion, despite the fact that the basic facts and the generalized principle upon which the conclusion is based are all true.

Noon, at 3. The text goes on to note that statistically most propane systems are reliable which requires additional investigation before a connection can be made linking the propane system to the explosion. Id. In other words, from a purely statistical viewpoint, it is more likely than not that the propane system did not cause the explosion. Id. This fact is verified by the HUD standards and research which show that propane systems which are manufactured to be gas tight are reliable. (R. at 7009:144) Therefore, the test to determine whether a propane system complies with applicable standards is to determine if it passes a pressure test rather than counting the number of threads.³

In addition to being criticized by his scientific peers, the reasoning used by Dr. Alex has been uniformly criticized and rejected by courts: “That inference turns scientific analysis on its head. Instead of reasoning from known facts to reach a conclusion, the experts here reasoned from an end result in order to hypothesize what needed to be known but was not.” Stibbs v. MAPCO, Inc., 945 F. Supp. 1220, 1224 (S.D. Iowa 1996) (excluding expert who employed differential diagnosis to eliminate possible causes until only one remained); see also Brewer, 2001 UT 77 at ¶¶21, 28 (acknowledging the need to rule out other possible causes); Indiana Michigan Power Co. v. Runge, 717 N.E.2d 216, 235 (Ind. 1999) (“the most troubling aspect of [plaintiff’s expert’s] testimony [on causation] is his failure to consider other causes of the accident in

³ Plaintiff’s own expert testified the threading and insertion of the pipes into the joints did not cause the system to leak. (R. at 7006:77-80, 172-75)

forming his opinion. . . .”).

In this case, Dr. Alex arrived at his conclusion first and did not investigate, let alone eliminate, other possible causes of the explosion. His opinion that one of the three fractured pipes was the source of the propane leak is nothing more than speculation.

B. Dr. Alex’s Testimony Is Directly Contrary to the Facts In Evidence and Accordingly Should Have Been Excluded.

Dr. Alex’s story is purely speculative as to Oakwood’s manufacturing procedures and directly contrary to the witness testimony introduced at trial by plaintiff. In allowing Dr. Alex’s testimony, the trial court required certain factual foundation. Specifically, the trial court demanded Thatcher and Romig’s testimony eliminating an outside source for the leak and testimony that Oakwood’s manufacturing procedures were such that it had no procedures to correct any alignment problems if it arose. During the Rimmasch hearing, the following discussion occurred:

Court: I am focusing quite a bit on source of gas migration, but certainly there has to be evidence too. I mean, if the only evidence is that [Oakwood would] adapt, [Oakwood would] drill a different hole, where is the evidence before us?

Mr. Plant: Right.

Court: Lacking that, there’s no basis for the rest of the argument. That has to be there too.

Mr. Plant: You should know this, your Honor. His initial thing was we put these things up to the floor first, so we had to bring it up vertical. That’s where we did it. He abandoned that.

Now, in his deposition he says, if we drilled the hold instead of forcing it, this doesn’t work too. I can show you in his deposition where he says that. So there’s other

things. But the point is he has to come in and say, we didn't drill the hole, he has to come in and say, here's the evidence to support my opinion, and absent that, it's just sheer speculation, as to causation. Again, very limited, as to this pipe breaking.

Court: I understand. You know, one thing I have appreciated from both of you, your motions have focused on specific things. They are about, you are accepting what you don't think there is a real argument about and you have focused. So I do understand that, you've both done that, but I've heard your argument, I've wrestled with it, I did not even make a preliminary determination before hearing this evidence today, but I think we are past the gatekeeper function for Dr. Alex. I think he can testify, provided the factual predicate's in there through other testimony. And it could conceivably get to a point that evidence that we're told we will hear, if it doesn't come in, I will strike Dr. Alex. I know that would worry you because striking evidence isn't always effective, but it would be what I would do if the evidence does not stack up as I'm told it will. That is evidence on migration or failure of migration, evidence on the installation. If the only evidence, for example, that comes in is that we adapt, we drill extra holes, we never force it, well, that's a big hole and I think we'd have to strike his conclusions, but it's got to come in that way. So I'm denying your motion to exclude his evidence on causation at this time.

(R. at 6698:150-52 (emphasis added)).

At trial, plaintiff introduced the deposition testimony of four Oakwood employees to lay the foundation for Oakwood's manufacturing procedures. The testimony unequivocally showed that Oakwood would unstrap or jiggle the pipe or redrill the hole if the hole and the pipe did not match up properly. (R. at 7004:73-74 (Julie Meek); 7004:120-21 (James Jackson); 7004:156-158, 166-67 (Richard Gibson)) None of the Oakwood employees testified that pipes were forced into place if the pipes did not

line up properly. (R. at 7004:73-74 (Julie Meek); 7004:120-21 (James Jackson); 7004:156-158, 166-67 (Richard Gibson)) In addition, Oakwood, in support of an early motion to exclude Dr. Alex's testimony, offered the affidavit of another employee who also corroborated the manufacturing methods. (R. at 3855-57 (Mark Ezzo))⁴

At trial, plaintiff introduced no testimony to establish the necessary foundation for Dr. Alex's story. Instead, plaintiff attempted to have Dr. Alex comment on the credibility of the witness testimony to establish what he believed to be the actual process Oakwood used to manufacture plaintiff's home. (R. at 7008:36-37) Without any proof (other than his calculations of pipe distances), Dr. Alex speculates that Oakwood would force the pipe into place. (R. at 7008:36-37; 62-63)

In addition to being contrary to the testimony regarding manufacturing procedures, Dr. Alex's testimony also ignores the governing standards. Dr. Alex relies on ANSI and ASME threading standards to establish an alleged defect because in his view this standard applies to all pipe used in homes. (R. at 7007:234-238) Dr. Alex has no knowledge where these standards were adopted by HUD as a standard for gas pipes (R. at

⁴ At trial, Dr. Alex suggested the testimony of the Oakwood employees was inconsistent and not credible. The testimony, however, is not inconsistent. Each employee unequivocally testified the risers would not be forced. No force is necessary because various methods are available to accommodate any variations in the length of the pipe. Specifically, the pipe could be moved or the hole redrilled. (R. at 7004:73-74; 7004:156-58, 166-67) Dr. Alex conceded he had no idea where the hole was drilled and the employee's testimony did not corroborate his opinion. (R. at 6698:82-83; 7008:81-84)

7007:239), but rather relies on Michael Slifka's prior deposition testimony as a basis. (R. at 7007:239-249) Mr. Slifka, however, testified that the standards are referenced in the HUD standards and used as guidelines. (R. at 7007:282-83) Importantly, however, the HUD standards reference hundreds of other standards, but it does not enforce every standard that it references. (R. at 7007:283-87) The governing standard is the propane system must not leak. If the gas system passes the pressure test, the system passes the HUD regulations. (R. at 7010:61-62, 65-66)

A major component—and a serious defect in—Dr. Alex's story is it assumes the piping system is rigid and fixed at two points with no ability to be moved to accommodate any deviation from precise measurements. (R. at 6698:118-20; 7008:57-60) Dr. Alex calculates the distances for the pipe as assembled for the Ercanbrack home and concludes it is short from the required measurement by one and 5/16 inches. (R. at 6698:116; 7008:55) Assuming two fixed points in the piping system, Dr. Alex runs a test which indicates it takes over 70 pounds of force to get the range riser to line up properly. (R. at 6698:122; 7008:45) Based on this amount of force and results from prior bend tests, Dr. Alex speculates Oakwood cracked the pipes in making it fit. (R. at 6698:122-23; 7008:54-55)

The undisputed testimony, however, is the pipe is only secured by flexible straps and it can be moved to allow the range riser to be inserted without force. (R. at 7004:156-158) Additionally, even if the pipes were not moved, the testimony is the hole

would be redrilled if it did not line up properly. (R. at 7004:166-67) In fact, Dr. Alex conceded he had no evidence to support his story that Oakwood would force the pipes in place:

Mr. Plant: Do you have any evidence that in Fort Morgan, Colorado, at the time this home was built that there was excessive pressure put on this pipe?

Dr. Alex: Other than it failed?

Mr. Plant: I'm asking for evidence [. . .]

Dr. Alex: No, I don't [. . .]

