2002

William G. Ercanbrack v. Oakwood Mobile Homes, Inc. (a North Carolina corporation) and Homes by Oakwood, Inc, (a North Carolina corporation) : Brief of Appellee

Utah Supreme Court

BEFORE THE UTAH SUPREME COURT

WILLIAM G. ERCANBRACK, Plaintiff/Appellee, v. OAKWOOD MOBILE HOMES, INC. (a North Carolina corporation) and HOMES BY OAKWOOD, INC. (a North Carolina corporation), Defendants/Appellants.	**Case No. 20020690 – SC**

BRIEF OF APPELLEE

Appeal from 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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LIST OF PARTIES

The parties to the proceeding before the trial court were Plaintiff William G. Ercanbrack and Defendants Oakwood Mobile Homes, Inc.; Homes by Oakwood, Inc.; SS Supply, Inc.; Summit Propane; Union Pacific Resources Co.; Eaton Metal Products, Inc.; Flare Construction, Inc.; and Natural Gas Odorizing.

The only parties to this appeal are Plaintiff/Appellee William G. Ercanbrack and Defendants/Appellants Oakwood Mobile Homes, Inc. and Homes by Oakwood, Inc. The other Defendants settled with Plaintiff/Appellee prior to trial, were dismissed from the action, and are not parties to the appeal.

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STATEMENT OF JURISDICTION

This Court has jurisdiction under Utah Code Ann. § 78-2-2(3)(j).

STATEMENT OF FACTS

In June 1997, Plaintiff-Appellee Bill Ercanbrack and his wife Tammy bought a manufactured home from Defendant-Appellant Oakwood.[1] Oakwood built the home at its plant in Fort Morgan, Colorado, and trucked it to the Ercanbracks' property near Coalville, where it installed the home. R. 7005:74. The Ercanbrack family moved into the home in September 1997. R. 7001:61. On January 31, 1998, a propane explosion completely destroyed the home and killed Tammy, Bill's seven-year-old daughter Tina, and Bill's eighteen-month-old son Jeremy. R. 7001:17, 20.

A. Mr. Ercanbrack Discovers the Explosion.

On January 31, 1998, Mr. Ercanbrack planned to meet his wife and children in Coalville at approximately 4:00 p.m., after he completed work, to do the family shopping. R. 7001:88-89. When the family did not meet him on time, he started driving towards his home, expecting to find the family with some car trouble along the road. R. 7001:90-91. He did not encounter them along the roadway, however, and when he approached his home site he saw that his house was gone and yellow lines were on the snow leading up to his home site. R. 7001:91-93. In his panic, Mr. Ercanbrack mistook these for police "do not cross" lines and turned around and headed to a phone to contact the Sheriff's

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[1] The home was built by Defendant-Appellant Homes by Oakwood, Inc., and sold by Defendant-Appellant Oakwood Mobile Homes, Inc. This brief refers to the two entities collectively as "Oakwood."

Office. R. 7001:92-93. Mr. Ercanbrack telephoned the Sheriff's Office at approximately 5:05 p.m. R. 7001:91-96; R. 7004:39-40. The police informed him that no explosion had been reported. R. 7001:96. He immediately sped back to the home site. R. 7001:96.

When he reached what was left of his home, Mr. Ercanbrack discovered that the yellow lines were actually insulation thrown from the explosion. R. 7001:96. He first discovered Tammy's body lying some distance away from the actual home site. R. 7001:96-97. She was without any clothes except for underpants, and her lower torso was burned a bright red. R. 7001:97-98. He took off his jacket and covered his wife and immediately began searching the wreckage to locate his children. R. 7001:97-98. He next discovered Tina's body in the midst of the wreckage of the home. R. 7001:98.

At about that time, Summit County police and others began arriving at the site. R. 7001:101. Mr. Ercanbrack and the others searched to locate Jeremy, but despite everyone's efforts, they were unable to locate the boy, and the search was eventually called off because of darkness. R. 7001:101-103. One officer then volunteered to remain at the site to secure the scene overnight and to ward off any animals. R. 7004:42-43; R. 7003:167.

The next morning the search began again. R. 7001:106. After some time, the police brought a search dog to the site, which eventually located the body. R. 7004:43-44. The body was charred beyond any recognition. R. 7001:107; R. 7003:171.

B. Investigation and Analysis of the Explosion.

Richard Thatcher, an experienced propane accident investigator, was at the Ercanbrack scene three days after the explosion and examined all aspects of the scene, including the gas pipes. R. 7006:24, 59, 87. He soon determined (and Oakwood's experts

agreed) that the explosion was caused by propane gas, which accumulated in the crawl space underneath the living area. R. 7011:195, 114; R. 7006:38; R. 7007:184.

The "external" portion of the home's propane system consisted of a fuel tank, lines connecting that tank to a "second stage regulator" outside the home, and lines running from the second stage regulator to an inlet connection at the wall of the crawl space. R. 7006:59-61. The "internal" portion of the system consisted of two horizontal supply pipes that ran from the inlet through the home's crawl space, about 17 inches below the floor level, and connected to two "risers," vertical pipes extending up through the floor that connected the horizontal pipes with the stove and furnace in the home. See Pipe and Fracture Diagram, Def.'s Tr. Ex. 237, Addendum Exhibit ("Add. Ex.") 1 hereto. One horizontal pipe ran straight from the inlet and connected to the furnace riser by a "T" joint; the second went out ninety degrees from the first pipe and connected to the range riser by an elbow joint. At the inlet the horizontal pipe was strapped to a stabilizing block to hold the pipe assembly rigid. The regulator and surrounding connections were covered by a plywood box to keep snow off the regulator. R. 7006:102-103; R. 7011:216. Oakwood manufactured the internal pipes, connections, and risers, from the inlet block in, but not the external portion.

All of the internal horizontal pipes, connections, and risers were recovered after the explosion. R. 7004:132-134. All external lines were recovered except for a threaded ring that was screwed into the second stage regulator. R 7011:50, 207. The system had broken in four places: (1) in the base threads of the range riser, (2) in the horizontal pipe, at an elbow joint just in from the range risers, (3) in the base threads of the furnace riser,

and (4) outside, in the regulator box, where the second stage regulator connected to a gas line. See Add. Ex. 1; R. 7010:85. The fourth break was the only one not in the crawl space. R. 7011:195-96. The regulator itself was melted. R. 7006:93.

The recovered gas pipe was pressure tested and contained no leaks, other than at the four fracture points (except for small leaks at two joints, which everyone agreed did not leak enough gas to cause the explosion). Oakwood Br. at 32; R. 6998:158-59, 168. From prior experience and testing, Mr. Thatcher believed the propane leak occurred in the crawl space. R. 7006:102. Mr. Thatcher believed that if the explosion had been caused by a leak in the regulator box, the fireball from the explosion would have damaged items near the box, which did not happen. R. 7006:99-100. Mr. Thatcher also concluded from his experience and observations that the propane would not have migrated from a leak in the regulator box into the enclosed crawl space in sufficient quantities to have caused an explosion. R. 7006:99-102.

Mr. Thatcher set out to test this conclusion through scientific testing. He and his associates built a smaller version of the Ercanbrack structure. They excavated, poured footings, built cinderblocks, and applied stucco and other similar features, with a simulated living area. During the tests the wind and snow conditions were recreated. R. 7006:103-132. Tests were run on the exemplar by releasing propane at the point of the outside break for several hours at the highest rate possible, representing the worst-case scenario leak that could occur. R. 7006:137-139. Thatcher in his 50+ years of experience in the industry has never encountered a residential propane leak as large as the amount released for the tests. R. 7006:137; R. 7005:204. The propane was monitored at

various locations in and around the crawl space. R. 7006:113, 135-136, 139-140. After running the tests and reviewing all data, Thatcher again concluded that a leak in the regulator box could not have caused the Ercanbrack explosion, because not enough gas could migrate into the crawl space to reach an explosive concentration. R. 7006:146.

Joseph Romig, Ph.D., who has been a gas explosion expert for over twenty years, also ran tests relating to the possibility of an outside leak and reviewed all evidence and reports in the case. R. 7007:97-101. Dr. Romig also ran multiple worst-case scenario tests releasing propane into the regulator box and collecting data in and around the test crawl space. R. 7007:97-101. After reviewing data and releasing his conclusions, Dr. Romig ran subsequent gas migration tests in an effort to address and answer questions raised by Oakwood's experts regarding the previous migration testing. R. 7007:161. As a result of examining the evidence, performing other related tests, and reviewing that data, Dr. Romig concluded, "I don't see any way that gas from outside – from leaking within that [regulator] box could account for this incident." R. 7007:180.

