

2008

Wendy Gudmundson, Kay Gudmundson v. Del Ozone, Ozonesolutions, L.C. Johnson Controls, Inc., John and Jane Does 1-10 : Brief of Appellee

Utah Supreme Court

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Recommended Citation

Brief of Appellee, *Wendy Gudmundson, Kay Gudmundson v. Del Ozone, Ozonesolutions, L.C. Johnson Controls, Inc., John and Jane Does 1-10*, No. 20080537.00 (Utah Supreme Court, 2008).
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IN THE UTAH SUPREME COURT	
<p>WENDY GUDMUNDSON, and KAY GUDMUNDSON,</p> <p>Plaintiffs and Appellants,</p> <p>vs.</p> <p>DEL OZONE, OZONESOLUTIONS, L.C., JOHNSON CONTROLS, INC., et. al.,</p> <p>Defendants and Appellees.</p>	<p>DEFENDANT/APPELLEE DEL OZONE'S BRIEF</p> <p>Supreme Court Case No. 20080537</p> <p>Trial Court Case No. 050916518</p>

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FILED
UTAH APPELLATE COURT

DEC 17 2008

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INTRODUCTION

Plaintiffs/Appellants Wendy and Kay Gudmundson (referred to collectively as “the Gudmundsons”) sued for Mrs. Gudmundson’s brain injury, alleging it was caused by exposure to ozone during a week in December 2004 at the Utah State Prison. The Gudmundsons allege Mrs. Gudmundson was exposed to dangerous levels of ozone because Johnson Controls, OzoneSolutions, and Del Ozone negligently installed a laundry ozone system at the prison.

Del Ozone, however, was a supplier, not an installer. Its role in the matter was limited to filling a purchase order for an ozone generator submitted to it by OzoneSolutions. The District Court granted Del Ozone’s motion for summary judgment on the ground that the Gudmundsons presented no evidence that the ozone generator was defective. In reaching this decision, the District Court noted that John Downey, the owner-operator of OzoneSolutions who installed the generator, testified that he tested the ozone generator after installation and it functioned properly. Because the Gudmundsons submitted no evidence to rebut this testimony, the District Court’s decision should be affirmed.

The Gudmundsons tacitly conceded that they did not carry their burden of submitting evidence sufficient to overcome summary judgment by requesting time for additional discovery under Rule 56(f). The District Court, however, denied this motion on the grounds that the Gudmundsons had ample time – 2 years – to conduct discovery, they received multiple extensions to discovery deadlines, and they failed to articulate

how the discovery sought would help them overcome summary judgment. Under Utah law, Rule 56(f) motions are upheld unless the District Court abused its discretion. The District Court did not abuse its discretion in denying the motion because the Gudmundsons had ample time to conduct discovery and the discovery sought would not establish the ozone generator was defective.

The District Court denied Del Ozone's motion for summary judgment on the ground that Del Ozone did not owe a duty to Mrs. Gudmundson, ruling that it was "not unforeseeable" that Mrs. Gudmundson could be injured by Del Ozone's product. Foreseeability, however, is only one of four factors a court must consider before imposing a duty. The other three factors – the likelihood of injury, the magnitude of the burden guarding against it, and the consequences of placing the burden on the defendant – all weigh in favor of not imposing a duty. Thus, this Court should affirm summary judgment in favor of Del Ozone on this ground as well.

Finally, the District Court granted summary judgment for all defendants on the ground of collateral estoppel. The District Court ruled that the Utah Labor Commission's determination that Mrs. Gudmundson was not injured by exposure to ozone precluded relitigation of the same issue in this case. The Court found that Mrs. Gudmundson had the ability in her worker's compensation proceeding to be represented by counsel, present evidence, and call and cross-examine witnesses, including expert witnesses. Moreover, the Utah Labor Commission relied on an Independent Medical Examination that found there was no evidence Mrs. Gudmundson's injuries were caused by exposure to ozone after a careful examination of her medical records and an inspection of the laundry ozone

system at the prison. Because the elements for collateral estoppel have been satisfied, the District Court's decision on this ground should be affirmed.

For each of these reasons, judgment in favor of Del Ozone should be affirmed.

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II. STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j) (“orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction.”).

III. SUMMARY OF ISSUES

The following are the issues relating to whether summary judgment in favor of defendant/appellant Del Ozone should be affirmed:

- I. Did the District Court abuse its discretion in denying the Gudmundsons’ Rule 56(f) motion for additional time?
 - A. Will the discovery requested in the Gudmundsons’ 56(f) affidavit – (1) interpretation of Mrs. Gudmundson’s MRIs, (2) information on neurotoxicity of ozone water disinfectant system, (3) information on water pulled from geothermal well beneath Bluffdale Prison, and (4) information from Del Ozone on whether instruments similar to ozone generator installed at prison have had defect problems – produce evidence that the ozone generator installed at the Bluffdale Prison was defective?
 - B. Were there legitimate reasons that the Gudmundsons were unable to conduct this discovery during the two years between the time they filed their Complaint and Del Ozone moved for summary judgment?
- II. Did the District Court err in granting Del Ozone summary judgment on the ground that the Gudmundsons presented no evidence that the generator was defective?
 - A. Can Del Ozone be liable absent evidence that the ozone generator was defective?
 - B. Is there any evidence to rebut the testimony of John Downey, owner-operator of OzoneSolutions, that the ozone generator was functioning properly after installation at the Bluffdale Prison?

- C. Does the lack of an automatic shut-off or ambient ozone monitor constitute a defect?
- III. Should summary judgment in favor of Del Ozone also be affirmed on the ground that Del Ozone did not owe a duty to the Gudmundsons?
 - A. Should the District Court have considered factors in addition to foreseeability prior to determining that Del Ozone owed the Gudmundsons a duty?
 - B. Under Utah law, did Del Ozone owe Mrs. Gudmundson a duty of care based on the sale of its generator to OzoneSolutions?
- IV. Should summary judgment in favor of all defendants be affirmed on the ground of Collateral Estoppel?

IV. SUMMARY OF ARGUMENT

I. The District Court did not abuse its discretion in denying the Gudmundsons' Rule 56(f) motion.

The District Court did not abuse its discretion in denying the Gudmundsons' Rule 56(f) motion for three reasons. First, the discovery the Gudmundsons sought will not lead to evidence that the ozone generator was defective, and therefore will not provide a basis for reversing summary judgment for Del Ozone. Second, the Gudmundsons had two years to conduct the discovery they sought and they did not provide a satisfactory explanation as to why they were unable to conduct this discovery during that time period. Third, the Gudmundsons' complaint that Del Ozone refused to stipulate to extend discovery deadlines for a third time fails because Del Ozone was under no duty to do so and the two years prior to Del Ozone's refusal provided the Gudmundsons with ample time to conduct discovery.

II. The District Court correctly granted Del Ozone summary judgment because the Gudmundsons presented no evidence that the ozone generator was defective.

The District Court correctly granted Del Ozone summary judgment. Del Ozone's role in this matter was limited to filling OzoneSolutions' purchase order for an ozone generator. OzoneSolutions installed the laundry ozone system, including the ozone generator, at the Bluffdale Prison. OzoneSolutions selected and purchased the generator from Del Ozone and OzoneSolutions installed it at the prison. Following installation, the generator was functioning properly according to John Downey, owner-operator of OzoneSolutions. The Gudmundsons presented no evidence rebutting Mr. Downey's testimony. Instead, the Gudmundsons argued without proof that the absence of an automatic shut-off and an ozone monitor constituted defects. These items, however, are accessories, not defects, and the Gudmundsons provide no evidence, expert or otherwise, supporting their assertion that the absence of these items constitutes a design or manufacturing defect.