Mr. Plant: Not your conclusions.

Dr. Alex: I don't. And nobody does.

(R. at 6698:83)

In addition to the evidence offered by Oakwood's employees, an independent third party witness corroborated Oakwood's testimony that it would not force pipes into place. John Bailey an employee of Summit Propane testified he visually examined the gas piping system at the Ercanbrack home as part of his duties when he hooked the system to the propane tank. (R. at 7009:29-30) Mr. Bailey did not observe any irregularities or observe the range riser was coming out of the floor at an unusual or peculiar angle as would be consistent with Dr. Alex's story.⁵ (R. at 7009:30) None of the Oakwood employees had any independent recollection of the Ercanbrack house.

⁵ If Dr. Alex's story was correct, the range riser would come up through the floor at an angle. (R. at 7008:62-63) If the range riser is perpendicular to the floor, it would not put any force on the riser. Dr. Alex's story requires the pipe to be manipulated to put in excess of 70 pounds of force onto the riser. Later, Dr. Alex speculates some other unknown force places enough additional force onto the riser to allow it to fully crack.

Accordingly, Mr. Bailey's testimony is the only direct eyewitness testimony concerning the Ercanbrack home.⁶

Consistent with the witness testimony, the only objective evidence as to the quality of the gas piping system in the Ercanbrack home also suggested Oakwood properly manufactured the home. All parties, witnesses and experts agree the gas piping system did not leak when it left Oakwood's Colorado manufacturing facility (**R. at 7004:106, 124**); did not leak when it arrived at the Ercanbrack's home site (**R. at 7006:82**); did not leak when Summit propane hooked the pipe system to the propane tank (**R. at 7006:82**); and did not leak after the explosion with the exception of the four fracture points.⁷ (**R. at 7006:77, 80-82; 7007:31-33**). More importantly, the Ercanbrack's lived in the home for five months without incident prior to the explosion. (**R. at 7000:13**)

Expert witnesses are not allowed to speculate about facts or disregard facts in the record in order to make the causal link. "An expert opinion cannot sustain a jury's verdict when it 'is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable . .

⁶ Plaintiff offered no testimony to indicate the range riser came through the floor at an angle or in any peculiar manner. Plaintiff had the opportunity to observe both the piping under the floor of the home prior to the construction of cinder block skirting (**R. at 7001:245-46**) and the range riser in the living area of the home. Nevertheless, plaintiff testified he did not see the range riser prior to the explosion. (**R. at 7001:243**)

⁷ Dr. Alex admits that all the fractures could have occurred in the explosion. (**R. at 6698:65, 69, 84; 7008:101**)

..” Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1057 (8th Cir. 2000) (quoting Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242, 113 S. Ct. 2578 (1993)). In this case, the uncontradicted testimony does not support Dr. Alex’s story.

In J.B. Hunt Transport, Inc. v. General Motors Corp., 243 F.3d 441 (8th Cir. 2001), the plaintiff offered the testimony of an accident reconstruction expert whose testimony was based largely on review of photographs. The court excluded plaintiff’s accident reconstruction expert where his opinion derived from his review of the photographs conflicted with uncontradicted eyewitness testimony and he admitted he lacked sufficient information to scientifically reconstruct the accident. See id. at 443. In this case, Dr. Alex’s opinion conflicts with all witness testimony. In fact, Dr. Alex conceded the Oakwood employees’ testimony did not support his story that the pipe would be forced. (R. at 7008:82) At trial, the following dialogue occurred:

Mr. Plant: Now, what is the testimony of Oakwood’s people—let me ask you, isn’t true that it is the testimony of Oakwood people that if, in fact, the hole doesn’t match up they drill a new hole?

Dr. Alex: That’s their testimony.

(R. at 7008:82, see also 6698:83)

In this case, Dr. Alex heard the testimony of the Oakwood employees regarding the manufacturing procedures. Dr. Alex, however, suggests that those procedures were not followed in this case. (R. at 7008:82-84) In Jetcraft Corp. v. Flight

Safety Int'l, the 10th Circuit excluded the human factors expert who offered expert opinion that contradicted the pilot's statement of what happened during a plane crash, stating: "to come in after the fact as in this case and to take into account contrary denials [by the pilot] and, in the absence of any evidence from the plaintiff as to what he did, to opine that the event was the inadvertent retraction [of the landing gear] by [the pilot] is just professional speculation." Jetcraft Corp. v. Flight Safety Int'l, 16 F.3d 362, 366 (10th Cir. 1993) (excluding expert's testimony on what pilot might have done to cause crash). Furthermore, the trial court sustained an objection when Dr. Alex attempted to comment on the Oakwood employee's testimony. (R. at 7008:36-37)

The only evidence produced regarding Oakwood's manufacturing procedures and the condition of the Ercanbrack's home when it was hooked to the propane source contradicted Dr. Alex's opinion.

C. Oakwood Offered Scientific Evidence Refuting the Scientific Basis for Much of Dr. Alex's Story.

In an attempt to bolster his opinion, Dr. Alex, and plaintiff's other experts, conducted a series of tests to refute testing or opinions first offered by defendants in the case. Each of these tests, however, is isolated to a particular component of Dr. Alex's story, is only undertaken after a test or theory is offered by defendants, yields inconclusive results, is not tied to facts in the record and cannot be combined to replicate or reproduce the cause of the explosion. In reviewing expert testimony and methodology,

courts have noted that Rule 702 requires specialized knowledge.⁸ Accordingly, it is important to ensure expert testimony offered at trial is reliable. Because the jury tends to regard experts as more credible, an expert offering scientific testimony ““may sway a jury even when as science it is palpably wrong.”” E.I. du Pont de Nemours and Co., Inc. v. Robinson, 923 S.W.2d 549, 553 (Tex. 1995) (citation omitted). Accordingly, expert scientific testimony must be derived by the scientific method and be supported by appropriate validation or good grounds. See Pride v. BIC Corp., 218 F.3d 566, 577-78 (6th Cir. 2000) (excluding plaintiff’s failure analysis expert who offered opinion as to how lighter leaked and exploded). As set forth below, Dr. Alex neither followed accepted scientific methods nor validated any of his assertions.

Dr. Alex calculated the pipe would be 1 5/16" too short. (R. at 7008:51) Additionally, Dr. Alex conducted bend tests to verify his conclusion that overthreaded and underinserted pipe as found on the range riser would be weaker than pipe threaded in strict accordance with the ANSI and ASME standards. (R. at 6698:122-124; 7008:59-60) Finally, Dr. Alex concluded the force necessary to get the shortened pipe lined up with hole in the floor was in excess of 70 pounds of force. (R. at 6698:122) Neither of these

⁸ “‘The word “knowledge” connotes more than subjective belief or unsupported speculation.’ The testimony here lacks the support to rise above speculation because it remains untested in many important aspects.” Stibbs v. MAPCO, Inc., 945 F. Supp. 1220, 1224 (S.D. Iowa 1996) (citation omitted). “It is also important to consider whether an expert’s processes and conclusions can be verified by subsequent, independent testing for ‘falsibility, or refutability’” Id. (citations omitted).

tests, however, are evidence that Oakwood would have forced the pipes into place. Additionally, Dr. Alex never inserted the risers through the holes to see if he could achieve a non full thickness crack by forcing the riser into the mis-aligned pipe below. (R. at 7008:52-55)

Instead of trying to simulate his story through one complete experiment to test its validity, Dr. Alex conducted individual tests to prove isolated elements of his story were plausible. For example, Dr. Alex bent pipes to determine the difference in the amount of force it would take to bend pipe properly threaded and inserted as compared to the pipe as manufactured in the Ercanbrack home. Dr. Alex concluded it was possible to crack the properly threaded and inserted pipe at about 80 pounds of force and that the over-threaded and under-inserted pipe was weaker than properly threaded and inserted pipe. (R. at 6698:124; 7008:59-60)

Based on these separate tests, Dr. Alex concluded it would be possible to crack the pipe if the hole and pipe did not properly align. (R. at 6698:124) Dr. Alex, however, did not combine the two tests to determine if he could actually crack the pipe in trying to force it into position. (R. at 7008:65) Furthermore, the test regarding the amount of force necessary to get the pipe into position assumed the piping was connected at two points. As the testimony at trial indicated, however, such an assumption is contrary to Oakwood's manufacturing process. (R. at 7004:156-158; 166-67) As such, the bending and force tests did little to shed light on what actually happened. The tests

are after-the-fact tests done to corroborate a preconceived story rather than to determine what happened.