Franklin Alex, Ph.D., examined the evidence to determine whether the source of the leak in the crawl space could be located. Dr. Alex has been a physical metallurgist for over forty years and specializes in failure analysis. R. 7007:232. Dr. Alex started his analysis by relying on the expert conclusions that (1) the accumulation of gas was in the crawl space, and (2) the propane in the crawl space could not have come from a leak outside the crawl space. R. 7008:15-16; 85-86; 101. Dr. Alex and Mr. Thatcher observed that the only source of propane in the crawl space was the Oakwood gas pipe. R. 7006:38; 7008:15. (Oakwood has never contended otherwise.) Therefore, Dr. Alex

concluded that the leak must have come from the pipe located within the crawl space. R. 7008:15, 16. Since the recovered pipe revealed no leaks in the crawl space except at the three fracture points, the propane leak for the explosion could only have originated from one of these three points. R. 7008:15-16; R. 6998:71-73, 76-77.

It is standard practice in failure analysis that once the possibilities have been narrowed, testing would occur to try to determine the failure. This testing may or may not involve examination of fracture surfaces. R. 6998:70-73, 77; R. 7007:233; R. 7008:26-27, 35. Since the leak had to have come from one of the three breaks in the crawl space, Dr. Alex inspected those fracture surfaces and concluded that each of the pipes was fractured by bending forces. R. 7008:21. Dr. Alex also reviewed the fracture surface at the outside fracture point. R. 7008:20. The half of the fracture surface that was recovered was too corroded to inspect with a scanning electronic microscope ("SEM"). R. 7008:20-21. The only conclusion that could be reached from studying the outside pipe fracture surface is that that break also occurred from bending forces. R. 7008:20.

Dr. Alex next used his mechanical engineering background to study the pipe itself and its assembly and construction. R. 7007:233; R. 6998:84. Dr. Alex familiarized himself with Oakwood's manufacturing process by reviewing the depositions of Oakwood employees, Julie Meek, Larry Webber, Richard Gibson, and others, who worked at Oakwood's Colorado plant. R. 6998:126, 128-129; R. 7007:278. Dr. Alex also reviewed the deposition of Michael Slifka, Oakwood's HUD expert. R. 6998:129. Dr. Alex reviewed a videotape Oakwood prepared showing Oakwood's processes for gas

pipe construction, installation, and testing.[2] R. 6998:125, 128-129, 131-132; R. 7008:234-238, 317-322. Dr. Alex also inspected a similar home at the Oakwood lot. R. 6998:133.

Dr. Alex's inspection revealed that every single pipe connection Oakwood manufactured violated American National Standards Institute's ("ANSI") standard B1.20.1, which governs threading and connection of gas pipes, and which is incorporated into the HUD standards for manufactured homes. R. 7008:38-43, 49-50, 67. B1.20.1 requires that the pipes used in the home have only 10-11 threads on a connection end, and that a pipe be inserted only 7-8 threads into a joint, with 3 threads remaining outside the joint. R. 7007:8. The pipes Oakwood manufactured all had 14 threads, and all connections in the horizontal pipes were ***fully*** inserted, i.e., inserted 14 turns, with no threads visible. R. 7008:38-48. The range riser, however, was ***under***inserted into the joint at its base: The pipe was inserted only 5 to 6 threads, with 8 threads visible, thus significantly weakening that joint. 7008:38-48.

Dr. Alex recognized that the combination of overthreading and overinsertion had two negative effects on the pipe assembly. First, the overthreading and overinsertion

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[2] Even though Oakwood prepared the videotape for the litigation, Oakwood subsequently moved the trial court to exclude the video. The trial court granted the motion in part, even though Richard Gibson, who had seen the video, testified in his deposition that the procedures depicted in the video were the same as the procedures used in manufacturing the Ercanbrack home. R. 6998:123, 124, 131, 132; R. 7008:234-238, 317-322. Because the video was clearly the type of material that an expert would reasonably rely on, Dr. Alex should have been allowed to testify regarding the video at trial under Utah R. Evid. 703. Further, that Dr. Alex consulted the video, as well as the other sources discussed in the text, refutes Oakwood's claim that Dr. Alex supposedly failed to perform a proper investigation or otherwise lacked foundation for his opinions.

caused the overall length of the horizontal pipe assembly to be shortened.[3] R:7008:41-42, 49-50. Second, the overinsertion caused the joints to be so highly "torqued" that they were impossible to adjust, thus making the entire assembly more rigid and less able to absorb or dissipate any stresses placed on the assembly. R. 7008:49-50.

Dr. Alex concluded that due to the shortening of the assembly caused by the over-threading and underinsertion, the range riser connection and the furnace riser connection were 1.3 inches closer together than they should have been. R. 7008:51. The holes in the floor through which the risers passed, however, had been drilled before the risers were installed or inserted. R. 7004:153-55; R. 7008:36-37. Dr. Alex thus concluded that the distance between the furnace and range riser pipes was 1.3 inches shorter than the distance between the holes drilled in the floor to accommodate those pipes, causing a misalignment between the riser bases and the riser holes. R. 7008:54-55.

Dr. Alex then recognized that during construction of the home, the risers and pipe assembly would likely have to be forced to make both risers fit through the holes (R. 7008:54-55), and conducted tests to determine what force would be necessary to accomplish such a maneuver. Dr. Alex determined that if the pipe assembly was fixed at only one point, i.e., at one riser insertion, the force necessary to insert the other riser would be twelve pounds (at 17 inches from the end of the riser pipe, which was the distance

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[3] When pipe is threaded and inserted in accordance with B1.20.1, there would be 8 thread-widths of "overlap" between the pipe and the joint, i.e., 8 threads would be inside the joint at full assembly. But Oakwood placed 14 threads on the end of each pipe and rotated them until ***no*** threads were visible, i.e, so there were 14 thread-widths of overlap. Each overthreaded-overinserted connection was thus 6 thread-widths shorter than a properly threaded and inserted connection. See R. 7008:131-32.

between the base of the range riser and the floor of the home). R. 7008:57-59. If, however, the system was fixed at two points, e.g., at the other riser and at the inlet block where the pipe enters the crawl space, the force necessary to fit the risers, measured 17 inches from the base of the riser, would be approximately 80 to 100 pounds. R. 7008:59.

Further, Dr. Alex also found that when the risers were forced and adjusted to fit the originally drilled floor holes, the range riser would tilt away from the furnace riser and would lean at an angle into where a wall would eventually be built. R. 6998:114-117, 118, 132; R. 7008:52-54, 153-158. Oakwood's inspector Richard Gibson testified that the range riser often was not vertical after installation. R. 7004:159. Therefore, to install the wall, the range riser must be forced and straightened to a vertical position. Julie Meek testified that as far as she knew, the range riser was vertical at final inspection, indicating the Ercanbrack riser was forced vertical at some point during construction. R. 7008:62-64.

As stated above, Dr. Alex discovered that the range riser was overthreaded and ***under***inserted into its elbow joint. Instead of being inserted for eight threads as B1.20.1 requires, the riser pipe was inserted into the elbow joint only five to six threads. R. 7008:41-42. This significantly weakens the joint, because a thinner section of the tapered pipe wall is exposed to the high stress area of the joint. R. 7008:42. Dr. Alex conducted tests to determine the difference in joint strength caused by an overthreaded and underinserted pipe and found that an overthreaded-underinserted joint is much weaker: a properly inserted pipe failed at 108 pounds of force, while the overthreaded-underinserted pipe failed at 80 pounds. R. 7008:43-45.

Dr. Alex knew that with the mild, ductile steel used in the pipes, failure from bending can result in a crack in the pipe which does not extend entirely through the pipe wall. R. 7008:64-65. In this scenario, the gas pipe would have already failed, yet the pipe would pass a leak test because the pipe would still be gas tight until the fracture worked all the way through. R. 7008:64, 68. Once a partial crack existed, a small amount of additional movement of the riser would cause the crack to extend completely through the pipe wall. R. 7008:65. Dr. Alex concluded that outside temperature changes at the Ercanbrack home could cause sufficient movement in the pipe to cause a partial crack in the range riser wall to extend through the entire wall. R. 7008:65. Dr. Alex also concluded that there would be no metallurgical fracture surface evidence that this partial pre-crack existed before the leak. R. 7008:26, 31-35.