III. In any event, the District Court should not have ruled Del Ozone owed the Gudmundsons a duty.

The District Court's analysis of whether Del Ozone owed the Gudmundsons a duty was incomplete. Duty is not solely determined by foreseeability. Under Utah law, the existence of a duty depends on balancing four factors: (1) foreseeability, (2) the likelihood of injury, (3) the magnitude of the burden of guarding against it, and (4) the consequences of placing this burden on the defendant. *See Slisze v. Stanley-Bostitch*, 1000 UT 20, ¶ 12. In the present case, the foreseeability was remote, as was the

likelihood of injury. By contrast, the consequences of placing a burden on Del Ozone would be extreme. No vendor who merely fills a purchase order, like Del Ozone, should be expected to insure proper installation of the parts ordered. Moreover, defendants Johnson Controls and OzoneSolutions are in a better position to answer for injuries stemming from installation because Johnson Controls contracted with the State to install the laundry ozone system and OzoneSolutions performed the installation.

IV. The District Court correctly granted summary judgment to all defendants on the ground of Collateral Estoppel.

The collateral estoppel arguments have been briefed by counsel for OzoneSolutions and Johnson Controls. Del Ozone hereby incorporates each and every argument in favor of collateral estoppel made and described by counsel for OzoneSolutions and Johnson Controls in their respective briefs.

V. STATEMENT OF THE CASE

I. The State of Utah hired Johnson Controls to install a Laundry Ozone System at its Bluffdale Prison and Johnson Controls hired OzoneSolutions to perform the installation.

In early 2004, Johnson Controls contracted with the State of Utah to install a laundry ozone system at its Bluffdale, Utah prison. (ROA 241). A laundry ozone system is an energy conservation system that reduces the amount of hot water and the total amount of water necessary for laundry by infusing washing machines with ozone. *See* Deposition of John Downey, at 12 (ROA 241). A laundry ozone system is designed for each laundry room based on two criteria: “one, how many washers are in the laundry; and, two, the size of the incoming water line.” Deposition of John Downey, at 13 (ROA

240). Based on the number of washers and size of the water line, the installer, in this case OzoneSolutions, determines the size of the ozone generator, the central component of the system. *See* Deposition of John Downey, at 14 (ROA 240). Other components included in a laundry ozone system include piping, a booster pump, and an ozone deconstruct module that converts the excess ozone back to oxygen. *See* Deposition of John Downey, at 15 (ROA 240).

Johnson Controls hired OzoneSolutions, L.C., to furnish and install the laundry ozone system at the Bluffdale Prison. *See* Deposition of John Downey, at 28 (ROA 241). Prior to this project, OzoneSolutions had installed approximately 200 laundry ozone systems. *See* Deposition of John Downey, at 52 (ROA 245). Based on this experience, OzoneSolutions had developed expertise in the installation of laundry ozone systems and their owner-operator, John Downey, testified:

Q: On the hierarchy – there is the State of Utah, Del Ozone, OzoneSolutions, and Johnson Controls. Who is the expert on that machine that you installed? When I mean “expert,” who was the expert on the specifications of how that machine works out of those four entities?

A: Say it again who they were.

Q: State of Utah, Del Ozone, OzoneSolutions, Johnson Controls. Who is the leading expert of those four entities that knows the most about how that machine works that you installed?

A: OzoneSolutions.

Deposition of John Downey, at 101-102 (ROA 249).

II. The Installation of the Laundry Ozone System.

OzoneSolutions installed the laundry ozone system at the Bluffdale Prison in early December of 2004. Tom Carson from Johnson Controls provided OzoneSolutions with “all the information on the number of washers and the size of the incoming lines.”

Deposition of John Downey, at 19 (ROA 241). Based on the information provided by Johnson Controls, OzoneSolutions selected the components for the system.

Although the Gudmundsons contend that “[t]he ozone generating system had been designed in part by Del Ozone;” this misstates Del Ozone’s involvement in the installation of the laundry ozone system at the Bluffdale Prison. Based on the information provided by Johnson Controls, OzoneSolutions selected the components for the laundry ozone system and installed the entire system, including the ozone generator, without Del Ozone’s assistance or consultation. *See* Deposition of John Downey, at 13 (ROA 240). Mr. Downey testified:

Q: Once you decided on the size of the generator and the different equipment that you were going to use in the prison system, did you advise Del Ozone of that?

A: Only through when we gave them a purchase order to buy it.

Deposition of John Downey, at 31 (ROA 241). In fact, OzoneSolutions opted to install a generator that it knew Del Ozone would not have recommended. Based on the number of washers and the size of the water line at the prison, OzoneSolutions determined that the laundry ozone system required a 15-gram generator. OzoneSolutions made this decision without consulting Del Ozone and Mr. Downey testified that he believed Del Ozone would have recommended a larger generator for the project:

Q: [D]id you purchase the generator before you arrived at the job site?

A: We issued the purchase orders for all of the equipment prior to us arriving, yes.

Q: Del Ozone wasn’t involved in deciding whether to use a 15-gram or wasn’t involved in deciding whether to use that specific generator?

A: No. Actually, the size that Del Ozone uses would have to be a larger generator than that.

Q: Okay. So you made the decision, not Del Ozone, to use the 15-gram generator?

A: Correct.

See Deposition of John Downey, at 37-38 (ROA 242). It is undisputed that OzoneSolutions provided no information to Del Ozone about the laundry ozone system at the prison other than the purchase order for the ozone generator. *See* Deposition of John Downey, at 13 (ROA 240). It is also undisputed that Del Ozone did not help install the laundry ozone system at the prison in any way. *See* Deposition of John Downey, at 171-172 (ROA 248-249).

When the installation was complete, OzoneSolutions tested the laundry ozone system, including the ozone generator, to make sure that it was functioning properly. Mr. Downey testified:

Q: And what is the – the purpose of the machine is to generate ozone; right? The purpose of the ozone generator is to generate ozone?

A: The primary component of a laundry ozone system is an ozone generator. The ozone generator is a combination of oxygen generator and ozone generator. It takes the ambient air, which has 20.9 percent oxygen, strips the nitrogen, and hydrogen air and increases that to 95 percent and then takes that 95 percent oxygen over to what they call a corona discharge cell, which is an electrical charge that splits the O₂ molecule apart and makes ozone. So it makes higher concentrations of oxygen and then makes ozone. So it is a dual-purpose generator.

Q: When you installed this machine, did you check to make sure that it was doing both of those functions?

A: Yes.

Q: And it was doing both of those functions as of December 10?

A: Yes.

Q: Or 9th when you did the installation?

A: Yes.

Deposition of John Downey, at 172-173 (ROA 251).

The Gudmundsons submitted no evidence contradicting Mr. Downey's testimony that the ozone generator functioned properly. The District Court noted the absence of evidence that the ozone generator was defective, stating:

I do agree with Del Ozone that at least based on my review of the submissions, the plaintiff presented no evidence that the Ozone generator was defective. While it is true that there appears to be some evidence that there may have been some venting issues, I found nothing that indicated factually a problem with the generator itself.

Transcript of Summary Judgment Hearing, ROA 1890, at 6 (emphasis added). The Gudmundsons did not even designate an expert witness who is qualified to testify concerning defects in ozone generators.

Rather than submit evidence of a defect in the ozone generator, the Gudmundsons claimed that the lack of an automatic shut-off and ambient ozone monitor constitute defects. However, Mr. Downey testified that such items are not standard features of a laundry ozone system and that they are installed at the client's, in this case Johnson Controls or the State of Utah's, request:

Q: Have you ever installed any monitors – with these 200 jobs that you installed, do you ever install any ozone monitors with them?