In contrast, David Moore replicated the force and deflection in the piping. (R. at 7011:80-93) Because the system is not rigid as Dr. Alex opines, it takes significantly more force and a tremendous amount of deflection in order to get enough force to crack a piece of the pipe. (R. at 7011:93) The system acts like a spring because it is not rigidly fixed. (R. at 7011:93) Accordingly, the pipe would crack at some other point rather than at the range riser as Dr. Alex believes. (R. at 7011:93)

Next, Dr. Alex's examination of the fracture surface yielded inconclusive results. All of the experts agreed the fracture surface was consistent with a one time fracture caused by a single event, such as an explosion. (R. at 6698:65, 69, 84; 7008:101 (Dr. Alex); R. at 7007:31 (Thatcher); 7011:64 (Moore)) Dr. Alex testified from a metallurgic standpoint it was impossible to tell which happened first, the explosion or the three fractures. (R. at 6698:84) In other words, all experts agreed the explosion had enough force to cause all the fractures in the gas piping system, and the fracture surfaces were consistent with an explosion. (R. at 6698:65). Accordingly, the evidence on the fracture surface did not support Dr. Alex's theory of a two-step cracking process in the pipe.

Dr. Alex, however, testified he would not expect to see any evidence of a latent non full thickness crack. (R. at 6698:74; 7008:25, 33) In fact, Dr. Alex did not

even examine the fracture surface under a scanning electron microscope because he was certain he would not see any evidence on the fracture surfaces. (R. at 6695:37; 7008:26) Dr. Alex did not run any tests to determine whether it was possible to achieve a non full thickness crack, nor did he achieve a non full thickness crack to demonstrate the fracture surface would be consistent with the three fractures found after the explosion. (R. at 7008:65)⁹

As support for his story, Dr. Alex relied on a test done by Oakwood's expert, David Moore, to show it was possible to get a non full thickness crack. (R. at 6698:134-35; 7008:65; 7011:93) David Moore testified in real life circumstances, however, it is nearly impossible to start a fracture of a pipe and then have the force stopped in a manner to prevent a full crack from occurring. (R. at 7011:93-96) Additionally, David Moore stated the only reason he was able to get this kind of crack was he was using a machine to apply the force. (R. at 7011:93-94) Naturally occurring forces do not have the ability to immediately sense the failure and immediately stop applying force. (R. at 7011:94-95) David Moore unequivocally stated he did not think it was possible to get a non full thickness crack in the Ercanbrack piping.

In further support of his conclusion that the evidence did not support a

⁹ Dr. Alex did leave some fractured pipes in his basement to show that the pipes would not oxidize to any significant degree which would be noticeable. (R. at 7008:31-35) As a result of this test, Dr. Alex concluded what he already believe was in fact the case, i.e. that no arrest lines would be visible. (R. at 7008:35)

latent pre-crack, David Moore analyzed the fracture surface of the recovered pipe from the Ercanbrack home. (R. at 7011:48-76) Unlike Dr. Alex, David Moore applied scientific principles and used a scanning electron microscope to examine the fracture surfaces on the three fractures under the home and took enlarged photographs of the fractures to document his analysis. (R. at 7011:49-56)

Exhibits 250 and 252 are magnified photographs of the fracture surface of the range riser, which Dr. Alex identified as the most likely source of a pre-explosion non full thickness crack. (R. at 7011:51-52, 60, 64) The magnified photographs of the fracture surface of the range riser indicated dimpling all over the surface. (R. at 7011:64) The dimples result from excessive overload forces well above fatigue forces. (R. at 7011:64) In addition to the dimples, the fracture surface had no signs of any progressive cracking, that is a crack that starts and stops at various stages. (R. at 7011:64) Based on this examination of the range riser, David Moore did not find any evidence of a pre-existing crack from the manufacturing process. (R. at 7011:65) David Moore's examination of the fracture surface indicated it was a one time event that caused the fracture. (R. at 7011:65)¹⁰ With respect to each of the three fracture surfaces, David Moore concluded each was inconsistent with a pre-existing crack and consistent with a

¹⁰ The fact that the fractures could have been caused by the explosion itself is agreed to by all experts in this case. (R. at 6698:65, 69, 84; 7008:109 (Alex); 7007:31 (Thatcher))

one time crack from an explosion.¹¹ (R. at 7011:66)

Finally, Dr. Alex has no idea what force actually caused the alleged non full thickness crack to become a full thickness crack. (R. at 6698:76; 7008:65-66). Dr. Alex believes thermal expansion and contraction is the most probable subsequent force to cause the full crack to develop. (R. at 6698:75-76; 7008:65) Dr. Alex, however, conducted no tests to determine if thermal expansion and contraction could yield enough force to finally crack the pipe. (R. at 6698:76)

Dr. Alex did not try to replicate or test his theory about what happened. His isolated after-the-fact tests were done merely to bolster his story not test or prove it. As the Texas Supreme Court discussed: “Assuming [Dr. Alex] was correct, he has offered nothing to suggest that what he believes *could have* happened actually *did* happen. His opinions are little more than ‘subjective belief or unsupported speculation.’” Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 728 (Tex. 1998) (emphasis in original).

On the other hand, Oakwood’s expert, David Moore examined the fracture surface and found contrary evidence to Dr. Alex’s story and assumption about what would be seen on the fracture surface. See Pride v. BIC Corp., 218 F.3d 566, 578 (6th Cir. 2000) (excluding plaintiff’s failure analysis expert because expert had failed to conduct timely tests to validate his theory and noting defendant’s expert had conducted

¹¹ One of the fracture surfaces could not be adequately cleaned to allow any analysis of the cause of the fracture. (R. at 7011:66)

tests which contradicted plaintiff's expert's theory). When Dr. Alex's story is examined for what it is, it becomes evident that his story is nothing more than a series of assumptions and unfounded conclusions stacked on one another without any scientific methodology or reasoning to support it. The trial court erred in not excluding his testimony at trial.

II. If this Court Believes Dr. Alex's Testimony Was Not "Novel" Scientific Testimony Requiring a Rimmasch Hearing, This Court Should Adopt the Reasoning of United States Supreme Court and Require All Expert Testimony to Meet Certain Minimum Requirements for Reliability.

As set forth above, Dr. Alex's testimony is inherently unreliable. The trial court conducted a Rimmasch hearing to determine if his testimony was sufficiently reliable as novel scientific testimony. Conceivably, this court could determine that Dr. Alex's theory was not novel scientific testimony subject to Rimmasch. See Patey v. Lainhart, 1999 UT 31, ¶16, 977 P.2d 1193. If this court determines Dr. Alex's failure analysis is not testimony founded on novel scientific theories or principles, Oakwood requests this court adopt a standard under Rule 702 that applies a Rimmasch standard of reliability to all expert testimony. The application of a reliability standard to all expert testimony should be a flexible standard dependent on the case and the expert.

For example, in this case, the court would not need to inquire into the qualifications of the expert or the general acceptance of failure analysis. The court's inquiry would be whether Dr. Alex followed accepted practice in conducting a failure analysis and whether he used sound methodology to arrive at his conclusions.

Recently, the United States Supreme Court determined that its standard for reliability in Daubert v. Merrell Dow, 509 U.S. 579, 113 S. Ct. 2786 (1993) applied to all expert testimony, not just scientific or technical testimony. See Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 148-49, 119 S. Ct. 1167, 1174-75 (1999) (holding Rule 702 of Fed. R. of Evid. with “respect to all such matters, ‘establishes a standard of evidentiary reliability.’”). In determining certain reliability standards, as set forth in Daubert, applied to all expert testimony, the court examined the language of Rule 702, which states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Federal R. Evid. 702 (upon which the Utah rule is modeled and is in fact identical).¹²

Examining Rule 702, the U.S. Supreme Court noted the “language makes no relevant distinction between ‘scientific’ knowledge and ‘technical’ or ‘other specialized’ knowledge. It makes clear that any such knowledge might become the subject of expert testimony. In Daubert, the Court specified that it is the Rule’s word ‘knowledge,’ not the words (like ‘scientific’) that modify that word, that ‘establishes a standard of evidentiary reliability.’” Kumho, 526 U.S. at 147, 119 S. Ct. at 1174. Similarly, this court discussed in State v. Rimmasch the same principle: “it can be said that evidence not shown to be

¹² In response to Daubert and Kumho, federal rule 702 was amended in 2000 to add additional language reflecting those opinions. The Utah rule has not been amended to contain the new language.