Dr. Alex identified several events during the manufacturing process that were likely to cause such a fracture to the base of the weakened, underinserted range riser. For example, based on the load tests explained above, Dr. Alex believed that the force required to move the risers and pipe assembly to let the risers fit through the floor holes would be enough to cause such a fracture. R. 7008:62. Dr. Alex also concluded that the bending force used to straighten the Ercanbrack riser back to vertical after it leaned through the floor hole was also sufficient to cause the pipe to fail. R. 7008:154-55. Dr. Alex also noted that impact to the riser during installation of the walls could cause enough force to partially fracture the pipe; because the range riser was 41 inches long, a force of 33 pounds at the end of the pipe would put the same stress on the pipe as a 70-pound force at 17 inches. R. 7008:63-64. Dr. Alex further concluded that a fracture

could result from transportation of the unit. R. 7008:64.

Dr. Alex determined one other way in which a fractured pipe could initially pass pressure tests but later develop a leak. Dr. Alex observed, during his inspection of the range riser, that the pipe was covered by a "copious amount" of pipe dope at the base. R. 7008:164-65. Dr. Alex noted that the pipe dope could have temporarily sealed the gas pipe for the pressure tests and eventually allow the crack to leak propane. R. 6998:75-76.

C. The Litigation.

Mr. Ercanbrack sued Oakwood, SS Supply Company (which had supplied the propane[4]), and other defendants, stating claims for negligence, strict liability, and breach of the implied warranties of fitness and merchantability. R. 416-441. He settled with all defendants except Oakwood. Oakwood maintained that the propane leaked from either the second stage regulator or the connection to that regulator, and that the propane must have migrated out of the plywood regulator box, under the snow, and through a vent in the crawl space wall. See, e.g., R. 7000:62-63; R. 7011:181, 186, 208, 210, 195-196. Oakwood also asserted that its personnel would not manipulate pipes if risers were misaligned, but instead would drill a new hole in the floor. R. 7000:43-44. Before trial, Oakwood filed a motion in limine to exclude "Dr. Alex's testimony concerning causation." R. 3771-3861. The trial court conducted a Rimmasch hearing, at which Dr. Alex testified and was examined by counsel for Oakwood and for Mr. Ercanbrack.

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[4] Mr. Ercanbrack's claim against SS Supply was based on the fact that the odorant included with the propane had faded, so that Mr. Ercanbrack and his family were unable to smell the propane leak. Mr. Ercanbrack contended that the odorant faded because SS Supply furnished a rusty tank, and it is well known that rust neutralizes the odorant.

R. 6998:54-152. Dr. Alex explained the basis for his opinions concerning how the improper threading and insertion of the horizontal pipes could have led to the explosion. Judge Hilder asked numerous questions and ultimately denied the motion. See R. 6998:152. Judge Hilder ruled, however, that if the only evidence at trial established that Oakwood drilled a new hole in the floor for the misaligned riser instead of manipulating the pipe assembly, Dr. Alex's testimony might be stricken.[5] Id.

At trial, Mr. Ercanbrack explained the circumstances of the explosion. Among other things, he explained that he had shoveled the snow away from the regulator box and the vents on the Sunday before the accident, and that it had not snowed at the site during that week. R. 7001:50-54, 76.

Mr. Thatcher, Dr. Romig, and Dr. Alex all testified and presented the opinions set forth above. Significantly, Dr. Alex presented his opinion concerning the possible locations of the leak, the likelihood that the pipe assembly was manipulated to align the risers, the forces required for such manipulation, and the effect such forces could have on the weakened riser, ***with little objection from Oakwood.*** See infra. Further, in response to points raised by Oakwood's experts, Dr. Alex offered additional opinions. In response to Mr. Moore's testimony that he did not find any "arrest marks"[6] on the pipe recovered from the explosion, Dr. Alex explained that the pipe was made from a mild steel that

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[5] The trial court indicated, however, that evidence that went only to Oakwood's claimed customs and practices would not be sufficient to exclude Dr. Alex's testimony: "I'm worried about general practice." R. 6998:142.

[6] An "arrest mark" is a mark indicating that a crack developed to a certain point, and then stopped.

would not yield such marks. R. 7008:26-27; R. 7011:231. Dr. Alex also testified, based on his years of experience, that an SEM examination would not have been either appropriate or necessary for this particular fracture analysis, because corrosion and damage on the pipe surfaces would interfere with such an examination and because the fracture scenario would not leave evidence that would show up on an SEM. R. 7008:26-27; R. 7011:231-32. Finally, Dr. Alex recounted an experiment he conducted wherein he partially broke several pipes, let them sit for six months, and then broke them the rest of way; examination of those surfaces with the SEM confirmed that no arrest marks were visible. R. 7008:31-35. Dr. Alex testified that his theory of causation was consistent with fracture mechanics and metallurgy. R. 7008:66.

Mr. Ercanbrack also introduced deposition testimony from Oakwood employee Richard Gibson, who was the Oakwood line inspector when the Ercanbrack home was built. Mr. Gibson's deposition testimony explained that when the unit arrived at the assembly station to have the risers inserted, the horizontal pipe was already strapped to the inlet block, to keep the gas line "rigid." R. 7004:156; R. 7008:174. Mr. Gibson testified that he worked on approximately 10,000 homes during his time at Oakwood, and that the risers were off from vertical ***five to ten percent of the time*** ("often enough that we knew it happened"). R. 7004:158-59, 165. Yet Mr. Gibson could recall only <u>one</u> time when a new hole was drilled to accommodate the misalignment. R. 7004:155. (Later at trial, Mr. Gibson said that he could recall 20-30 times when riser holes were redrilled and covered. R. 7008:212.) Moreover, Mr. Gibson admitted that sometimes when risers were misaligned, ***Oakwood personnel would manipulate the pipe assembly to make the risers fit.***

R. 7004:158. Mr. Gibson claimed, however, that Oakwood personnel only would "jiggle" the pipes. Id. This admission is ***itself*** quite damning, because Mr. Slifka testified that when risers are not vertical, the ***only*** permissible correction HUD allows is to drill new holes in the floor. R. 7009:148.

Finally, Mr. Ercanbrack referenced the quality-control document, or "traveler," that accompanied the Ercanbrack home through the manufacturing process. See Traveler, Defs.' Tr. Exs. 207(a) and (b), Add. Ex. 2 hereto. The traveler's purpose is to document significant events during the manufacturing process, and the traveler form specifically directs Oakwood's employees to "list all non-conformances." Id. The traveler for the Ercanbrack unit lists things like "blocks for gas unit installed by #10," "hole in kitchen ceiling panel needs changed, re staple ceiling diaphragm," and "switch in closet panel change." Id. But the traveler did not say that a new riser hole was drilled or that the inlet pipe was ever unblocked or reblocked.

At the close of Mr. Ercanbrack's case, Oakwood moved for a directed verdict, which the trial court heard and denied two days later. R. 7008:168; R. 7011:5-17. In the meantime, Oakwood presented its case, including expert witness testimony. David Moore testified that he did not believe manipulation of the pipes would have fractured a riser, and that he could find no physical evidence of such a pre-explosion fracture. R. 7011:68-69; 94-95. Based primarily on his inability to find physical evidence (even though Dr. Alex had testified that such evidence would not exist), Mr. Moore leapt to the conclusion that the leak probably occurred at the outside fracture (R. 7011:159), though his examination of that surface did not yield anything. R. 7011:66-68.

John Freeman testified, based on Mr. Moore's opinion that propane probably did not leak from the crawl space, that propane could have leaked at the regulator or the regulator box fracture point and migrated under snow into the crawl space vents. R. 7011:186. Freeman admitted, however, that he had no evidence of a leak in the regulator box and was unaware of any event that would have caused such a leak. R. 7011:208. Finally, Michael Slifka stated that compliance with ANSI B1.20.1 was not required by HUD regulations, though he admitted that a manufacturer cannot "ignore" B1.20.1. R. 7010:10, 28-29, 43-44, 51.

Oakwood never produced the persons who installed the risers for the Ercanbrack unit, so there was no direct evidence as to what actually occurred. Instead, Oakwood merely asserted that its practice was to drill a new hole and cover the old hole with tin if the pipe did not align with the riser holes. See Oakwood Br. at 28-29.