A: The ORP monitor and controllers is an ozone monitor. We do that with every system.

Q: I mean, like the monitors that we just went over that had those readings.

A: The ambient ozone monitors?

Q: Yeah.

A: Have ever installed one?

Q: Yes.

A: Yes.

Q: Why – how do you decide when you do or don't install?

A: We don't decide. If the client wants it, they ask for it. Or if we give them the option, they ask for it.

Q: Who would have decided in this case – who had that decision whether or not monitors should be installed?

A: We normally give the customer the option to put one in or not.

Q: You say you do, meaning OzoneSolutions or Johnson Controls does?

A: We ask the customer.

Q: Did you ask the State of Utah if they wanted a monitor?

A: I had no communication with the State of Utah.

Q: So do you know if anybody asked the State of Utah or explained to them why you might want a monitor?

A: No.

Q: Would that be your job to go to the State of Utah and say, "You might want a monitor because sometimes the ozone leaks"?

A: No. If I felt our system –

MR. MAHLER: Object to form.

A: If I felt like our system needed an ambient ozone monitor, it would be a standard feature. I don't believe the Del Ozone generator needs one.

Deposition of John Downey, at 169-171, ROA 248. Mr. Downey also testified that he generally opted not to use such a monitor:

Q: Why do they sometimes put – do you know why sometimes the monitors installed in the system?

A: If it is in the specifications or the customer asks for it.

Q: So in these specifications that came to you, the specifications came from Johnson Controls, is that right?

A: They didn't have any specifications on the ozone system other than a generic sentence.

* * *

Q: Do you know why nobody talked about a monitor in this case?

A: I don't believe with the Del Ozone generator an ambient ozone monitor is necessary.

Q: So it was your personal call, it wasn't necessary –

A: It is OzoneSolutions' call. It is not involved with our system.

Q: So OzoneSolutions' call was, "We don't even need to bring up the monitor with the State of Utah because it is unnecessary"?

A: Correct.

Deposition of John Downey, at 169-171, ROA 248 (emphasis added). Thus OzoneSolutions, not Del Ozone, decided not to install an ambient ozone monitor.

Following installation and testing, Johnson Controls and OzoneSolutions conducted an in-service training session at the prison. *See* Deposition of John Downey, at 106 (ROA 250). Del Ozone did not participate in the training session. *See* Deposition of John Downey, at 73-74 (ROA 246). Mrs. Gudmundson, a prison employee in the laundry at the time, attended the training session. *See* Deposition of Wendy Gudmundson, at 50 (ROA 255). In addition to the training session, Mrs. Gudmundson was also provided with a safety manual for the ozone generator, which she testified that she read:

Q: Do you remember being given or having access to any type of publications, either like an owners' manual or any type of manual that talked about the ozone machine?

A: Yes. He gave us a manual.

Q: Okay. And did you have your own copy, or was there just a couple of copies laying around the office?

A: There was one copy for the office and then one for maintenance.

Q: I see. Did you have access to that manual?

A: Yes.

Q: Did you ever take the time to read through it?

A: Yes.

Deposition of Wendy Gudmundson, at 47 (ROA 254).

III. Mrs. Gudmundson's Injuries.

The prison began using the laundry ozone system on Monday, December 13, 2004. Mrs. Gudmundson worked on that Monday, but did not recall whether she had a headache. *See* Deposition of Wendy Gudmundson, at 53-54 (ROA 256). Mrs. Gudmundson first recalled having a headache on Tuesday, December 14, 2004. She described it as a dull headache that rated a 4 on a scale of 1 to 10. *See* Deposition of Wendy Gudmundson, at 56-58 (ROA 256-257). Mrs. Gudmundson woke up with a similar headache on December 15, 16, and 17, 2004. *See* Deposition of Wendy Gudmundson, at 65-67 (ROA 258). This week was the only period in which Mrs. Gudmundson was exposed to ozone from the prison's laundry ozone system.

Mrs. Gudmundson also woke up with a headache on Saturday, December 18, 2004; however, this headache did not prevent her from travelling to the desert to search for gems. On that day, she woke up at approximately 5 a.m. and accompanied her husband and a friend, Clyde Sowers, into the desert near Duchesne to search for gems. They arrived in Duchesne around 10:30 a.m. As they searched for gems, Mrs. Gudmundson testified that her headache grew progressively worse and she left with her husband around 2 p.m. *See* Deposition of Wendy Gudmundson, at 75-77 (ROA 259-260). Mrs. Gudmundson also testified that she had eaten only some pretzels and jerky prior to leaving Duchesne with her husband at 2 p.m. *See* Deposition of Wendy Gudmundson, at 78 (ROA 260). Mrs. Gudmundson testified that her headache continued on Sunday and her husband took her to the hospital on Monday, December 20, 2004. *See* Deposition of Wendy Gudmundson, at 83-84 (ROA 261). On Tuesday, December 21,

2004, Mrs. Gudmundson underwent a CT scan and MRI of her brain at Timpanogos Regional Hospital, both of which revealed normal findings. *See* Timpanogos Regional Hospital report (ROA 267-270).

Over a month later, on January 27, 2005, Mrs. Gudmundson underwent an MRI of the cervical spine which revealed a Chiari I malformation. *See* Report of Central Utah Medical Clinic (ROA 272). Even though Mrs. Gudmundson had not been exposed to the laundry ozone system at the prison during the intervening month, she still claimed it caused her condition.

On February 1, 2005, Mrs. Gudmundson saw Dr. Howard Reichmann. Dr. Reichmann noted “Patient’s symptoms are not typical for a Chiari malformation ... Chiari malformations almost never cause frontal headaches and they are almost always neck and occipital.” Report of Dr. Howard Reichmann (ROA 274-276). Nevertheless, Dr. Reichmann recommended that the Chiari malformation should be decompressed for safety purposes. Report of Dr. Howard Reichmann (ROA 274-276). On March 2, 2005, Dr. Howard Reichmann performed a suboccipital craniectomy with decompression of the foramen magnum, duraplasty and decompression on Mrs. Gudmundson. *See* Utah Valley Regional Medical Center Operation Report (ROA 278-279).

Mrs. Gudmundson had an extensive medical history prior to December of 2004, when the laundry ozone system was installed at the prison. Mrs. Gudmundson is an alcoholic and she has struggled with anorexia and bulimia throughout her adult life. She has smoked since she was 17 and she also has anemia. And prior to December 2004, Ms.

Gudmundson did not participate in any exercise routine. *See* Deposition of Wendy Gudmundson, at 108, 112-114, 116, 120 (ROA 262-265).

IV. There is no evidence the level of ozone in the prison exceeded EPA recommendations.

The Gudmundsons assert in their appellate brief that “[e]ven after ventilation was put in to try and control ozone levels, the ambient ozone levels continued to exceed OSHA and EPA levels.” Opening Brief, at 6. However, they failed to submit any evidence that the ozone levels at the prison exceeded OSHA and EPA levels. The Gudmundsons’ statement is not supported by any citation to the record. A close review of the Gudmundsons’ memorandum in opposition to summary judgment also reveals that there is no evidence the ozone levels at the prison during the week of December 13, 2004 exceeded OSHA and/or EPA levels. To the contrary, the Gudmundsons submitted only their own conjecture combined with an affidavit by Jesse Mansanarez, a prisoner who also worked in the laundry, stating that he smelled the ozone when the machine was turned on. This does not establish the level of ozone in the laundry room when Mrs. Gudmundson was present.