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., 775 P.2d 388, 397-98 (Utah 1989) (quoting Utah R. Evid. 702). Accordingly, Rimmasch and Rule 702 of the Utah Rules of Evidence support the reasoning adopted by the U.S. Supreme Court in Kumho.

Other courts that have examined the issue have similarly held that all experts should meet certain standards of reliability before they are allowed to testify at trial. Prior to the U.S. Supreme Court’s decision in Kumho, the Texas Supreme Court was confronted with the same issue. In E.I. du Pont de Nemours and Co., Inc. v. Robinson, 923 S.W.2d 549 (Tex. 1995), the Texas Supreme Court using a substantially similar analysis to Kumho ruled that all expert testimony was subject to a reliability standard. See id. at 556. Shortly, after Robinson, the Texas Supreme Court reaffirmed its decision that nothing in Rule 702 limits reliability to only novel scientific testimony. See Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 720-21 (Tex. 1998).¹³

¹³ Texas and the federal courts are not alone in applying a threshold standard to all expert testimony. Several other states have expressly adopted the standard announced in Kumho and applied it to all expert testimony. See Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575 (Ky. 2000) (adopting Kumho standard for all expert testimony in Kentucky); Safeco Ins. Co. of America v. Chrysler Corp., 2002 WL 1772925, *6-7 (La. Ct. App. 3rd Cir. 2002) (applying Kumho standard to non-scientific expert testimony and excluding expert’s opinions); Adeola v. Kemmerly, 822 So. 2d 722, 727 (La. Ct. App. 1st Cir. 2002); Days Cove Reclamation Co. v. Queen Anne’s County, 2002 WL 31011262, *9 (Md. Ct. Spec. App. 2002) (“An expert opinion ‘derives its probative force from the facts on which it is predicated, and these must be legally sufficient to sustain the opinion of the expert.’”). Additionally, other states which have not adopted the federal standard

In addition to the language of Rule 702 which suggests it should be applied across the board to all experts, other considerations also support applying Rimmasch in some form to all expert testimony. First, the determination of what constitutes “novel” scientific testimony subject to Rimmasch versus “pedestrian” scientific testimony is a fine line. As the court recognized in Kumho: “There is no clear line that divides one from the others. Disciplines such as engineering rest upon scientific knowledge. Pure scientific theory itself may depend for its development upon observation and properly engineered machinery. And conceptual efforts to distinguish the two are unlikely to produce clear legal lines capable of application in particular cases.” Id. at 148, 119 S. Ct. at 1174. As discussed above the language of Rule 702 does not distinguish between the various types of expert testimony: “It would be an odd rule of evidence that insisted that some expert opinions be reliable but not others. All expert testimony should be shown to be reliable before it is admitted.” Gammill, 972 S.W.2d at 726.

in Daubert have similarly applied their own standard in a manner consistent with Kumho to all expert testimony. See Commonwealth v. Montanez, 769 N.E.2d 784, 795-96 (Mass. App. Ct. 2002) (applying Massachusetts standard in Commonwealth v. Lanigan, 641 N.E.2d 1342 (Mass. 1994) and Kumho standard to expert testimony); Kemp v. State, 2002 WL 1901333 (N.J. 2002) (New Jersey has a similar standard to Daubert as set forth in Rubanick v. Witco Chemical Corp., 593 A.2d 733 (N.J. 1991) which it applies consistent with Kumho); Taylor v. Abernethy, 560 S.E.2d 233, 239-40 (N.C. Ct. App. 2002) (North Carolina has adopted its own standard in State v. Goode, 461 S.E.2d 631 (N.C. 1995) which is based on Daubert and interpreted consistently with Kumho); State v. Stevens, 78 S.W.3d 817, 832-34 (Tenn. 2002) (Tennessee has its own case standard as set forth in McDaniel v. CSX Trans., Inc., 955 S.W.2d 257 (Tenn. 1997) which this opinion applies to all expert testimony).

Second, and perhaps most importantly, relying on the jury to assess an expert's methodology and the validity of her/his opinions is contrary to the requirements of expert testimony and contrary to common sense. As discussed, expert witnesses offer scientific, technical or specialized testimony. Experts with specialized knowledge testify in order to assist the jury in determining what happened. Without reliability standards in place, an expert may not be of any assistance to the jury and will confuse the jury. By its very nature, expert testimony is outside the ken of the jury.

If this court determines that Dr. Alex's testimony was not novel scientific testimony subject to Rimmasch, Oakwood requests this court extend Rimmasch and hold that all expert testimony meet certain threshold reliability standards in order to be admissible. As set forth in point I above, Dr. Alex's testimony fails to meet even the most relaxed standards of reliability. Under this standard, Dr. Alex's testimony should be excluded.

III. Plaintiff Failed to Show Oakwood's Acts Proximately Caused the Explosion and Resulting Injuries.

The trial court erred in denying Oakwood's pre-trial Motions for Summary Judgment, its Motion for a Directed Verdict and its Post-trial Motion for J.N.O.V. because plaintiff's evidence regarding the proximate cause was insufficient as a matter of law and required the jury to speculate. It is well settled: "The party with the burden of proof does not make an issue for the jury's determination by relying on the hope that the jury will not trust the credibility of the witnesses. If all of the witnesses deny that an

event essential to the plaintiff's case occurred , the plaintiff cannot get to the jury simply because the jury might believe these denials. There must be some affirmative evidence that the event occurred.” 9A Wright & Miller, *Federal Practice and Procedure: Civil* 2d § 2527, at 288. In this case, the event essential to plaintiff's case is that Oakwood would force the gas pipes into place and in the process crack one of the pipes.¹⁴

In order to establish its case against Oakwood, plaintiff had to show: ““(1) that the [manufactured home] was unreasonably dangerous due to a defect or defective condition; (2) that the defect existed at the time the product was sold, and (3) that the defective condition was a cause of the plaintiff's injuries.”” Burns v. Cannondale Bicycle

¹⁴ Oakwood acknowledges that in challenging a denial of a directed verdict or J.N.O.V. determination, it has a duty to marshal the evidence in support of the plaintiff's case. See Brewer v. Denver & Rio Grande Western R.R., 2001 UT 77, ¶33, 31 P.3d 557. In this case, Oakwood, as it did at trial, concedes the pipe was overthreaded in some places and it was over or underinserted into some of the pipe joints. The rest of plaintiff's theory is that because of this threading and insertion, the pipe was shortened by one and five-sixteenth inches. (R. at 7008:51) Based on the threading and insertion identified in the piping, plaintiff relied on Dr. Alex's testimony to explain how this discrepancy caused the explosion. (R. at 7008:54-55) Finally, Dr. Alex states there is no evidence that another hole was drilled. (R. at 7008:55) Dr. Alex's testimony and testing has been set forth at length in the statement of facts and in point I of this brief. The threading and insertion evidence and Dr. Alex's testimony is the only evidence of causation presented at trial. Importantly, Dr. Alex conceded no evidence exists to prove Oakwood put excessive force on its pipe to make it fit. (R. at 6698:83) According to Dr. Alex, no evidence existed on any of the fracture surfaces. (R. at 7008:72) And the fractures were consistent with having been caused by the explosion rather than prior to the explosion. (R. at 7008:101) Finally, there was no evidence that a subsequent force caused the pipe to move and cause a full thickness crack. (R. at 7008:117) Accordingly, other than the above mentioned evidence and Dr. Alex's testimony which is set forth at length (see, e.g., pp. 51-54, *supra*), there is no other evidence to marshal.

Co., 876 P.2d 415, 418 (Utah 1994). In this case, plaintiff's evidence failed to establish any of these elements.