Importantly, Oakwood witnesses corroborated or failed to dispute many of Dr. Alex's conclusions. For example, Oakwood stipulated that the connecting pipes were overthreaded by three threads. R. 7000:41-42; R. 7011:240. Oakwood also did not contest that the horizontal pipes were fully inserted into their connections or that the effect of the overthreading and overinsertion was to shorten the riser distance by 1.3 inches. Nor did Oakwood dispute that the range riser was ***under***inserted into its elbow joint. In fact, both Mr. Gibson and Larry Webber, a Colorado HUD inspector at Oakwood when the home was built, testified that the 7 to 8 threads showing in the range riser were unacceptable; Mr. Gibson would have required rethreading if he had seen it before it left the Oakwood plant. R. 7004:151-152, 205-07; R. 7008:301-302, 308-309.

Mr. Moore, Oakwood's metallurgy expert, confirmed that an underinserted pipe connection would be significantly weaker than a properly inserted connection. R. 7011:78-85, 126-127. Mr. Moore also confirmed that it was possible to achieve a partial thickness crack in a pipe by bending it. R. 7010:135. In fact, Mr. Moore testified to a series of experiments that ended up confirming Dr. Alex's opinion that the force required to make a riser pipe line up with the predrilled hole would be enough to partially crack the pipe. R. 7011:78-85. Mr. Moore testified that he made four attempts to bend the pipe, two with proper insertion and two with overthreading-overinsertion, and that in ***three of those four attempts***, he was able to achieve a crack that did not extend through the entire wall thickness. R. 7011:135. The only pipe that did not fracture was properly threaded and inserted. R. 7011:135-136, 139.

Importantly, Mr. Moore was able to obtain these partial fractures ***at deflections of as low as 1.5 to 1.65 inches***, which is nearly ***identical*** to the 1.3 inch misalignment that Dr. Alex calculated. R. 7011:82-85, 136-137, 139. Further, Mr. Moore obtained fractures with forces of 85 to 90 pounds (id.), which are consistent with the forces Dr. Alex said would be required to align the risers if the assembly was rigid. R. 7011:31.

Mr. Moore also admitted that a partial thickness fracture that later developed into a full crack would not necessarily leave discernable metallurgical evidence on the fracture surface. R. 7011:156. Finally, Mr. Moore acknowledged that a partial fracture could grow to a full fracture with as little as 1/20" movement, and that expansion and contraction at the Ercanbrack home could account for over 1/20" relative movement in the gas pipe. R. 7011:119-120, 139-140.

In his opening statement, Oakwood's trial counsel told the jury that it was conclusively established that, while Mr. Ercanbrack was the first to report the explosion, he did not report the explosion until 6:05 p.m. R. 7000:61. Counsel stated, "I don't know what he did, but there is a lot of time unaccounted for." Id. The deposition testimony obtained by Oakwood prior to trial, however, showed that Mr. Ercanbrack reported the explosion at approximately 5:05 p.m. – not at 6:05. Ercanbrack Dep. at 52-56, 142, Add. Ex. 3. Mr. Ercanbrack had testified as to the sequence of events – that he left Coalville at 4:30 p.m., drove 11 miles in 20 minutes, arrived at the scene of the explosion at 4:50 p.m., immediately dashed to find a telephone, and called the Sheriff's Office from a neighbor's house, clearly only a few minutes after arriving at the scene. Id. From its deposition of Fire Investigator Lynn B. Borg, Oakwood had also elicited testimony that Mr. Ercanbrack reported the explosion at "1705" – 5:05 p.m. Borg Dep. at 24-25, Add. Ex. 4. And Investigator Borg's Report of Investigation, introduced at his deposition, also stated repeatedly that Mr. Ercanbrack reported the explosion at "1705." Add. Ex. 5.

After deposing Mr. Ercanbrack and Investigator Borg, Oakwood served a set of Requests for Admission, which included the following two responses by Mr. Ercanbrack:

> 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 which is attached hereto as Exhibit 2).
>
> RESPONSE TO REQUEST FOR ADMISSION NO. 12: Admit.
>
> REQUEST FOR 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.

At trial, Oakwood sought to introduce Admission No. 12 to support its claim that Mr. Ercanbrack did not report the explosion until 6:05 p.m. Oakwood also attempted to exclude evidence that contradicted its reading of the admission. The court admitted both admissions and allowed evidence as to the actual time of the call, ruling that the court's "fundamental purpose here is to give the jury the whole picture." R. 6997:30.

During the trial, Oakwood did not object to testimony showing that Mr. Ercanbrack reported the explosion at 5:05 p.m. R. 7001:92-96. Oakwood itself even elicited such evidence on cross-examination of Mr. Ercanbrack. R. 7003:90-96, 107-09. Oakwood also did not object to testimony from Sheriff's officers and Blaine Ercanbrack to the effect that the Sheriff's Report was incorrectly logged at 6:05, and the correct time would have been 5:05. E.g., R. 7004:39-40; R. 7003:157; R. 7007:257-58. Additionally, Oakwood put into evidence Investigator Borg's Report of Investigation, recording that Mr. Ercanbrack reported the explosion at "1705." Defs' Tr. Ex. 294, Add. Ex. 5.

Ultimately, both sides rested their cases, and Oakwood did not renew its motion for a directed verdict. See R. 7011:241. Instead, the case went to the jury. The jury was instructed that Mr. Ercanbrack and SS Supply had reached a settlement agreement. The trial court further instructed that the jury must still determine from the evidence which party or parties were at fault, and the percentage of fault that each party contributed in causing the damage. Additionally, the court instructed the jury that Mr. Ercanbrack now had a financial interest in showing that the parties that did not settle were entirely to blame for the accident and damages. The trial court did not disclose to the jury the

amount paid in the settlement with SS Supply.

The jury returned a verdict determining that Oakwood was 60 percent liable for the accident and finding that Mr. Ercanbrack had incurred $8,953,600 in damages. Judgment was entered against Oakwood for $5,259,638.40. The jury determined that SS Supply was 40 percent liable for the accident. Forty percent of $8,953,600 is $3,581,440, very close to what SS Supply had previously paid in settlement ($3.25 million). Ten days later, Oakwood moved for a judgment notwithstanding the verdict and for a new trial, which was denied. This appeal followed.

DETERMINATIVE PROVISIONS

Utah R. Civ. P. 36(b), 50(b); Utah R. Evid. 103(a), 702, 703. See Add. Exs. 6 through 10.

SUMMARY OF ARGUMENT

The trial court and the jury did exactly as they were supposed to. Judge Hilder carefully and appropriately exercised his discretion in response to Oakwood's evidentiary and procedural objections, and the jury carefully weighed the conflicting evidence. Oakwood's dissatisfaction with the verdict does not mean error occurred.

Oakwood's claim that the trial court erred in allowing Dr. Frank Alex's testimony fails for several reasons. First, Oakwood's challenge is improper because Oakwood fails to identify the particular statements or opinions that supposedly should have been excluded. Oakwood's challenge to Dr. Alex's "story" is not sufficient to enable Mr. Ercanbrack to respond or the Court to rule. Second, Oakwood's challenge based on Rimmasch fails because Dr. Alex's testimony was not based on novel principles or techniques, and

there is no good reason to extend Rimmasch. Third, Oakwood waived most of its objections by not presenting them at trial. Fourth, Oakwood's arguments fail on the merits because there was ample foundation for the opinions Dr. Alex expressed at trial, and the testimony was helpful to the jury in assessing whether the explosion was caused by a defect in the home. Oakwood's main complaint is that Dr. Alex and its own experts reached different conclusions, but that is not ground for striking evidence.

Oakwood's attack on the jury verdict should be rejected as well. Once again, Oakwood failed to preserve its objections by failing to move for a directed verdict at the close of the evidence and by failing to marshal the evidence on appeal. Oakwood's challenge fails on the merits as well, as the jury's determination that the explosion was caused by a defect in the home is supported by the evidence. The jury was well within its rights in relying on the direct and circumstantial evidence showing a defect and how the defect led to the result, particularly since Mr. Ercanbrack's evidence refuted the only alternative explanation Oakwood offered for how and why the accident occurred.