V. Mrs. Gudmundson’s Worker’s Compensation Claim.

On May 13, 2005, Mrs. Gudmundson filed an Application for Hearing with the Utah Labor Commission alleging entitlement to compensation for medical expenses and disability as a result of overexposure to ozone at the Draper prison on December 17, 2004. *See* Utah Labor Commission Order (ROA 281). The Utah Labor Commission

requested an independent medical examination, which was conducted by Dr. Edward Holmes on December 8, 2005. Dr. Holmes concluded:

Based on our review of the medical records, our examination of Ms. Gudmundson, a site visit and a literature review we think that she suffered of severe migraine headaches. These headaches may have been triggered or temporarily exacerbated by ozone exposure or have appeared due to the normal evolution of the Chiari malformation. There is no indication in the literature that the Chiari malformation could have resulted from ozone exposure ... Severe migraine headaches may lead to the discovery of the Chiari malformation, which was already present.

It is also important to note, that at no time, during our evaluation or in the medical records, did Mrs. Gudmundson report irritative symptoms to the eyes or lungs (a common first indicator of significant ozone exposure). In the case of an acute and significant exposure these respiratory symptoms are expected...

... In short, if she had sufficient dose of ozone to cause brain edema or swelling she would have had massive toxicity elsewhere, especially in her lungs, as would other workers in the area.

We think this patient presented with a real and painful medical condition (Chiari 1) requiring extensive medical and surgical treatment but it is not medically reasonable to conclude that the Chiari 1 malformation was caused by ozone exposure.

Letter of Edward B. Holmes (Emphasis added.) (ROA 295).

On October 2, 2006, Utah Labor Commission Judge Hann dismissed Mrs. Gudmundson's application with prejudice, stating, "The petitioner did not suffer a compensable occupational disease as the result of exposure to ozone in December 2004 while employed by the respondent, State of Utah." Utah Labor Commission Order (ROA 283).

On November 1, 2006, Mrs. Gudmundson filed a Motion for Review by the Utah Labor Commission Appeals Board based on the Discovery of New Evidence. In this

motion, Mrs. Gudmundson conceded that her injuries were not directly caused by exposure to ozone. She stated:

Petitioner believes exposure to levels of ozone above the OSHA permissible exposure levels caused her to suffer severe headaches, nausea, and vomiting. These symptoms, in turn, naturally led Petitioner's physician, Dr. Howard Reichman, to run tests on the Petitioner for meningitis, one of which involved performing a spinal tap. It was this spinal tap, in the course of routine diagnostic testing, that caused Petitioner's Chiari malformation, resulting brain surgery, and total disability, as illustrated by medical papers on acquired Chiari malformations due to lumbar punctures attached to this Motion for Review. **It is acknowledged that the ozone exposure did not directly cause Petitioner's neurological problems,** but in the course of being treated for ozone exposure, Petitioner was subjected to a reasonable, standard, routine, and even necessary diagnostic procedure to rule out meningitis, which, in turn triggered a Chiari malformation, required brain surgery, and ultimately left the Petitioner with serious, permanent neurological and physical handicaps. That said, the mechanism that started the entire chain reaction, was exposure to dangerous levels of ozone at work in the prison laundry.

Petitioner's Motion for Review, ROA 1339 (emphasis added). On April 23, 2007, the Utah Labor Commission's Appeals Board affirmed Judge Hann's ruling. *See* Order Affirming ALJ's Decision (ROA 357-360). Mrs. Gudmundson chose not to appeal this ruling.

In their brief, the Gudmundsons attack the Labor Commission's finding by claiming that the process was insufficient, rather than by providing evidence that the conclusion was wrong. The Gudmundsons list the following alleged deficiencies in the process:

(1) “[b]ecause the worker’s compensation system is set up to expedite the award of benefits to an injured worker, most applicants do not develop a worker’s compensation case as they would a personal injury lawsuit;” (2) written expert reports are submitted rather than testimony and cross-examination of medical experts; (3) It is rare to take a deposition of a defense doctor; (4) “[i]t is rare for an applicant’s attorney to hire their own medical expert, due mainly to financial considerations; and (5) “[t]he standards of review of medical and other evidence are different in Labor Commission matters than litigation in the district courts.

Appellants’ Brief, at 8.

The contentions listed above are fatal to this appeal for two reasons. First, the procedures noted did not prevent the Gudmundsons from being represented by counsel, submitting evidence, cross-examining witnesses and providing their own expert witnesses. Rather, they simply highlight that the Gudmundsons chose not to do this. In fact, in some respects, the the Gudmundsons benefited from the lower standards. For instance, the Independent Medical Examination summarized a June 28, 2005 letter from Dr. Howard Reichman, stating, “Dr. Reichman in which he ... explains that ozone exposure was responsible for brain swelling and that the lumbar puncture allowed a negative pressure to develop in the spinal canal, which in turn allowed the tonsils to drop. [Note: No brain swelling was ever objectively documented on any objective test]. (ROA, 292-293) (emphasis redacted). However, the actual letter from Dr. Reichman contains no such conclusion. It states:

She had presented with an ozone toxicity, which then lead to the need for a lumbar puncture, which then lead to a Chiari malformation and tight posterior fossa, which lead to a surgical decompression. She was having wicked, severe headaches, drop attacks, and couldn’t stand up-right. Dr. Sbei

and I talked a number of times about this diagnosis, but came to the conclusion that it seemed like the Chiari was causing a lot of these symptoms, and his best guess is that the ozone caused some brain swelling, and then coupled with the lumbar puncture during that investigative process allowed a negative pressure effect to develop in the spinal canal, which allowed the tonsils to drop, and hence she had a symptomatic Chiari.

ROA 612 (emphasis added). Thus, the Independent Medical Examination gave greater weight to the Gudmundsons' theory than Dr. Reichman actually stated in his letter. Had higher evidentiary standards been applied, Dr. Reichman's assessment of Dr. Sbei's "best guess" as to the cause would have been inadmissible as hearsay and inconclusive.

Second, the Gudmundsons presented no evidence that the Labor Commission's conclusion that Mrs. Gudmundson's injuries were not caused by exposure to ozone was incorrect. The Gudmundsons argue that the reports offered by retained experts Dr. Kaye Kilburn and Dr. Douglas Rollins call this conclusion into question, but they do not. These experts' opinions concern chemicals other than ozone and they do not conclude that Mrs. Gudmundson's injuries were caused by exposure to ozone alone. Dr. Kilburn concluded:

The sequence of events is explained best by ozone inhalation producing increased absorption of it and the background chemicals: chlorine, phosphoric acid, sodium hydroxide hydrofluorosalic acid-flourine and resmethrin, a pyrethroid insecticide, and detergents that cause intolerance to many chemicals manifested by headache, reduced sense of smell, memory loss, dryness of skin and mucous membrane. This made Wendy Gudmundson totally and permanently disabled.

This expert opinion is rendered to the legal standard of more probable than not.

ROA, at 686 (emphasis added). Dr. Kilburn concluded only that it was “more probable than not” that the best explanation for Mrs. Gudmundson’s medical problems was inhalation of ozone and eight other chemicals. Even more suspect is Dr. Rollins’ opinion. He concluded:

OPINION

It is my opinion that Wendy Gudmundson’s exposure to the ozone laundry purification while she worked at the Wasatch Laundry facility exposed her to ozone and to the disinfection byproducts catalyzed by the ozone. These substances resulted in the severe, intractable frontal headaches that resulted in her admission to Timpanogos Hospital on December 20, 2004.