First, plaintiff strained to identify a defect or defective condition. After examining the pipe recovered from the explosion, plaintiff's experts Thatcher and Alex concluded the pipe had too many threads in some places, the pipe had not been inserted far enough into some joints, and the pipe had been inserted too far into other joints. This threading and insertion, according to plaintiff's experts, violated certain ANSI and ASME standards. Although the ANSI and ASME standards are referenced by the governing HUD standards, the HUD regulations set the standard which the home must meet. (R. at 7009:142-44) The only expert on standards governing the manufactured home industry testified the gas piping as manufactured by Oakwood would pass the applicable regulations. (R. at 7010:61-64) Thus, the only expert, and the expert relied on by Dr. Alex regarding the applicable standards, testified the Oakwood home did not have a defect due to overthreaded and over and underinserted pipes.¹⁵

Next, the objective evidence is inconsistent with a defect existing at all or at the time the house was sold. It is undisputed the gas pipes in the Ercanbrack home did

¹⁵ Utah Code Ann. § 78-15-6(3) provides that there is a rebuttable presumption that a product is free from any defective condition if the methods of manufacturing and techniques for testing are in conformity with government standards for the industry. Indeed, as part of his "send a message" argument, plaintiff's counsel conceded the HUD standard was not interpreted or enforced to require a certain amount of threads or insertion into joints. (R. at 7012:19-21)

not leak when it left Oakwood's manufacturing facility, when it was hooked to the outside propane tank or after the explosion. Additionally, it is undisputed the Ercanbracks lived in the home for several months without experiencing or noticing any leaks in the propane system. In order to prevail, plaintiff had to show a manufacturing defect which existed when the home was sold. Under the applicable HUD regulations, the objective physical evidence showed no defect existed before or after the explosion. Finally, the undisputed testimony showed any problems due to threading and assembly of the pipes would not have caused Oakwood to put force on the pipes in a manner to create a crack. (R. at 7004:73-74, 120-21, 156-58, 166-67)

Finally, plaintiff relied on Dr. Alex to establish the causal connection between Oakwood's manufacturing of the gas pipes and the explosion that occurred. Dr. Alex tried to make the required connection by identifying a potential defect in the gas pipes and then making some post-hoc explanations to show how the defect could have led to the explosion. In substance, the sufficiency of the causal connection essentially succeeds or fails based on the admissibility and foundation for Dr. Alex's testimony. This court has recognized, however, an expert's opinion "is nevertheless limited by the foundation laid for it. A declaration about causation is inadmissible 'where an expert witness has not testified to sufficient facts on which to base his opinion.'" Patey v. Lainhart, 1999 UT 31, ¶23, 977 P.2d 1193.

As the Utah Court of Appeals has discussed, "it is not enough to merely

contend that a defect existed, show that an accident occurred, and assume the two are necessarily related.” Burns v. Cannondale Bicycle Co., 876 P.2d 415, 418 (Utah Ct. App. 1994) (upholding grant of summary judgment where plaintiff had no evidence of defect on bicycle). Nevertheless, Dr. Alex does just that. Dr. Alex uses the fact the explosion occurred to assume a manufacturing defect caused the explosion. Because some of the gas pipes recovered after the explosion were fractured, Dr. Alex assumes one of the fractures was the source of the leak. (R. at 3852-53; 6698:66-78; 7008:16, 21) Dr. Alex did not have the requisite foundation for his testimony. The foundational problems were set forth at length in section I-B.

In this case, plaintiff presented a story to the jury regarding pipe threading and insertion in an attempt to show a manufacturing defect. The evidence does not support plaintiff’s version of the event. “When the proximate cause of an injury is left to speculation, the claim fails as a matter of law.” Mitchell v. Pearson Enterprises, 697 P.2d 240, 246 (Utah 1985). In order for the jury to find a defect and causation, the jury had to ignore or disbelief uncontradicted witness testimony,¹⁶ speculate as to manufacturing

¹⁶ Like Dr. Alex, the jury is not entitled to completely disregard or disbelief the uncontradicted testimony from Oakwood’s employees. See Quintana-Ruiz v. Hyundai Motor Corp., 303 F.3d 62, (1st Cir. 2002) (discussing jury is not at liberty to disregard uncontradicted testimony unless it is inherently improbable, contradictory or riddled with omissions); Perfetti v. First National Bank of Chicago, 950F.2d 449, 454 (7th Cir. 1992) (finding jury could not reasonably disbelieve all of defendant’s employees’ testimony); Martin v. Citibank, N.A., 762 F.2d 212, 217-18 (2nd Cir. 1985) (holding plaintiff failed to offer sufficient evidence to prove claim where only evidence contradicted discrimination); Kenneth E. Curran, Inc. v. Salvucci, 426 F.2d 920, (1st Cir. 1970)

processes which put undue force on the pipe and speculate about a later unidentified force which caused an alleged non full thickness crack to grow into a full crack. When the jury is required to speculate about an essential element of plaintiff's case as was required in this matter, the claim fails as a matter of law. The trial court erred in not granting Oakwood's Motion for a Directed Verdict or its Motion for J.N.O.V.

IV. After Oakwood Relied on Plaintiff's Admissions During Its Opening Statement, the Trial Court Erred by Allowing Plaintiff to Offer Evidence Contrary to the Admission.

Allowing evidence contrary to the admission after Oakwood relied on the admission as conclusively established was highly prejudicial to Oakwood and incited the jury's passion against Oakwood. Rule 36(b) of the Utah Rules of Civil Procedure provides: "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." Utah R. Civ. P. 36(b). The first part of Rule 36 provides that it is self-executing. See Utah R. Civ. P. 36(a)(2); In re Pendleton, 2000 UT 77, ¶42, 11 P.3d 284. Due to the self-executing provision, Oakwood was entitled to rely on plaintiff's admission at trial.¹⁷

Only after Oakwood represented to the jury certain facts were conclusively

(noting even though testimony was "evasive" and "incredible at times" it still required jury to speculate); Federal Ins. Co. v. Summers, 403 F.2d 971, 974 (1st Cir. 1968) (noting trier of fact may not use disbelief of witness testimony alone to find the opposite is true).

¹⁷ In fact, plaintiff knew Oakwood could rely on the admissions, as Oakwood had relied on other admissions contained in the same set of Request for Admissions in its request for partial summary judgment against SS Supply. (R. at 5887-88; 6994:24-26)

established, did Oakwood learn plaintiff was intending to present previously undisclosed evidence and testimony to contradict the admission. (**R. at 6697:24-29**) At this point, Oakwood, not plaintiff, brought the issue of contradictory evidence to the court's attention. (**R. at 6697:24**) Rule 36 requires the party seeking to amend or withdraw an admission to present a motion to the court. Utah R. Civ. P. 36(b); see also Carney v. Internal Revenue Service, 258 F.3d 415, 419 (5th Cir. 2001) (stating proper procedure for amending or withdrawing an admission is to file a motion with the court); Metzler v. Lykes Pasco, Inc., 972 F. Supp. 1438, 1443 (S.D. Fla. 1997) ("An admission that is not withdrawn or amended cannot be rebutted by contrary testimony or ignored by a district court."). As part of a motion to withdraw or amend an admission, the moving party, plaintiff in this case, must show: "(1) amendment or withdrawal would serve the presentation of the merits of the action, and (2) amendment or withdrawal would not prejudice [the nonmoving party] in maintaining [its] action on the merits." Langeland v. Monarch Motors, Inc., 952 P.2d 1058, 1061 (Utah 1998).

In this case, plaintiff never submitted a motion to withdraw the admissions. (**R. at 6697:24**) Notwithstanding the failure of plaintiff to move to amend or withdraw the admissions, the trial court addressed the issue on Oakwood's request to prevent plaintiff from offering the contrary evidence. After reviewing the admissions and listening to counsel, the trial court determined the admission was ambiguous (absent any such objection from plaintiff in his response to the original request for admission) and

plaintiff was entitled to offer evidence to clarify his responses to the admissions. (**R. at 6697:24-29**) This ruling was an abuse of the trial court's conditional discretion and highly prejudicial to Oakwood.

This court has ruled: "The trial court does not have discretion to unilaterally disregard the admissions." Jensen v. Pioneer Dodge Ctr., Inc., 702 P.2d 98, 100 (Utah 1985); Langeland, 952 P.2d at 1060. Nevertheless, the trial court in this case made an independent determination that the admissions were ambiguous.