Oakwood's other challenges, based on the alleged misconduct of plaintiff's counsel during closing argument and alleged error on the part of Judge Hilder, are after-the-fact, makeweight arguments to compensate for the fact that Oakwood has no legitimate basis for appeal. First, the court did not err in allowing both Mr. Ercanbrack's admission to Request No. 12 and other evidence to explain the admission. Oakwood unreasonably relied on the admission in representing to the jury that there was a lot of time unaccounted for, insinuating impropriety on the part of Mr. Ercanbrack during that time. The admission was poorly drafted by Oakwood, and evidence from pre-trial discovery

was overwhelming that Mr. Ercanbrack reported the explosion at 5:05 p.m. – not 6:05. The court's ruling, indicating that "my fundamental purpose here is to give the jury the whole picture," was a proper exercise of discretion, particularly when the challenged evidence was elicited by Oakwood itself, and when the only relevance of the timing of the report was to create a fictitious gap of time, so Oakwood could imply impropriety from that fiction.

Second, the trial court properly exercised its sound discretion in dealing with the arguments of both counsel, and the arguments of plaintiff's counsel were not improper or prejudicial. The argument referencing "send a message" was urged in the context of ultimate liability, and was not inviting the jury to "respond in damages." Any prejudice was cured through court instruction and the explanation of plaintiff's counsel that he was not asking the jury to punish Oakwood. The argument that there were applicable standards that imposed a legal duty on Oakwood was not an improper comment on the merits of the case. Oakwood's claim of prejudice from reference to Oakwood as a large, out-of-state corporation is unfairly based on mischaracterizations of counsel's argument and of the context in which the argument was made. Finally, Mr. Ercanbrack's counsel did not improperly argue credibility in responding to Oakwood's direct accusation that Mr. Ercanbrack was lying. The response was confined to the record and was not based on the personal knowledge of Mr. Ercanbrack's counsel.

Third, the trial court did not err in failing to instruct the jury that SS Supply was a proximate cause of the injuries, or as to the amount SS Supply paid to settle with Mr. Ercanbrack. Indeed, the jury expressly found that SS Supply was a proximate cause and

appropriately apportioned fault. While disclosing the fact of settlement to the jury was proper, it would have been improper to disclose the amount of the settlement.

Finally, as the Court will see in analyzing the various alleged errors and misconduct asserted by Oakwood, this is not a case in which the accumulation of error amounts to a determination that Oakwood did not receive a fair trial. Oakwood was "entitled to a fair trial but not a perfect one, for there are no perfect trials." McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 552 (1984).

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING DR. ALEX'S EXPERT TESTIMONY.

The trial court acted well within its discretion in allowing Mr. Ercanbrack to present expert opinion testimony from Dr. Frank Alex. Dr. Alex is a highly qualified metallurgist who has been specializing in the field of failure analysis for nearly forty years. Dr. Alex visually and microscopically examined the pipe recovered from the Ercanbrack home, consulted manufacturing standards, made mathematical calculations, performed various re-enactment tests, read and analyzed depositions of Oakwood employees, viewed a videotape of Oakwood's manufacturing process, and went to a sales lot to examine a similar home. In reliance on these sources and on his own knowledge and experience in metallurgical failure analysis, Dr. Alex concluded that Oakwood defectively threaded and inserted the pipes comprising the home's propane system, and that these defects most likely led to the explosion.

Under Rule 702, "Scientific, technical, or other specialized knowledge" is

admissible if it will "assist the trier of fact to understand the evidence or determine a fact in issue." Utah R. Evid. 702. Expert testimony is generally admissible where "'the subject matter is not one of common observation or knowledge, or in other words, where witnesses because of particular knowledge are competent to reach an intelligent conclusion and inexperienced persons are likely to prove incapable of forming a correct judgment without skilled assistance.'" Patey v. Lainhart, 1999 UT 31, ¶ 22, 977 P.2d 1193 (citation omitted). If expert testimony is based on "novel scientific principles or techniques," the proponent of such evidence must show that those principles or techniques are "inherently reliable." See State v. Rimmasch, 775 P.2d 388, 396-98 (Utah 1989). But if the testimony is not based on novel principles or techniques, the proponent need only show that there is an adequate foundation for the expert's ***opinions***. See Patey at ¶¶ 20, 23.

"A trial court has ***considerable discretion*** in determining whether expert testimony is admissible." State v. Crosby, 927 P.2d 638, 642 (Utah 1996) (emphasis added). "Consequently, absent a clear abuse of this discretion, an appellate court will not reverse the trial court's determination." State v. Kelley, 2000 UT 41, ¶ 11, 1 P.3d 546.

A. Oakwood's failure to specify the testimony that it believes should have been stricken precludes consideration of its argument.

While Oakwood claims that the trial court erred in allowing Dr. Alex to testify, Oakwood never specified, either below or on appeal, precisely which portions of Dr. Alex's testimony are objectionable. Oakwood raises one specific objection, that Dr. Alex should not have testified that the leak was at one of the fracture points in the crawl space.

Otherwise, Oakwood merely complains about "Dr. Alex's opinion regarding causation," "Dr. Alex's testimony," or "Dr. Alex's story." See R. 3771-3861; Oakwood Br. at 27. But Dr. Alex testified for over 240 transcript pages (R. 7007:227-299; R. 7008:5-169; R. 7011:228-235) and gave several opinions that related to "causation." Oakwood cannot seriously contend that ***everything*** he said is inadmissible.

An appellant may not complain about an evidentiary ruling unless he made a "specific" objection. Utah R. Evid. 103(a)(1). A general objection fails to satisfy this requirement. See, e.g., Redevelopment Agency v. Barrutia, 526 P.2d 47, 50 (Utah 1974) ("Defendants' generalized objections directed to the entire deposition do not comport with the requirements of [the rule]."). The Court should therefore disregard Oakwood's challenge to the admissibility of Dr. Alex's testimony.

B. The trial court properly allowed Dr. Alex to testify that the leak must have been located at one of the three fracture points in the crawl space.

The Court should reject Oakwood's attack on Dr. Alex's testimony that the propane leak was located at one of the three fracture points in the pipes under the home. Contrary to Oakwood's claim, there is nothing "speculative" about Dr. Alex's conclusion that the propane leak occurred at one of the three fracture points. Instead, Dr. Alex's opinion is soundly based on Mr. Thatcher's and Dr. Romig's testimony that established that the propane leak was in the crawl space.

As explained in the Statement of Facts, the evidence was undisputed that the ex-

plosion involved propane gas that had accumulated in the crawl space.[7] Because all of the pipe was recovered and tested, everyone agreed that ***except for*** the four places where the pipe was broken (one in the regulator box outside, and three in the crawl space), there were no ***other*** breaches in the propane system that could have leaked enough to cause an explosion. R. 6998:158-63. Therefore, everyone agreed that the leak that caused the explosion had to come from one of the four fracture points. But Mr. Thatcher and Dr. Romig both testified that the outside leak ***could not*** have caused the explosion. R. 7006:146; R. 7007:180. Significantly, ***Oakwood does not challenge the admissibility of either Mr. Thatcher's or Dr. Romig's testimony***.

Because Mr. Thatcher and Dr. Romig conclusively eliminated a leak in the regulator box as a source, the leak ***had to*** be at one of the three fracture points in the crawl space. There was no other choice: "Number one, we know we had gas under the trailer that caused an explosion. Okay, number two, ***assuming the gas came from a source under the trailer 100 percent had to be one of the three broken pipes***." R. 7008:15.

Therefore, Dr. Alex did not make a "speculative leap" or "turn[] scientific analysis on its head." Oakwood Br. at 22, 26. Dr. Alex merely started with reasoned conclusions furnished by experts in the field of propane explosions and gas migration -- conclusions that Oakwood does not attack -- and took them one logical step further based on his own knowledge and experience as a failure analyst. And Oakwood's witnesses did not

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[7] Because it is undisputed that propane from the home's internal or external propane system exploded, Oakwood's argument that "statistically" most propane systems are reliable is absurd. Oakwood Br. at 26.

disagree with Dr. Alex's reasoning: They did not suggest another possible source of the leak other than the fracture points, nor did they dispute that ***if*** the gas did not migrate from the regulator box, the leak ***must have*** been at one of the three fracture points in the crawl space. In fact, Oakwood's migration expert John Freeman used the ***same reasoning***, concluding that if the leak were outside, it "had to be" in the regulator box, because there were no other breaches outside. R. 7011:195-96.