ROA, at 692. This opinion is troubling for several reasons. First, it concludes only that the exposure to “substances” “resulted in her admission to Timpanogos Hospital on December 20, 2004;” however, as Dr. Rollins notes earlier in his opinion, “She was admitted to Timpanogos Hospital on December 20, 2004 where she had a normal brain CT scan, a normal brain MRI, and a lumbar puncture to rule out meningitis.” ROA, at 691 (emphasis added). Thus, Dr. Rollins concludes only that exposure to substances led to a hospital visit where no problems were found or diagnosed. Second, Dr. Rollins’ conclusion is based on multiple “substances,” not ozone. However, the Gudmundsons’ Complaint and First Amended Complaint allege only injuries stemming from exposure to ozone. They do not mention other chemicals. Thus, these opinions do not undermine the Labor Commission’s ruling that Mrs. Gudmundson’s injuries were not caused by exposure to ozone.

The Gudmundsons also state in their brief that additional time for discovery was warranted because they recently changed counsel. However, the Gudmundsons had ample time prior to changing counsel to conduct discovery. They filed their Complaint on September 20, 2005. Del Ozone filed its motion for summary judgment on September 10, 2007. Thus, the Gudmundsons had 720 days in which to gather evidence supporting their claims. During that time, an attorney planning meeting report and two amended case management orders were entered (on June 7, 2006; October 10, 2006; and June 6, 2007; respectively). Also during that time, defendants engaged in discovery, including several depositions. The Gudmundsons offer no explanation for why they were unable to conduct the discovery they request during those 720 days.

The District Court noted all of this at the hearing on motions for summary judgment, stating:

[T]here is a Rule 56(f) motion raised by the plaintiff, and I will address that first. Basically, I'm denying that motion. I don't believe that the Rule 56(f) continuance has merit.

The case was filed in 2005. This case has had a – two years of discovery and three case management orders. The fact that the parties – and at least two of those case management conferences I have convened by telephone and spoken with Counsel...

The last case management order, which was the second amended, basically the third case management order, but set fact discovery deadline of November 5th of 2007. The only real argument is that this is a complex case, and the deadlines have been insufficient.

I cannot agree. First of all, while I recognize that plaintiff's Counsel has joined the matter after the part – after it had initiated, I went back and reviewed the submission. I note that there was no leave of Court noted under Rule 74. Any counsel substituting was to certify they would comply with the notice – with the existing hearing schedules and

deadlines, if their appearance was not to be entered solely upon – you know, without Court approval. I received no such request and no such commitment.

Most importantly – these are sort of procedural problems; but more importantly, I don't find that plaintiff has identified exactly what discovery is needed to address the summary judgment motions, why that information is solely in control of the movants, or what good faith efforts it has made to secure it. I think under our law, this is insufficient to state a basis for a Rule 56(f) continuance.

Transcript of Hearing, ROA 1890, at 4. The Gudmundsons had two years to gather evidence supporting to their claim that Mrs. Gudmundson was injured by exposure to ozone and they did not.

VI. The Gudmundsons filed the present Complaint claiming Mrs. Gudmundson was injured by exposure to ozone, not byproducts of ozone.

As noted above, on September 20, 2005, the Gudmundsons filed a Complaint in the present case. In their Complaint, the Gudmundsons alleged:

Mrs. Gudmundson's medical condition was caused by ozone overexposure due to fact that ozone generator in the Wasatch Laundry Facility lacked a ventilation system, a fresh air replenishing system, automatic shut-off, audible alarm, visual alarm, a recapture system for the ozone and the other required equipment under OSHA guidelines.

Complaint, at¶ 30, ROA 6 (emphasis added). The Gudmundsons amended their Complaint on December 4, 2006. In their First Amended Complaint, the Gudmundsons made the same allegation:

Mrs. Gudmundson's medical condition was caused by ozone overexposure due to the fact that the ozone generator in the Wasatch Laundry Facility lacked a ventilation system , a fresh air replenishing system, automatic shut-off, audible

alarm, visual alarm, a recapture for the ozone, and other required equipment under OSHA guidelines.

First Amended Complaint, at ¶ 33, ROA 125 (emphasis added). Neither of the Gudmundsons' complaints mentions injuries caused by "byproducts of ozone." Thus, the Labor Commission ruled upon the very issue raised in the Gudmundsons' Complaint and First Amended Complaint.

In their memorandum in opposition to summary judgment, filed on October 15, 2007, the Gudmundsons attempted to amend their claims. In that memorandum, the Gudmundsons stated:

25. The Labor Commission's opinion was limited to "ozone exposure." See Exhibit Y, Utah Labor Commission's Conclusions of Law ("The petitioner did not suffer a compensable occupational disease as a result of exposure to ozone in December 2004 ...").

26. Wendy's injuries are not claimed to have occurred solely from ozone but from exposure to ozone in combination with other chemicals and materials. See Exhibit "Z", Plaintiff's Disclosure of Expert Witness (Kay H. Kilburn, M.D.).

ROA 388. The District Court noted this improper maneuver, stating, "Well, there seems to be kind of a moving target, in terms of what the theory of causation was. One – initially it was that it was exposure to Ozone. Then it was that there was – you know, Oz – the exposure to Ozone and to other chemicals." Transcript from Hearing on Motions for Summary Judgment, ROA 1890, at 34.

VII. Summary Judgment and Notice of Appeal.

On March 24, 2008, The District Court entered an order granting summary judgment to Del Ozone and Johnson Controls. On April 2, 2008, the Gudmundsons filed a notice of appeal. On May 28, 2008, The District Court entered an order granting summary judgment to OzoneSolutions. On June 4, 2008, the Gudmundsons filed a notice of appeal. On June 27, 2008, this Court issued a Notice of Decision and ordered that the Gudmundsons' initial appeal had been dismissed without prejudice to any subsequent timely appeal. On June 30, 2008, the Gudmundsons filed a third notice of appeal.

VI. ARGUMENT

I. The District Court did not Abuse its Discretion by Denying the Gudmundsons' Rule 56(f) Motion.

A. Standard of Review

This Court has stated, “[w]e review the denial of a rule 56(f) motion for an abuse of discretion.” *Overstock.com, Inc. v. Smartbargains, Inc.*, 2008 UT 55, ¶ 20, 192 P.3d 858 (Citation omitted). “We will not reverse the district court’s decision to grant or deny a rule 56(f) motion for discovery unless it “exceeds the limits of reasonability.”” *Id.* (Citations omitted). “The “limits of reasonability” standard is based on the specific circumstances of each case – there is not a “bright line” test for determining whether the district court abused its discretion.” *Id.*, at ¶ 22 (Citation omitted). The Court continued:

Some of the relevant factors in determining whether a rule 56(f) motion is warranted include, but are not limited to: (1) an examination of the party’s rule 56(f) affidavit to determine whether the discovery sought will uncover disputed material facts that will prevent the grant of summary judgment or if the party requesting discovery is simply on a “fishing expedition,” (2) whether the party opposing summary judgment motion has had adequate time to conduct discovery and has been conscientious in pursuing such discovery, and (3) the diligence of the party moving for summary judgment in responding to the discovery requests provided by the party opposing summary judgment.

Id. (Citations omitted).

B. The discovery sought will not establish that the generator was defective.

It is undisputed that OzoneSolutions installed the laundry ozone system at the Bluffdale Prison without any assistance or consultation from Del Ozone. As part of that

system, OzoneSolutions purchased an ozone generator from Del Ozone. Del Ozone shipped the generator to the Bluffdale Prison where OzoneSolutions installed it. Mr. Downey's testimony that the generator functioned properly following installation is unrefuted. Following installation, Mr. Downey tested the generator to ensure it was functioning properly. He testified:

Q: And what is the – the purpose of the machine is to generate ozone; right? The purpose of the ozone generator is to generate ozone?