In Langeland, the trial court similarly allowed amendments to be withdrawn without any findings or supporting analysis. See id. at 1061. In reviewing that grant, this court reviewed the court's decision de novo. See id. In this case, the trial court was influenced by the what it perceived to be ambiguities in the admission and evidence which tended to suggest the admission was incorrect. Accordingly, the court believed the merits would be served by allowing plaintiff to introduce evidence contrary to the admission.

Had plaintiff moved for amendment of the admission prior to trial, the trial court's ruling may have been proper in light of the evidence which plaintiff brought forward. In this case, however, two factors indicate the trial court should have denied plaintiff's request to offer contrary evidence. First, Oakwood had already relied on the admission and made representations to the jury regarding the admission. Second, the evidence used to contradict the admissions had not previously been disclosed to Oakwood

to show it would not be justified in relying on the admission. As courts examining the similar federal rule have observed: “Once trial begins, a more restrictive standard is to be applied in permitting a party to withdraw or amend an admission.” 999 v. C.I.T. Corp., 776 F.2d 866, (9th Cir. 1985) (noting subject of admission had already been presented to the jury); American Automobile Assoc. v. AAA Legal Clinic of Jefferson Crooke, 930 F.2d 1117, 1120 (5th Cir. 1991) (holding once trial has begun, a court will not permit withdrawal or amendment “unless failure to do so would cause ‘manifest injustice.’”).

If plaintiff believed this admission was ambiguous or incorrect, plaintiff should have objected to the admission or simply denied it. Instead, plaintiff affirmatively admitted to the facts as set forth in the admission. After plaintiff listened to Oakwood’s opening statement which relied on the admission, plaintiff indicated he had evidence contrary to the admission which he intended to offer. Although this evidence tends to indicate the admission was incorrect, plaintiff must also show no prejudice would result to Oakwood in introducing the evidence. Because Oakwood had already presented the admission to the jury as a conclusive fact, allowing plaintiff to offer contrary evidence with no instruction or clarification to the jury was devastating and prejudicial to Oakwood.

As has been discussed in prior points, the explosion’s cause and origin was difficult, if not impossible, to ascertain from the recovered remnants of the explosion. In order to attempt to meet his burden, plaintiff relied on circumstantial evidence, expert

testimony and credibility determinations. The credibility of the parties, their counsel and the witnesses was a crucial factor in this case. By introducing this contrary evidence, plaintiff, in essence, was able to suggest Oakwood was lying and misrepresenting facts. Prior to plaintiff disclosing this evidence after the trial had begun, Oakwood had no reason to anticipate the sheriff's log was incorrect regarding the time of plaintiff's call. The log was kept by a disinterested third party as part of its regular business.

Once the court allowed this evidence to come in, Oakwood had to abandon this line of evidence and hope the jury forgot about the opening as well. Plaintiff reminded the jury about Oakwood's statements about when the call was made, stating in Closing: "We'll [Oakwood] even tell you what Bill did do and imply that something was wrong with that. They never proved that, did they? What they did was, they changed in mid stream. They made their opening statement and then all of a sudden they changed because they had to, because the police officers are like, no, that's all wrong." (**R. at 7012:9-10**)

Although allowing the contrary evidence to come in after Oakwood's reliance would always be prejudicial, the circumstances of this case exacerbated the prejudice. Plaintiff was not only allowed to contradict his sworn admission but also to suggest Oakwood's credibility was suspect. Plaintiff's closing argument stated to the jury in no uncertain terms that Oakwood had made a promise it could conclusively show a time discrepancy which later turned out to be false. In order to prove his case, plaintiff

had to have the jury believe Oakwood lied about its manufacturing process. The uncontradicted testimony of Oakwood's employees showed the force necessary to sustain Dr. Alex's theory would not occur given the system for building the homes. Now, plaintiff was able to point to a specific representation from Oakwood's opening statement which it was unable to prove. Plaintiff seized on this opportunity to paint Oakwood as dishonest and desperate. Accordingly, the trial court's decision to allow the contrary evidence was highly prejudicial to Oakwood and a reversible error warranting a new trial of this matter.

V. The Trial Court Erred In Refusing To Grant a New Trial Because of Prejudicial Remarks Made By Plaintiff's Counsel In Closing Argument.

Judge Higginbotham, in Draper v. AIRCO, Inc., 580 F.2d 91 (3rd Cir. 1978), reversed a jury verdict for plaintiff in a wrongful death suit and remanded the case for a new trial due to plaintiff's counsel's misconduct in closing arguments. Judge Higginbotham framed the issue with which this Court must wrestle:

In reaching this conclusion, we wish to emphasize that we do not expect advocacy to be devoid of passion. A life has been lost here and the family is entitled to have someone speak with eloquence and compassion for their cause. But jurors must ultimately base their judgment on the evidence presented and the rational inferences therefrom. Thus, there must be limits to pleas of pure passion and there must be restraints against blatant appeals to bias and prejudice. These bounds of conduct are defined by the Code of Professional Responsibility and the case law.

Id. at 95.

The Utah Rules of Professional Conduct provide at Rule 3.4(e) that a lawyer shall not:

- (e) In trial, elude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts and issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt of innocence of an accused;

As noted above, it is this proscription, along with case law, that will guide this Court's assessment of the prejudicial impact of plaintiff's counsel's misconduct during closing arguments. Appellant asserts that plaintiff's arguments were prejudicial in the following respects: (1) use of "send a message" argument when no punitive damages were claimed; (2) reference to merits of plaintiff's case; (3) reference to defendant as "out-of-state" corporation interested in making a profit; and (4) statements regarding witness credibility.

In Fisher v. McIlroy, 739 S.W.2d 577 (Mo. Ct. App. 1987), the defendant appealed from the trial court's ruling vacating a jury verdict in favor of the defendant on his counterclaim against the plaintiff. The Court of Appeals affirmed the granting of a motion for a new trial on the grounds that defense counsel's conduct in closing arguments had prejudiced the jury whose award had been based on bias, passion and prejudice.

The court noted that defense counsel in its closing argument had invited the jury to respond in damages to show to the plaintiff and others "like him" that the

plaintiff's behavior in operating his vehicle as alleged by the defendant was almost wanton. Id. at 582. The defendant contended that his remarks did not constitute a request for punitive damages, but only a proper request for compensation. The appellate court reasoned:

The closing argument to a jury that the jury could, by its verdict, speak out about its feelings as to a certain matter in issue at trial and that the jury could send a message to a particular group in the community through its verdict is viewed as injecting the issue of punitive damages into a case through the argument, even though such damages had not been pled. Smith v. Courter, 531 S.W.2d 743, 747 (Mo. 1976). This argument entitled the opposing party to a new trial. Id.

Id. The Court of Appeals held that the argument by defendant's attorney for the jury to "send a message to the young people in this city" did indeed inject a plea for punitive damages into the trial, the argument had been objected to by plaintiff's counsel, and for that reason, the trial court's order granting a new trial was affirmed.

In Maercks v. Birchansky, 549 So. 2d 199 (Fla. Dist. Ct. App. 1989), the defendant appealed from a jury verdict awarding the plaintiff \$750,000.00 in compensatory damages in a medical malpractice action. Defendant had made a motion for a new trial, arguing that plaintiff's counsel had engaged in improper argument during closing and had denied him a fair trial. The trial court denied the motion.

The medical malpractice suit had been for compensatory damages only. On appeal, the Florida Court of Appeals noted that it had stated repeatedly that "we will not

condone such arguments as were made in closing where counsel for plaintiff three times asked the jury as the ‘conscience of the community’ to ‘send a message with its verdict,’ . . .” Based on this misconduct, as well as plaintiff’s counsel making derogatory personal remarks about opposing counsel, asserting his personal opinion as to the credibility of a witness, and the justness of his cause, the court reversed and remanded for a new trial. See also Murphy v. Murphy, 622 S.2d 99 (Fla. Dist. Ct. App. 1993) (new trial; counsel “overstepped the boundaries of advocacy in expressing his personal views,” including his opinion that the jury should “send a message”); Masson v. Kansas Power & Light Co., 642 P.2d 113, 117 (Kan. Ct. App. 1982) (new trial; summation advised that a jury which returned a favorable verdict “will have done that one American duty and sent a message to a utility that you are not going to put up with this kind of treatment of your citizens”).