1. Dr. Alex's testimony is not inadmissible under *Rimmasch* because *Rimmasch* does not apply.

As noted above, Rimmasch applies only to scientific testimony based on "novel scientific principles and techniques." See Patey ¶ 16, 977 P.2d at 1196.[8] Oakwood does not claim that Dr. Alex's testimony was based on novel principles or techniques. Having failed to even ***address*** this important prerequisite for the application of Rimmasch, it is improper for Oakwood to ask this Court to reverse on the basis of Rimmasch. Moreover, Dr. Alex's testimony regarding the possible locations for the leak is ***not*** based on novel or untested scientific principles, but on the opinions of other experts and his own substantial knowledge and experience. One expert may rely upon another in formulating his or her opinions, and there is no claim that ***those*** other opinions were inadequately supported. See Patey ¶ 32 (it was proper for one dentist to relay the causation opinions obtained from other experts); Lanham v. Idaho Power Co., 943 P.2d 12, 919 (Idaho 1997) ("The trial court may, in its discretion, permit an expert to render an opinion based in part on

[8] See also State v. Kelley, 2000 UT 41, ¶ 19, 1 P.3d 546; State v. Adams, 2000 UT 42, ¶ 16, 5 P.3d 642; Green v. Louder, 2001 UT 62, ¶ 27, 29 P.3d 638; Alder v. Bayer Corp., 2002 UT 115, ¶¶ 58-59, 61 P.3d 1068.

facts or opinions provided by others.") Oakwood agrees. R. 6998:139.

Finally, Dr. Alex's testimony is not "novel" simply because he used "differential diagnosis." Oakwood claims that such reasoning "has been uniformly criticized and rejected by courts" (Oakwood Br. at 26), but Oakwood fails to note that ***this*** Court has squarely held that differential diagnosis "is one of the oldest and most widely used and recognized of all the methods." Alder v. Bayer Corp., 2002 UT 115, ¶ 62, 61 P.3d 1068. In Alder, the Court recognized that differential diagnosis has been held to be "'presumptively admissible'" and "does 'not even implicate *Rimmasch*, much less violate its requirements.'" Id. ¶¶ 63, 66 (citations omitted).

2. Dr. Alex's testimony satisfies Rule 702's foundation and reliability requirements.

Because Rimmasch does not apply, Dr. Alex's testimony need only satisfy Rule 702's requirement that his opinions have an adequate foundation. See Patey ¶¶ 22-23, 977 P.2d at 1198. "'The expertise of the witness, his degree of familiarity with the necessary facts, and the logical nexus between his opinion and the facts adduced must be established.'" Id. ¶ 23 (quotation omitted).

a. Oakwood has waived any objection under traditional Rule 702 standards.

Oakwood does ***not*** claim on appeal that Dr. Alex's testimony fails to meet the traditional, non-Rimmasch, foundational requirements. Thus, Oakwood has waived any argument that Dr. Alex's testimony was inadmissible under those standards.

Further, Oakwood did not object when Dr. Alex testified that the leak had to be at one of the three fracture points. See R. 7008:15-16, Add. Ex. 11 hereto. (Oakwood did

object when he restated his conclusion later.) Oakwood's pretrial Rimmasch motion was insufficient to preserve an objection based on the foundation for a particular opinion under Utah's traditional standard, because Rimmasch addresses only the ***principles and methods*** underlying an expert's opinions, not the testimony itself. See, e.g., Adams ¶ 16, 5 P.3d at 647 (emphasis added) (refusing to apply Rimmasch because "*Rimmasch* simply requires that the scientific principles underlying the expert's testimony be inherently reliable, ***not that the expert's actual testimony be inherently reliable***.").

Had Oakwood made a ***foundational*** objection at trial, Mr. Ercanbrack could have asked Dr. Alex additional questions to cure any problem. But Oakwood remained silent. Mr. Ercanbrack would be prejudiced if Oakwood were allowed to object now.

b. Dr. Alex's testimony was supported by an adequate foundation.

Finally, Dr. Alex's testimony concerning the location of the leak ***was*** supported by a proper foundation: Mr. Thatcher's and Dr. Romig's unchallenged expert testimony and analysis that the leak was in the crawl space and that there was no other place in the propane system from which the propane could have leaked.

Oakwood's arguments largely miss the point. For example, Oakwood suggests that Dr. Alex improperly failed to consider alternatives, but the only possible locations for the leak were the four fracture points, and Thatcher and Romig eliminated outside sources as possible causes. In other words, the record does not reveal any other "possible

sources" for the leak.[9]

Oakwood suggests that Mr. ***Thatcher*** did not identify or eliminate possible sources of the leak ***within the home*** (Oakwood Br. at 21), but this is a specious argument because no one suggested at trial that the leak could have been inside the home. Oakwood did not claim that propane leaked from within the home, but rather that the propane leaked at the regulator box (and then migrated out of the box, under snow, through a vent, and into the crawl space). R. 7011:159, 181, 186, 195-96, 208, 210. Even Oakwood's gas expert testified that only small amounts of propane were in the living area, and that this gas had ***migrated from the crawl space*** due to a thermal "stack effect" that drew air ***up***, not the other way around. R. 7011:188, 196, 216-217. Finally, Oakwood cites no evidence in the record that a leak in the living area actually ***could have*** caused the explosion, i.e., that gas leaking inside the home could have migrated into the crawl space and accumulated enough to explode. Therefore, Oakwood has no basis to suggest that anyone wrongly failed to "eliminate" a source within the home.

Oakwood's experts did not dispute that ***if*** the leak occurred in the crawl space, it had to have occurred at one of the three fracture points there. Moreover, any disagree-

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[9] Oakwood's cases are distinguishable. In Stibbs v. MAPCO, 945 F. Supp. 1220, 1224-25 (S.D. Iowa 1996), the plaintiff's experts theorized that a propane explosion was caused by a faulty control valve on a water heater, but post-accident testing revealed no leak in the valve and the experts acknowledged that they could not rule out the furnace as a possible source of the leak. Similarly, in Indiana Michigan Power Co. v. Runge, 717 N.E.2d 216, 232-38 (Ind. Ct. App. 1999), the plaintiffs sued a utility for various symptoms they claim were caused by power lines, and they attempted to establish causation through experts who had no medical degrees, had not examined the plaintiffs or reviewed their records, and who failed to consider that the symptoms at issue, i.e., rashes, headaches, tooth decay, and a miscarriage, could be caused by countless other things.

ment with Dr. Alex's opinions would go "to the weight to be given the expert's testimony, not to its admissibility." Green ¶ 28, 29 P.3d at 646. Thus, the trial court did not err in allowing Dr. Alex to testify as to the possible locations for the leak.[10]

3. *Rimmasch* should not be extended.

The Court should decline Oakwood's request to extend Rimmasch to cover the present case. This Court has ***repeatedly*** reiterated that Rimmasch applies only to testimony based on novel principles or techniques. As noted in section I(B)(1) above, this Court has held at least five times that Rimmasch does not apply to testimony not derived from novel scientific principles.

Rimmasch need not be extended to ensure that expert testimony satisfy "certain threshold reliability standards." Oakwood Br. at 45. Patey makes clear that even non-novel expert testimony must be supported by a proper foundation, including a connection between the opinion and the supporting facts. See Patey ¶ 23, 977 P.2d at 1198. If expert testimony is "unreliable," there will be no logical connection between the opinion and the factual basis, and such evidence can be excluded on that basis.

Oakwood does not suggest that the Court was wrong in refusing to extend Rim-

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[10] Finally, Oakwood misleads the Court when it suggests that a "cause and origin expert" used "Dr. Alex's methodology" as a "text book example of faulty reasoning." Oakwood Br. at 25 (quoting Randall Noon, Engineering Analysis of Fires and Explosions at 3). In the Noon hypothetical, the only fact known is that an explosion occurred in a room containing a propane furnace, and the question is whether it is appropriate to conclude that propane exploded. Noon points out that such a conclusion may not be proper ***if there is another plausible cause of the explosion***. See id. at 3-5. In the present case, however, there ***is*** no other plausible cause of the explosion, because everyone agrees the explosive substance was propane that came either from the regulator box fracture point or from one of the fracture points in the crawl space.

masch to non-novel evidence, that conditions have changed, or that the refusal to extend Rimmasch has harmed Utah courts. Instead, Oakwood wants Rimmasch extended simply because Oakwood dislikes the outcome of the present case.

4. Dr. Alex's testimony satisfies any additional requirements under *Rimmasch*.

Finally, Dr. Alex's testimony concerning the locations for the leak would be admissible under Rimmasch. Even though Rimmasch did not apply, Judge Hilder did conduct an extensive Rimmasch hearing, at which Dr. Alex testified and the parties argued all issues surrounding the admissibility of Dr. Alex's opinions. R. 6998:54-152. The trial court considered the arguments carefully and correctly concluded that, as long as there was evidence that the gas could not have migrated from the regulator box into the crawl space, Dr. Alex would be allowed to testify that the leak had to come from one of the three crawl space fracture points. R. 6998:147, 152.