A: The primary component of a laundry ozone system is an ozone generator. The ozone generator is a combination of oxygen generator and ozone generator. It takes the ambient air, which has 20.9 percent oxygen, strips the nitrogen, and hydrogen air and increases that to 95 percent and then takes that 95 percent oxygen over to what they call a corona discharge cell, which is an electrical charge that splits the O₂ molecule apart and makes ozone. So it makes higher concentrations of oxygen and then makes ozone. So it is a dual-purpose generator.

Q: When you installed this machine, did you check to make sure that it was doing both of those functions?

A: Yes.

Q: And it was doing both of those functions as of December 10?

A: Yes.

Q: Or 9th when you did the installation?

A: Yes.

Deposition of John Downey, at 172-173 (ROA 251).

The discovery the Gudmundsons sought in their rule 56(f) affidavit will not refute or call into question Mr. Downey's testimony. In their affidavit, the Gudmundsons sought additional time for discovery for four reasons:

1) the interpretation of Mrs. Gudmundson's MRIs, taken in December, 2004, June, 2006, and again in August, 2006;

- 2) information on the neurotoxicity or carcinogenic effects of an ozone water disinfectant system;
- 3) information on water being pulled from a geo-thermal well below the Utah State Prison; and
- 4) further information from Del Ozone relating to Del Ozone's denial of whether any of its "instruments that are similar to the Device in question [the ozone generator at the Utah State Prison] have ever been known to cause a health problem as a result of the use or improper use of said similar device," in response to interrogatories from Plaintiffs.

Appellants' Brief, at 44 (quoting ROA 388). None of these four items would have yielded evidence that the generator was defective. The first three – Mrs. Gudmundson's MRIs, toxicity reports, and information on geo-thermal wells – are completely unrelated to the generator. The fourth item – information from Del Ozone about prior problems on similar instruments – would not have provided information on whether the generator used at the prison was defective. At best, this information would have revealed the rate of error for the generator model, but not for the specific generator installed at the Bluffdale Prison. That generator functioned properly according to the expert who installed and inspected it. Because the requested information would have had no bearing on whether the generator in this case was defective, the District Court did not abuse its discretion in denying the Gudmundsons' Rule 56(f) motion for additional time.

C. The Gudmundsons had ample time to conduct discovery.

The Gudmundsons advance two arguments that the District Court abused its discretion in denying their motion: first, the district court was wrong in concluding that they had "two and a half years" to uncover evidence to support their claims, and second,

that the district court belittled the fact that they needed additional time due to changing counsel. These arguments are without merit and are unsupported by the law.

The Gudmundsons did in fact have two and a half years to discover and present evidence supporting their claims. They filed their Complaint on September 20, 2005. The hearing on the motions for summary judgment, where Judge Lindberg granted Del Ozone's Motion for Summary Judgment, occurred on March 3, 2008. Thus, two and half years elapsed between filing of the Complaint and entry of judgment, and the Gudmundsons failed to conduct any of the sought-after discovery.

The Gudmundsons argue that "less than two years" elapsed between the filing of the Complaint and Del Ozone's Motion for Summary Judgment. This does little to advance their argument because it provides no explanation for why they didn't conduct discovery over the two-year period. It is undisputed that 720 days passed between September 20, 2005, the date they filed their Complaint, and September 10, 2007, the date Del Ozone moved for summary judgment. During that time, an attorney planning meeting report and two amended case management orders were entered (on June 7, 2006; October 10, 2006; and June 6, 2007; respectively). Also during that time, Del Ozone, OzoneSolutions, and Johnson Controls engaged in discovery, including several depositions. The Gudmundsons offer no explanation for why they were unable to conduct the discovery requested in their 56(f) affidavit during those 720 days.

Rather than explain why they were unable to conduct this discovery, the Gudmundsons blame Judge Lindberg. They complain that a notation in the margin of a brief noting their excessive delay somehow prejudiced their ability over the prior two

years to conduct discovery. This complaint lacks substance and tact. First, the notation merely indicates what the Gudmundsons ask this Court to ignore – that they had ample time to conduct discovery. It states, “Too bad – Ct. unlikely to grant a 3rd extension on this case where P’s have been represented by competent counsel through case & discovery has proceeded w/o interruption.” The Gudmundsons’ Brief, at 46. Each of the statements contained in this notation are true. It is true that the Gudmundsons had been represented by counsel throughout the case. It is also true that discovery had proceeded without interruption. Even if the notation somehow suggested bias, it was made after the 720-day period for discovery had expired. Thus, it offers no explanation of why the Gudmundsons were unable to conduct this discovery during that two-year period.

The Gudmundsons argue that this case “closely resembles the situation found in *Strand v. Associated Students of Univ. of Utah*, 561 P.2d 191 (Utah 1977);” however, they fail to explain how. In fact, they don’t recite any of the facts from *Strand* that they allege are similar to the facts here. A close inspection of *Strand* reveals that it is nothing like the case at hand. In *Strand*, “[t]he complaint was filed [on] February 13, 1976.” *Id.*, at 192. On March 9, 1976, “defendants filed a motion to dismiss.” *Id.* “On March 25, 1976 plaintiff’s counsel filed an affidavit” requesting additional time to conduct discovery. *Id.* The trial court held a hearing on the motion to dismiss on March 26, 1976, and granted the motion on March 30, 1976. *See Id.*, at 193. Thus, only 24 days passed between the time plaintiffs filed their complaint and defendants moved to dismiss. On these facts, the Court held:

[T]here had not been sufficient time since the inception of the law suit for plaintiff to utilize discovery procedures, and thereby have an opportunity to cross-examine the moving party. The pleadings had not been closed, and there were complex legal issues posed, with an inadequate factual basis.

Under such circumstances, it was an abuse of discretion to grant defendant's motion. The court should have ordered a continuance to permit discovery, or denied the motion for summary judgment, without prejudice to its renewal, after adequate time had elapsed in which plaintiff could have obtained the desired information.

Id., at 194.

The facts in *Strand* are nothing like the facts present here. First, *Strand* involved a motion to dismiss filed before any discovery had taken place. This case involves motions for summary judgment that were filed after extensive discovery had occurred. Second, in *Strand*, only 24 days elapsed between the time plaintiffs filed their complaint and defendants moved to dismiss. No discovery could have taken place in so short a time. Here, 720 days elapsed between the time the Gudmundsons filed their complaint and Del Ozone filed its motion for summary judgment. This was ample time to conduct discovery. In fact, each of the defendants conducted discovery and submitted substantial evidence in support of their respective motions for summary judgment. Finally, the Court in *Strand* ruled that the judge had abused her discretion because “there had not been sufficient time since the inception of the law suit” for plaintiff to utilize discovery procedures. *Id.* (Emphasis added). By contrast, the Gudmundsons had a full two years since the inception of their law suit to conduct discovery.

The present case more closely resembles *Jensen v. Smith*, 2007 UT App 152, 163 P.3d 657, and *Jones v. Bountiful City Corp.*, 834 P.2d 556 (Utah Ct. App. 1992). In both of these cases, the Utah Court of Appeals ruled that the district judge did not abuse his or her discretion in denying a rule 56(f) motion because the plaintiffs had been dilatory. In *Jensen*, “almost two and a half years elapsed between the inception of this lawsuit and Defendant’s motion for summary judgment.” *Jensen v. Smith*, 2007 UT App at ¶ 4. In *Jones*, “there was sufficient time for both parties to conduct discovery since the inception of the lawsuit some twenty-six months earlier, again weighs in favor of the trial court’s ruling.” *Jones v. Bountiful City Corp.*, 834 P.2d at 562. Like the plaintiffs in *Jensen* and *Jones*, the Gudmundsons had two years to conduct the discovery they sought. This was sufficient time and the District Court did not abuse its discretion in finding that the the Gudmundsons were dilatory.