At this trial, plaintiff’s counsel made the following inflammatory and irreversibly prejudicial remarks:

If the parents of the children, HUD and Oakwood, if the parents don’t care why would the children care. Well, this is the time to teach the children a lesson. It is the only way to be able to send a message. This explosion is in HUD’s data base, but not because the pipe was substandard. So what difference does it make? They’re just going to put in there, well, people died in a manufactured home, that’s not going to do anything. It is of no consequence. The thread standard ain’t going to be enforced any better today than before the Ercanbrack family died. What does it take? It takes you to send a message.

* * *

Unfortunately, some corporations will do as little as they can get away with under the regulations and guidelines. And although these standards are law, HUD chooses not to enforce. Well, looks like we're going to have to send a message to Oakwood because no one else is. We are going to have to send a message that their practices are unacceptable.

Mr. Plant: Your Honor –

The Court: Mr. D'Elia. Mr. D'Elia, approach, please.

(R. at 7012:19-22)

At this point, the court gives a short, curative instruction that punitive damages are not an issue and that any damages awarded must be to compensate, not to punish. After such an extreme presentation of a punitive damages argument, however, the salutary effect of the trial court's curative instruction is best summed up by the trial judge in the case of O'Rear v. Freuhauf Corp., 554 F.2d 1304, 1309 (5th Cir. 1977):
“You can throw a skunk into the jury box and instruct the jurors not to smell it, but it doesn't do any good.”

Ercanbrack's counsel compounded the prejudicial nature of the closing argument when he improperly argued that if Oakwood's defenses as to liability were valid, the court would have dismissed Ercanbrack's claims prior to trial. The prejudicial effect of this argument cannot be underestimated and the comment in and of itself warrants a new trial.

In Donahue v. Intermountain Health Care, 748 P.2d 1067 (Utah 1987), the Utah Supreme Court affirmed a trial court's grant of a new trial because plaintiff's

counsel had insinuated in closing arguments that the case should have been resolved prior to trial, and plaintiff attempted to resolve the matter, but the defendant pushed the matter to trial. The Court observed that plaintiff's counsel's arguments appeared to be motivated by desire to stir up the jury emotionally against the defendant, and the arguments could have prejudiced the jurors against the defendant and caused them to render an inflated verdict. Id. at 1068. Consequently, this Court affirmed the trial court's grant of a new trial. Id.

A similar result is warranted in this case. Ercanbrack's counsel's improper arguments stirred the jury's emotions and unfairly prejudiced them against Oakwood. Although Oakwood's counsel objected to the argument and the court sustained the objection (**R. at 7012:70**), no curative instruction was given and the arguments irreparably tainted the proceedings and obviously had a strong influence on the jury's deliberation and their verdict. The fact that the jury awarded damages for Ercanbrack's personal lost earnings and benefits, contrary to the court's instructions, demonstrates that the jury acted under the influence of passion and prejudice. Ercanbrack's counsel's objectionable and prejudicial comments created an irregularity in the proceedings sufficiently severe to warrant a new trial

At the start of plaintiff's closing argument, counsel quickly pointed out that defendant Oakwood was an out-of-state North Carolina corporation. (**R. at 7012:4**) Not satisfied with noting Oakwood's citizenship, plaintiff's counsel goes on to inflame the

passion of the jury as follows:

How were the defendants negligent? Well, Oakwood is a large corporation with its principal office in North Carolina and plants in California, Texas, Colorado and other places. They build and they sell, they mass produce homes. They rely upon manufacturing a large number of homes and then producing them for making a profit just like any other corporation. (R. at 7012:15)

Taken in isolation, such arguments , which do not go to the merits of the case but are intended only to bias the jury, may not be sufficient to require reversal and remand for a new trial. This argument would not require reversal if it had not preceded plaintiff's "send a message" damages argument. First, plaintiff raises the ire of the jury by pointing out that the defendant is an out-of-state large corporation that is only interested in profit, and then instructs them that they must "send a message" to this large, out-of-state corporation that only seeks profit. The cumulative thrust of plaintiff's counsel's argument is that because the defendant is a large, rich corporation, and because they know that the plaintiff is a poor resident of their own county, the jury should base its verdict in favor of plaintiff on this financial disparity. "But justice is not dependent upon the wealth or poverty of the parties and a jury should not be urged to predicate its verdict on a prejudice against bigness or wealth." Draper v. AIRCO, Inc., 580 F.2d 91, 95 (3rd Cir. 1978).

It is in direct violation of Rule 3.4(e) for a lawyer at trial to allude to any matter that is not relevant or to express a personal opinion as to the credibility of a

witness or a litigant. Plaintiff's counsel expressly violated that prohibition several times during his closing argument. A prime example can be found in counsel's discussion of the testimony of John Bailey, an employee of former defendant SS Supply (**R. at 7012:75-76**) Plaintiff's counsel discusses Mr. Bailey, and his relationship with defense counsel in the following terms:

I think the better thing to do now – he says Bailey. You really believe Bailey? See the way he addresses Mr. Plant? Gee, under the circumstances, he is going to ask everything from him. Smiling at him. Boy, he knew exactly what he was talking about. Spit those questions and answers. As soon as I stood up, Good afternoon, Mr. Bailey. Good afternoon. When did you meet last? Silence. Sorry, I don't understand you, he said, oh, when did you meet with Mr. Plant? I don't remember. Three weeks ago was all it was said Mr Rigby. But he doesn't remember. It's because he doesn't want to tell you the truth. They're in cahoots. They are absolutely in cahoots. They met with them on times. I never met with Bailey, he doesn't talk to me, he talks with them. He's their witness. They're in cahoots but he is trying to make you believe that under the circumstances, gee, Bailey is most the objective guy in the world. He is just for the propane company. No, he's not. He's in cahoots with the Oakwood people right now because under the circumstances, whatever the reason, he locked himself into a story at one time. It just happens to fall it. Politics make strange bed fellows. He is with him. That's not the point.

And again, did you see what they stood up? Somebody's lying. Boom, they point right to him. Bill's not lying. (**R. at 7012:75-76**)

In one fell swoop, plaintiff's counsel accuses defense counsel of the subornation of perjury, accuses a witness of lying, and personally vouches for the fact that

his client is not lying. Admittedly, defense counsel did not object to this prejudicial comment. It was, however, error on the part of plaintiff's counsel to make such outrageous statements, the error should have been obvious to the trial court, and there is a reasonable likelihood of a more favorable outcome for Oakwood had plaintiff's counsel not made such outrageous accusations. See State v. Medina Juarez, 2001 UT 79, ¶18, 34 P.3d 187 (discussing standards to demonstrate plain error). Indeed, in light of the inflammatory quality and sheer quantity of plaintiff's counsel's misconduct during closing arguments, review is warranted to prevent plain error. See Bradley v. Romeo, 716 P.2d 227, 228 (Nev. 1986) (recognizing that "[t]he ability of this court to consider relevant issues *sua sponte* in order to prevent plain error is well established"); see also Kaas v. Atlas Chemical Co., 623 So. 2d 525, 526 (Fla. Dist. Ct. App. 1993) (attorney's expression of his personal opinion that an expert witness is a liar is misconduct warranting a new trial, and no objection is required because such arguments fall squarely within that category of fundamental error in which the basic right to a fair trial has been fatally compromised).

Plaintiff's counsel's attack on the credibility of Mr. Bailey and his laudatory comments about the credibility of his own client are both grounds for reversal of this verdict and remanding for a new trial. See, e.g., Blanch Road Corp. v. Bensalem Township, 57 F.3d 253, 264 (3rd Cir. 1995) (counsel's comment that a particular witness's testimony had been honest and accurate deemed inappropriate, new trial

granted); Commercial Credit Business Loans, Inc. v. Martin, 590 F. Supp. 328, 333 (E.D. Pa. 1984) (laudatory comments violate the rule against commenting on the credibility of a witness – only new trial could cure client’s inappropriate arguments). Finally, plaintiff’s inappropriate, prejudicial and inflammatory remarks during closing argument were compounded by counsel’s specifying a target amount for the jury to award. (**R. at 7012:31-34**, where plaintiff’s counsel first sets a damages starting point of \$6,883,288.00 and **R. at 7012:80**, where plaintiff’s counsel asserts that the jury should award up to \$10,000,000.00).