The trial court acted well within its discretion. Most importantly, Dr. Alex's reasoning that the leak had to come from one of the crawl space fracture points, based on Mr. Thatcher's and Dr. Romig's opinions, is perfectly sound. Dr. Alex testified that he reviewed those opinions based on his own scientific background and agreed with their reasoning. R. 6998:72.

Oakwood's failure to challenge Mr. Thatcher's and Dr. Romig's testimony is fatal to Oakwood's attempt to challenge the admissibility of Dr. Alex's testimony on the possible sources of the leak, as Oakwood is really complaining about ***Thatcher and Romig***'s opinions. Thatcher and Romig determined that the leak had to come from the crawl

space and that the system was gas tight everywhere except the fracture points. The jury obviously believed those witnesses, whose opinions must be taken as true for purposes of this appeal. See, e.g., Water & Energy Sys. Tech. v. Keil, 2002 UT 32, ¶ 15, 48 P.3d 888 (court will "view all evidence and all reasonable inferences drawn therefrom in the light most favorable to that verdict").

The established methods and principles Dr. Alex used to conclude that the leak came from one of three fracture points in the crawl space meet any requirement of "reliability" imposed by Rimmasch or any other authority. The trial court therefore did not abuse its discretion in allowing Dr. Alex to present that opinion.

C. The trial court properly allowed Dr. Alex to explain how Oakwood's improper threading and insertion of gas pipes likely led to the leak.

Oakwood apparently claims that the trial court erred in allowing Dr. Alex to testify that the leak most likely occurred at the base of the range riser and was most likely caused by Oakwood's improper threading and insertion of the pipes that made up the propane system. Once again, Oakwood's argument lacks merit.

1. Dr. Alex's testimony was proper.

The subjects of Dr. Alex's testimony, including the proper threading and insertion of gas pipe connections, the effects of improper threading and insertion, the effects of certain bending forces on Schedule 40 pipe, the forces at which such pipe may partially or fully fracture, the mechanisms by which a partial fracture may develop into a full fracture, and the reasons why a fracture may not be manifest for months are well beyond "common observation [and] knowledge," Patey ¶ 22, 977 P.2d at 1198, and Dr. Alex

clearly has specialized knowledge that "will assist the trier of fact to understand the evidence [and] to determine a fact in issue." Therefore, his testimony is proper.

Further, Dr. Alex established an adequate foundation for his opinions. As explained in the Statement of Facts, Dr. Alex relied on his decades of experience in failure analysis, direct examination of the recovered pipe, reference to the standards governing pipe threading and insertion, visual and microscopic examination of the fracture surfaces, experimental testing, depositions of Oakwood employees, a videotape of Oakwood manufacturing processes, examination of a home similar to the Ercanbrack home, and his general knowledge of the properties of Schedule 40 pipe. The trial court carefully considered Dr. Alex's foundation and testimony, and Oakwood's objections, and concluded that Rule 702 allowed Dr. Alex's testimony. Oakwood has given no reason to believe that Judge Hilder abused his discretion in so ruling.

2. Oakwood's challenges to Dr. Alex's testimony lack merit.

a. Testimony Regarding Manipulation of the Pipe Assembly.

Oakwood has not established, and cannot establish, that the trial court exceeded its ample discretion in allowing Dr. Alex to testify about the likely manipulation of the risers and pipe assembly and the effects that such manipulation would have on the range riser.

i. Oakwood failed to object at trial.

First, Oakwood waived any objection by failing to object to the testimony at trial. In response to Oakwood's motion in limine, the trial court ruled that Dr. Alex would be allowed to testify, but his testimony might subsequently be stricken if Oakwood established that new holes were actually drilled to accommodate the misalignment. See Oak-

wood Br. at 28 (quoting R. 6998:150-52). ***But Oakwood never followed up at trial.*** Instead, Dr. Alex testified, without objection, that when the risers were misaligned by 1.3 inches, "You could force it to fit ... [b]y actually pulling it" and "[O]ne of the things you could do is you could actually take and pull a pipe so far that you could put enough on the force so it breaks." See R. 7008:54, 63. Oakwood also failed to object to Dr. Alex's testimony concerning the forces involved in pulling the pipe over or the effect that those forces would have on the range riser. See R. 7008:58-66.

An objection must be made at trial unless the trial court "makes a definitive ruling on the record admitting or excluding evidence." Utah R. Evid. 103(a)(2). As shown by the quotation in Oakwood's brief, the denial of the motion in limine "at this time" clearly was not "definitive"; the ruling expressly contemplated a further objection based on evidence of Oakwood's manufacturing processes, which never came. Cf. Scott v. Ross, 140 F.3d 1275, 1285 (9th Cir. 1998) (where trial court denied motion in limine but indicated it would consider subsequent objections, party's failure to object waived right to challenge admission).

Mr. Ercanbrack would be severely prejudiced if the Court were to consider Oakwood's belated challenge. Had Oakwood objected at trial, Mr. Ercanbrack could have presented any additional foundational or corroborating evidence that was required. Accordingly, Oakwood should not be allowed to challenge that testimony now.

ii. Oakwood's arguments fail on the merits.

Oakwood's challenge appears to be based entirely on Rimmasch, but Oakwood has not established, or even ***claimed***, that Dr. Alex's testimony was based on novel prin-

ciples or techniques, and as such Rimmasch does not apply. In fact, Mr. Moore agreed that failure analysis is not "complex or difficult." R. 7010:7-11. Similarly, Oakwood has not asserted that Dr. Alex's testimony fails to satisfy the traditional Rule 702 requirements. Oakwood thus cannot show that Rule 702 bars Dr. Alex's testimony. Cf. State v. Rugebregt, 965 P.2d 518, 524 (Utah Ct. App. 1998) (challenge under Rimmasch not sufficient to raise challenge under Rule 702).

Oakwood's primary complaint appears to be that Dr. Alex's testimony was "directly contrary" to Oakwood's testimony that instead of manipulating the pipe assembly to align the risers, Oakwood "would" redrill the floor hole and release the pipe assembly from the inlet block to accommodate any manipulation of the assembly. No one from Oakwood testified to redrilling a floor hole or unblocking the gas assembly; instead, Oakwood relied on testimony about its purported "general practices."

There is no basis, under Rimmasch or Rule 702, for Oakwood's contention that Dr. Alex's testimony is ***inadmissible***. First, Oakwood's position that its after-the-fact testimony about general practices not tied to the Ercanbrack home requires the exclusion of Dr. Alex's testimony is absurd on its face. If Oakwood were correct, then a litigant could ***always*** bar adverse expert testimony simply by testifying that its general practice was to do everything properly. For example, suppose that in a vehicle accident case, the plaintiff's expert concludes that the defendant's vehicle was speeding. The driver of the other car is killed, and his employer claims that its ***standard practice*** is for its employees to obey the speed limit. It is ***obvious*** that in such a situation, the plaintiff's expert would be allowed to testify as to the conclusions drawn from the evidence, and it would be up to

the jury to determine whether the driver was speeding. The same analysis applies here.

Oakwood claims that expert testimony may be excluded where that testimony contradicts "indisputable" facts in the record. Oakwood Br. at 32. But that principle, to the extent it is even valid, does not apply here, because it is certainly not "indisputable" that Oakwood drilled a new hole in the floor of the Ercanbrack home to remedy the misalignment between the risers and the floor holes.

Indeed, ***there is no evidence that Oakwood drilled a new hole***; to the contrary, there is evidence that Oakwood did not drill a new hole. Because no one remembers building the Ercanbrack home, the best source of evidence as to its construction is the "traveler," on which Oakwood employees were to "list all non-conformances." Traveler, Add. Ex. 2. The traveler for the Ercanbrack unit lists trivialities like "blocks for gas unit installed by #10," "hole in kitchen ceiling panel needs changed, re staple ceiling diaphragm," and "switch in closet panel change." Id. But even though trivialities like these are listed on the traveler, ***nothing on the traveler indicates that the hole for the range riser was redrilled on the Ercanbrack unit.*** Id.