D. Del Ozone’s refusal to stipulate to a third extension of discovery deadlines did not prejudice the Gudmundsons.

The Gudmundsons do not argue that Del Ozone was not diligent in responding to their discovery requests. Instead, they argue that Del Ozone refused to stipulate to extend discovery. The record, however, demonstrates that Del Ozone did not object to extending discovery for the Gudmundsons on two prior occasions. Del Ozone participated in an Attorneys’ Planning Meeting on June 7, 2006, and stipulated to amend the Case Management Order on October 10, 2006. The Case Management Order was later amended a second time, on June 6, 2007. Thus, Del Ozone provided the Gudmundsons multiple opportunities to conduct discovery. Del Ozone was under no duty to extend

discovery a third time simply because the Gudmundsons changed counsel. Moreover, the Gudmundsons have failed to demonstrate how this prejudiced them in light of the preceding two years in which they could have conducted this discovery.

For each of the reasons stated above, the District Court did not abuse its discretion in denying the Gudmundsons' Rule 56(f) motion and its ruling should be affirmed.

II. The District Court correctly granted summary to Del Ozone because the Gudmundsons presented no evidence that the ozone generator was defective.

A. Standard of Review

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Utah R. Civ. Proc. 56(c). The Utah Supreme Court “review[s] the district court’s decision to grant summary judgment for correctness, affording the trial court no deference.” *Crestwood Cove Apartments Business Trust v. Turner*, 2007 UT 48, ¶ 10, 164 P.3d 1247. “In reviewing a grant of summary judgment, [the Court] view[s] the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.” *Smith v. Four Corners Mental Health Center, Inc.*, 2003 UT 23, ¶ 2, 70 P.3d 904.

B. The Gudmundsons’ Claims Against Del Ozone hinge upon a Defect in the Generator.

In their Complaint and First Amended Complaint, the Gudmundsons raised four claims for relief against Del Ozone: (1) Strict Liability – Defective Product, (2) Inference

of Negligence – Res Ipsa Loquitur, (3) Breach of Implied Warranty of Merchantability, and (4) Negligent Manufacture. *See* Complaint and First Amended Complaint, ROA 1-18 and 119-135 respectively. Each of these claims sounds in products liability, as they must, because Del Ozone did nothing more than sell an ozone generator to OzoneSolutions. This Court has stated, “[p]roducts liability always requires proof of a defective product, which can include “manufacturing flaws, design defects, and inadequate warnings regarding use.” *Bishop v. Gentec, Inc.*, 2002 UT 36, ¶ 25, 48 P.3d 218 (citation omitted). “Alternative theories are available to prove different categories of defective product, including negligence, strict liability, or implied warranty of merchantability.” *Id.*, quoting Restatement (Third) of Torts: Product Liability § 2 cmt. N (1997). The Court continued,

Alternative theories entail different evidentiary burdens. For example, proof of a defect under a negligent manufacture theory will necessitate proof that the defective condition of the product was the result of negligence in manufacturing process, or proof that the manufacturer knew or should have known of the defective condition, whereas these elements are unnecessary under strict liability or breach of warranty theories. Whatever the theory, however, the defendant’s liability is for the defective product, and not merely for any underlying negligence.

Id. (Emphasis added) (Citation omitted). Thus, each of the Gudmundsons’ claims for relief against Del Ozone requires evidence that the ozone generator was defective.

C. The Gudmundsons Presented No Evidence the Generator was Defective.

In the present case, the district court correctly ruled that the Gudmundsons presented no evidence that the ozone generator was defective, and therefore, Del Ozone

was entitled to summary judgment. In fact, the only evidence submitted to the district court showed that the ozone generator was functioning properly after OzoneSolutions installed it in the laundry ozone system at the Bluffdale Prison. John Downey, the owner-operator of OzoneSolutions who installed the ozone generator into the ozone laundry system, testified:

Q: And what is the – the purpose of the machine is to generate ozone; right? The purpose of the ozone generator is to generate ozone?

A: The primary component of a laundry ozone system is an ozone generator. The ozone generator is a combination of oxygen generator and ozone generator. It takes the ambient air, which has 20.9 percent oxygen, strips the nitrogen, and hydrogen air and increases that to 95 percent and then takes that 95 percent oxygen over to what they call a corona discharge cell, which is an electrical charge that splits the O₂ molecule apart and makes ozone. So it makes higher concentrations of oxygen and then makes ozone. So it is a dual-purpose generator.

Q: When you installed this machine, did you check to make sure that it was doing both of those functions?

A: Yes.

Q: And it was doing both of those functions as of December 10?

A: Yes.

Q: Or 9th when you did the installation?

A: Yes.

Deposition of John Downey, at 172-173, ROA 251. This evidence is unrefuted.

The Gudmundsons contend the ozone generator was defective because it “did not include an ambient air monitor, for example, nor did it have an automatic shut-off valve that would automatically engage if pollutant levels exceeded EPA or OSHA limits.” The Gudmundsons’ Brief, at 47. To support this position, the Gudmundsons cite ROA 559-570. These citations refer to deposition testimony of John Downey regarding the

ventilation of the laundry ozone system, not the generator. The District Court correctly distinguished between problems in the laundry room's ventilation and the generator itself, stating:

I do agree with Del Ozone that at least based on my review of the submissions, the plaintiff presented no evidence that the Ozone generator was defective. While it is true that there appears to be some evidence that there may have been some venting issues, I found nothing that indicated factually a problem with the generator itself.

Transcript of Summary Judgment Hearing, at 6, ROA 1890.

The absence of an ambient air monitor or automatic shut-off valve are not defects. To qualify as a defect, the condition must be a manufacturing flaw, a design defect, or an inadequate warning. *See House v. Armour of America, Inc.*, 886 P.2d 542, 547 (Utah Ct. App. 1994) (Citations omitted). The Gudmundsons have cited no cases holding that the absence of ambient air monitors and automatic shut-off valves qualify as defects. These items are accessories. Their absence does not mean that the generator was not functioning properly, that the generator was defectively designed, or that the generator was not accompanied with adequate warnings. Thus, the lack of an ambient air monitor or automatic shut-off valve does not establish a defect under the law and cannot sustain claims for relief for products liability, strict liability, negligent installation or breach of implied warranty. The Gudmundsons submitted no other evidence that the generator was defective, therefore, summary judgment should be affirmed.

Even if this Court was inclined to agree with the Gudmundsons that the absence of an ambient air monitor and automatic shut-off constitute defects, OzoneSolutions, not

Del Ozone, decided not to include these items in the laundry ozone system. Mr. Downey testified that this decision was made exclusively by OzoneSolutions, without consulting

Del Ozone:

Q: Do you know why nobody talked about a monitor in this case?

A: I don't believe with the Del Ozone generator an ambient ozone monitor is necessary.

Q: So it was your personal call, it wasn't necessary –

A: It is OzoneSolutions' call. It is not involved with our system.

Q: So OzoneSolutions' call was, "We don't even need to bring up the monitor with the State of Utah because it is unnecessary"?

A: Correct.

Deposition of John Downey, at 169-171, ROA 248. Because OzoneSolutions unilaterally decided not to include the monitor, they should be responsible for any resulting liabilities. Del Ozone was not informed about the decision to proceed with installation without an ambient air monitor, therefore, it should not be the party responsible for that decision.