If this Court is going to “send a message” to trial counsel in the State of Utah, it should do so with respect to this issue and admonish counsel not to specify a target amount for the jury to award. “Such suggestions anchor the juror’s expectations of a fair award at a place set by counsel, rather than by the evidence.” Consorti v. Armstrong World Ind., Inc., 72 F.3d 1003, 1016 (2nd Cir. 1995). Again, in and of itself, counsel’s telling the jury what to award may not be such plain error as to mandate reversal. Under the facts of this case, however, and given the cumulative nature of plaintiff’s counsel misconduct during closing argument, this further instance of inappropriate statements to the jury requires reversal and remand for a new trial.

VI. SS Supply Was A Proximate Cause of the Injuries and the Amount of Its Settlement Should Have Been Disclosed to the Jury to Ensure a Proper Award.

“Utah courts have consistently recognized that “a more recent [or

criminal/intentional] act may . . . relieve the liability of a prior negligent actor under the proper circumstances.”” Bansasine v. Bodell, 927 P.2d 675, 677 (Utah Ct. App. 1996) (citation omitted). Assuming, *arguendo*, Oakwood manufactured a defective mobile home, the undisputed facts show SS Supply was an intervening and unforeseeable cause of the explosion and injuries. Whether or not a subsequent act can relieve a prior negligent party of liability depends on the foreseeability of the subsequent negligent act. See id.; Mitchell v. Pearson Enterprises, 697 P.2d 240, 245-46 & n.20 (Utah 1985). In this case, SS Supply provided a tank to the Ercanbracks that contained rust. It is undisputed that rust causes ethyl mercaptan to oxidize and lose its odor. (**R. at 2976-77**) It is well established that the odor is added to propane as a last warning of a propane leak. (**R. at 2976-77**)

Plaintiff’s pleading sets forth that had the propane still possessed its odor, the plaintiff and his family would have smelled the leaking propane and avoided the tragic explosion. (**R. at 2976-77; 5159; 5167-68; 5887-88; 6994:25**) Oakwood could not reasonably foresee that SS Supply would provide the Ercanbracks with a rusty tank, thereby depleting the propane of its odor and preventing the Ercanbracks from detecting a leak. Given plaintiff’s admissions and his pleadings, the trial court erred in not instructing the jury that SS Supply was a, if not the, proximate cause of the injuries.¹⁸

¹⁸ Due to the allotment of time to the parties to present their respective cases, Oakwood had little ability to both defend against plaintiff’s allegations and put on an affirmative case demonstrating SS Supply’s liability.

Prior to trial, SS Supply settled with plaintiff for the sum of \$3.25 million. In light of SS Supply's liability for supplying an unreasonably dangerous and defective propane tank, Oakwood requested the jury be informed not only of the settlement but also of the amount. Admittedly, this court has stated: "instances would be rare when the amount of the settlement should be disclosed." Slusher v. Ospital, 777 P.2d 437, 444 (Utah 1989). One of the concerns with disclosure of settlement is the jury will infer liability to a settling party, thereby relieving other defendants from a finding of fault. See id. at 442. Given the facts establishing SS Supply's liability, this problem is substantially mitigated in this case. In this circumstance, the jury cannot make an appropriate award unless it has a knowledge of the amount already paid.

VII. The Errors in this Case Were Substantial and Pervasive Enough to Undermine Any Confidence that a Fair Trial Was Had.

In addition to the six reversible errors set forth above, the trial in this matter was not conducted in a manner to afford Oakwood a fair opportunity. As such, the cumulative errors denied Oakwood its due process and a new trial is required. See United States Const. XIV Amend., § 1; Utah Const. Art. I, § 7. This court has stated: "While no one error by itself perhaps mandates reversal, the cumulative effect of the several errors undermines our confidence that defendants were able to present to the jury their theory of the case and that a fair trial was had." Whitehead v. American Motors Sales Corp., 801 P.2d 920, 928 (Utah 1990). In Whitehead, the trial court erroneously excluded some of defendant's evidence and then improperly restricted defendant's ability to cross examine

plaintiff's witness on the same issue. See id. This court found those two errors sufficient to warrant a new trial.

In this case, the errors were more pervasive. Similar to Whitehead, however, the errors were interrelated and built on one another. The trial court committed two additional errors which on their own may have been harmless, but when combined with the others were devastating. For example, the trial court set no deadlines for discovery or expert testing, as a consequence the parties were conducting rebuttal tests up until trial. In the end, however, only Oakwood's expert's last test was excluded. (**R. at 6697:19-22**) As discussed earlier, plaintiff's story of what caused the accident was not supported by facts in evidence or scientific methodology. Oakwood's expert constructed a full-scale replica of the gas piping system used in the Ercanbrack's home. This model was not used to for any novel scientific theory, but rather to show the jury how the pipes look and function. Despite the fact this model was nothing new or novel, the trial court excluded it citing its "10-day rule." (**R. at 6697:22**)

Furthermore, the trial took place over twelve days. Due to the burden of proof and defendant's cross examination, it often occurs that plaintiff's case-in-chief takes longer than defendant's. In this case, however, the disparity in the allotted time was so severe that it limited Oakwood's ability to put on its case. Oakwood was forced to exclude several witnesses it had intended to call. (**R. at 7007:17-20**) As discussed, Oakwood was not only defending against plaintiff's claims, but it also needed to put on

evidence showing SS Supply's culpability. Had the trial court, prior to trial, agreed to instruct the jury that SS Supply was a proximate cause, this burden could have been mitigated.

In discussing principles of fairness, this court long ago noted the concept of due process meant "that a party shall have his day in court—that is each party shall have the right to a hearing before a competent court, with the privilege of being heard and introducing evidence to establish his cause or defense, after which comes judgment upon the record thus made." Christiansen v. Harris, 163 P.2d 314, 316 (Utah 1945) This court went on to enumerate several factors essential to an action before a person may be deprived of life or liberty. See id. at 317. A part of the process involves not only the right to be heard, but the right to put evidence and exclude improper prejudicial evidence. Federal courts have recognized: "Cumulative errors, while individually harmless, when taken together can prejudice a defendant as much as a single reversible error and violate a defendant's right to due process of law." United States v. Allen, 269 F.3d 842, 847 (7th Cir. 2001). In this case, the accumulated errors occurred throughout the proceedings in this matter deprived Oakwood of its due process of law and resulted in an unsupportable jury verdict against it.

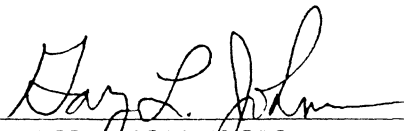
CONCLUSION

The foregoing errors undermine the confidence that a fair trial took place. As a result of these errors, the jury rendered an inflated verdict based on passion and

prejudice rather than the evidence presented. Oakwood respectfully requests this court either reverse and rule plaintiff's case fails as a matter of law or remand for a new trial with instructions.

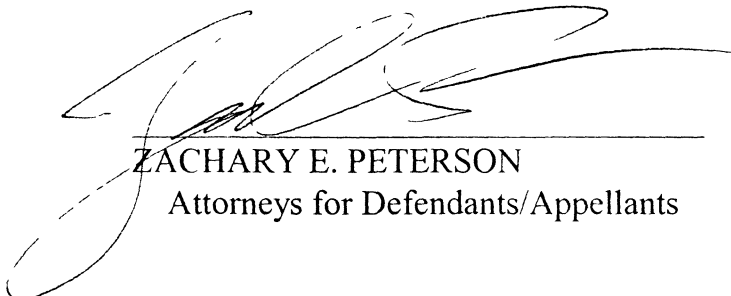
DATED this 3 day of December, 2003.

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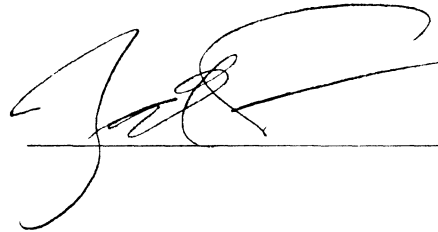
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Certificate was delivered via U.S. Mail on this 3 day of December, 2003, to the following:

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