The Gudmundsons have also argued that the entire laundry ozone system installed by OzoneSolutions was defective, however, such assertions do not sustain a claim against Del Ozone. The Utah Court of Appeals has stated, "the after-sale negligent installation of a nondefective product does not give rise to a product liability claim." *See Utah Local Gov't Trust v. Wheeler Machinery Co.*, 2006 UT App 513, ¶ 12, 154 P.3d 175; *citing Alder v. Bayer Corp.*, 2002 UT 115, ¶ 23, 61 P.3d 1068 (stating that because a negligently installed machine was not defective when purchased, the case was one of negligence and not of product liability). It is undisputed that Del Ozone's role in this matter was limited to filling the purchase order submitted by OzoneSolutions for an

ozone generator. It is also undisputed that the ozone generator was functioning properly after installation. Therefore, products liability claims cannot be sustained against Del Ozone.

D. A Qualified, Vetted Expert is Required to Testify that the Generator was Defective.

The Gudmundsons' assertion that the absence of an ambient air monitor or an automatic shut-off is not only unfounded, it is also unreliable. The Gudmundsons and their counsel are unqualified to testify about defects in ozone generators. In order for the Gudmundsons' assertions to constitute evidence that the district court could have considered, they would have needed to be offered by a qualified expert who had filed a report and been subject to cross-examination at a deposition. The Gudmundsons have designated no such expert. As such, their assertions are mere arguments, and the district court correctly concluded that they do not constitute evidence of a defect.

In fact, the only person involved in this case who was qualified to testify as to whether the absence of an ambient air monitor or automatic shut-off constituted a defect in the generator was Mr. Downey. Yet, Mr. Downey offered no such testimony. Because the Gudmundsons rely only upon their own unfounded assertions rather than the testimony of qualified, vetted experts, the district court correctly concluded that there was no evidence of a defect and Del Ozone was entitled to summary judgment on the claims against it on this ground.

III. This Court should affirm summary judgment on the ground that Del Ozone did not owe the Gudmundsons any duty.

This Court recently stated, “on appeal, we may affirm the district court “on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the [district] court”.” *Ockey v. Lehmer*, 2008 UT 37, ¶ 42, 189 P.3d 51 (Citation omitted). This Court has also previously stated:

[A]n appellate court may affirm the judgment appealed from if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the [district] court to be the basis of its ruling [and] even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court.

State v. Robison, 2006 UT 65, ¶ 19, 147 P.3d 448 (citation omitted).

Summary judgment should also be affirmed because Del Ozone owed the Gudmundsons no duty. “‘The question of whether a duty exists is a question of law’ and is reviewed for correctness.” *Slisze v. Stanley-Bostitch*, 1000 UT 20 ¶ 9 (citation omitted). “[I]t is axiomatic that one may not be liable to another in tort absent a duty.” *Yazd v. Woodside Homes Corp.*, 2006 UT 47, ¶11 (citation omitted). “Any analysis of a tort claim, then, begins with an inquiry into the existence and scope of the duty owed the plaintiff by the defendant.” *Id.*

In deciding not to grant summary judgment on this ground, Judge Lindberg stated, “I don’t agree with Del Ozone that it’s – that the connection between its role as manufacturer of the Ozone System is so attenuated to the injury of the worker in this case, Ms. Gudmundson, that it was unforeseeable. I just cannot – cannot agree with

that.” Transcript of Summary Judgment Hearing, ROA 1890, at 6. Judge Lindberg later clarified that she meant the ozone generator, not the laundry ozone system. Later in the hearing, Judge Lindberg added, “I’ll tell you that the reason why I was not persuaded is because if you are manufacturing a component, and you know that that component is – use of that component is for laun – in laundry ozone systems, it is not unforeseeable that an operator of a laundry ozone system employing that component could be injured by a problem.” Transcript of Summary Judgment Hearing, ROA 1890, at 31 (emphasis added).

The Court, however, is required to consider additional factors prior to determining whether a duty exists. Specifically, a court should consider (1) the extent that the manufacturer could foresee that its actions would cause harm, (2) the likelihood of injury, (3) the magnitude of the burden guarding against it, and (4) the consequences of placing the burden on the defendant, prior to determining whether a duty of reasonable care exists. *See Slisze v. Stanley-Bostitch*, 1000 UT 20 ¶ 12. “A relationship that is highly attenuated is less likely to be accompanied by a duty than one, for example, in which parties are in privity of contract.” *Yazd v. Woodside Homes Corp.*, 2006 UT 47, ¶16. “A person who possesses important, even vital, information of interest to another has no legal duty to communicate the information where no relationship between the parties exists.” *Id.*, ¶17.

It is undisputed that Del Ozone’s only role in this matter was to fill the purchase order submitted by OzoneSolutions for an ozone generator. The District Court ruled that this alone created a duty because it was “not unforeseeable” that an operator of the

laundry ozone system could be injured; however, Del Ozone's relationship to Mrs. Gudmundson was too attenuated to warrant imposition of a duty. Del Ozone was removed from Mrs. Gudmundson by three parties. The State of Utah, Mrs. Gudmundson's employer, contracted with Johnson Controls to install a laundry ozone system at the prison. Johnson Controls, in turn, hired OzoneSolutions to perform the installation. And OzoneSolutions purchased the generator from Del Ozone. Thus, it was not readily foreseeable that Mrs. Gudmundson would be injured as a result of Del Ozone selling a non-defective ozone generator to OzoneSolutions.

The other factors weigh heavily in favor of imposing no duty on Del Ozone. First, there was little likelihood that someone would be injured by the generator. This is confirmed by the Gudmundsons' failure to submit any evidence that Mrs. Gudmundson was injured by exposure to ozone, the chemical emitted by the ozone generator. In fact, as noted above, the Gudmundsons changed course in their opposition to summary judgment, claiming that Mrs. Gudmundson was injured by exposure to byproducts of ozone. Because the generator emits only ozone, there is no evidence of injury and this factor weighs heavily against imposition of a duty.

Similarly, the factors concerning the burden and consequences of imposing a duty on Del Ozone weigh heavily against imposition of a duty. The burden of imposing a duty would be substantial. Such a ruling would effectively require Del Ozone to monitor installation and use of each item it sells. In this case, the generator was sold to OzoneSolutions, an experienced installer of laundry ozone systems. The burden is better

born by OzoneSolutions, and by Johnson Controls, who hired them to install the laundry ozone system, including the generator.

The balance of factors weighs against imposition of a duty, therefore, summary judgment in favor of Del Ozone should be affirmed on this ground as well.

IV. Summary judgment should also be affirmed on the ground of collateral estoppel.

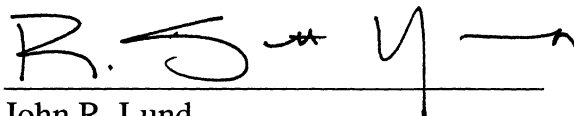
The collateral estoppel arguments have been briefed by counsel for OzoneSolutions and Johnson Controls. Del Ozone hereby incorporates each and every argument in favor of affirming summary judgment on the ground of collateral estoppel made and described by counsel for OzoneSolutions and Johnson Controls in their respective briefs.

VII. CONCLUSION

For the reasons stated above, summary judgment in favor of Del Ozone should be affirmed.

DATED this 17th day of December, 2008.

SNOW, CHRISTENSEN & MARTINEAU

A handwritten signature in black ink, appearing to read "R. S. Young", written over a horizontal line.

John R. Lund
R. Scott Young
Attorneys for Appellee Del Ozone

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of December, 2008, I caused a true and correct copy of the foregoing to be served via U.S. Mail and hand delivery to the following:

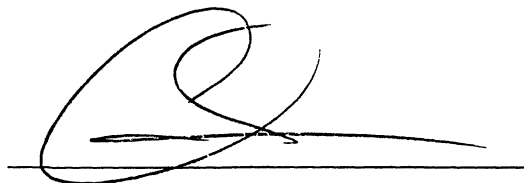
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A handwritten signature in black ink, appearing to be "Brent Gordon", is written over a horizontal line.