To drill a new hole, someone would have to measure, locate, and drill the new hole. The person would have to drill through the linoleum floor that was installed after the holes were originally drilled, and a piece of tin would have to be cut and inserted into the old hole.[11] R. 7008:182. Oakwood employee Richard Gibson testified that redrilling

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[11] While Mr. Gibson tested the gas line and inspected the riser, he never claimed to have seen tin covering the old riser hole. R. 7008:185, 211, 213, 222, 227. Similarly, there is no evidence that John Bailey of Summit Propane saw tin in the floor when he moved the

was exceedingly rare; he could recall only ***one*** instance when it happened (later changed to 20-30 out of 10,000 homes). R. 7004:155; R. 7008:212. And yet, despite the rarity of the event, not a ***single*** Oakwood employee documented that a new hole was drilled.

Likewise, there is no evidence that the home's gas line was ever unstrapped from the inlet block to accommodate any such manipulation.[12] The traveler does not indicate that the pipe was ever released from the inlet block or subsequently reattached to the block, ***even though the traveler reflects the initial blocking of the gas pipe***: "Blocks for gas line installed by #10."[13] R. 7008:241. Given that the traveler reflects the initial blocking of the gas line, it is reasonable to conclude that the traveler would have reflected any unblocking or reblocking of the line had it occurred.

Because the traveler does not even ***suggest*** that a new hole was drilled to accommodate the misaligned risers, or that the pipe assembly was unstrapped from the block to

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stove and capped the riser to conduct a pressure test after hookup. R. 7004:20-21, 29. And no piece of tin was found at the scene of the explosion.

[12] It is misleading for Oakwood to claim that the pipe is "only secured by flexible straps and it can be moved." (Oakwood Br. at 30). As Oakwood's own witnesses explained, when the unit came to the riser insertion station, the pipe was strapped *to a wooden block*, which held the pipe "rigid." R. 7004:156; R. 7008:174.

[13] Moreover, even if the gas line were unblocked at the input, the distance between the risers still would not match up with the distance between the predrilled floor holes, so that forces would still need to be placed on the risers and gas assembly to make the risers fit, and the misalignment of the risers with the floor holes would result in constant stress on the gas pipe assembly during transportation and occupancy.

Also, any testimony by Oakwood concerning the "flexibility" of the system is suspect because of the overthreading and overinsertion of the horizontal pipes. As Dr. Alex testified, Oakwood's practice of threading the pipes fully into the joints, instead of leaving a number of threads showing as required by ANSI B1.20.1, resulted in the gas pipe assembly being ***less*** flexible. See R. 7008:49-50.

facilitate any manipulation of the assembly, it is reasonable to conclude that no such actions occurred. Cf. Kaiser Aluminum & Chemical Corp. v. Illinois Cent. Gulf R. Co., 615 F.2d 470, 477 (8th Cir. 1980) (absence of record showing inspection and cleaning of cars was evidence that inspection and cleaning did not happen).

Further, while Oakwood ***claims*** that its standard practice was to redrill holes, testimony by Oakwood employees demonstrates that this is not necessarily so. For example, ***Oakwood admits that its employees sometimes "jiggle" riser pipes to make them fit instead of drilling new holes***. Oakwood Br. at 28. It is a fine line between "jiggling" a pipe and ***forcing*** a pipe. Further, Oakwood admits that its employees ***are*** allowed to move pipes ***up to half an inch*** when pipes are misaligned. R. 7004:158. It would therefore not be surprising if an employee moved a pipe 1.3 inches, i.e., only 0.8 inches over the "allowed" distance. Finally, Richard Gibson testified that even though pipes were misaligned five to ten percent of the time, new holes were rarely drilled. R. 7004:155, 158-59, 165.

Oakwood also has not shown that it is indisputable that its employees ***always*** followed its alleged procedures regarding misalignment of risers. There are times when following procedures will be time consuming or difficult, and a line employee, like anyone else, may decide to take a "shortcut." Indeed, Mr. Slifka testified that the assembly line required the work at each station to be completed within 20 minutes (R. 7009:156-57), so it is perfectly believable that an assembler may have decided to simply pull the pipe assembly roughly an inch-and-a-half to insert the risers instead of stopping the installation, measuring, and drilling a new hole.

In fact, the underinsertion of the range riser shows that Oakwood's quality control procedures are not always followed: Two Oakwood employees testified that having eight threads showing above a joint was "unacceptable," and that the joint should have been caught and fixed before the home went out. R. 7004:151-152, 205-07, R. 7008:301-302, 308-309. But the home went out with an underinserted range riser nonetheless, showing that Oakwood's employees do not always follow the procedures they are supposed to.

Given these facts, and the inferences that can be drawn from them, it is clearly not "indisputable" that new holes were drilled and the pipe assembly unblocked on the Ercanbrack unit. It was therefore permissible for Dr. Alex to rely on the other evidence in his possession, including the evidence of the improper threading and insertion, the weakening of the range riser, the location of a fracture point at the range riser, the characteristics and properties of the steel at issue, and the subsequent events, and point out that Oakwood's employees likely could have manipulated the riser pipe to align with the floor holes, and that the forces required to manipulate the pipe would have been enough to cause a leak to develop after delivery.[14]

Expert testimony is admissible if it will "assist the trier of fact . . . to determine a fact in issue." Utah R. Evid. 702. For the jury to determine whether, as Mr. Ercanbrack

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[14] The Court can also disregard Oakwood's claim that Mr. John Bailey of Summit Propane "corroborated Oakwood's testimony that it would not force pipes into place." Oakwood Br. at 31. Mr. Bailey did not see the Ercanbrack home during construction; all he can say is that when he hooked the home's gas system to the external propane tank, he did not observe any irregularities. But he didn't crawl under the house. R. 7004:35-36. Further, that the pipes appeared vertical when Mr. Bailey hooked the system up suggests that the riser may have been straightened after being forced through the hole, which would have contributed to the bending forces at its base.

asserted, the improper threading and insertion of the pipes and risers led to the explosion, the jury would have to know how the threading and insertion would affect the pipe assembly, what forces would be placed on the assembly as a result, whether those forces would be enough to fracture the steel used, and how a fracture induced during manufacture could have remained gas tight for six months. Dr. Alex's testimony goes directly to these issues and plainly assisted the trier of fact in understanding and evaluating Mr. Ercanbrack's claim against Oakwood. There was thus nothing improper about Dr. Alex's testimony concerning the manipulation of the risers during the construction of the home. See, e.g., Patey ¶¶ 23-26, 977 P.2d at 1198 (dentist allowed to testify about types of blows to the head that could damage teeth and to testify that vehicle accident "was the type of event that could have caused [plaintiff's] dental injuries"); Allstate Ins. Co. v. Hugh Cole Builder, Inc., 137 F. Supp. 2d 1283, 1289 (M.D. Ala. 2001) (expert's opinions "need not prove the plaintiffs' case by themselves; they must merely constitute one piece of the puzzle that the plaintiffs endeavor to assemble before the jury."); Orth v. Emerson Elec. Co., 980 F.2d 632, 637 (10th Cir. 1992) (expert "was not expounding on novel scientific evidence, but was taking known facts, together with his knowledge of causation factors, and drawing a rational conclusion as to causation").

b. Testimony Regarding Governing Standards.

The Court can quickly dispose of Oakwood's claim that Dr. Alex's testimony supposedly "ignores" the governing standards. Oakwood Br. at 29. In claiming that ANSI B1.20.1 was only a "guideline," Oakwood presents only part of the story. For example, Oakwood ***stipulated*** that the pipes were overthreaded by three threads. R. 7000:41-42; R.

7007:240. Further, while Oakwood's HUD expert ***attempted*** to testify that B1.20.1 did not apply, he also admitted during his examination that (1) HUD requires all manufactured homes to comply with National Fire Protection Association standard 54 (NFPA 54), and (2) NFPA 54 states that "[m]etallic pipe and fitting threads shall be taper pipe threads and shall comply with [ANSI B1.20.1]." R. 7010:10. Mr. Slifka further acknowledged that a manufactured home builder could not ignore B1.20.1.[15] R. 7010:39. Finally, Oakwood itself contended that NFPA 54 required "approximately ten" threads on each connection end, and the 14-thread pipes clearly violated the standard that ***Oakwood*** professed. R. 7011:240. Thus, Dr. Alex had a basis to testify that the threading and insertion of pipes breached applicable standards.

c. Disagreements Between Alex and Moore.

The Court can also reject Oakwood's argument that some of Dr. Alex's testimony should be excluded because Dr. Alex supposedly did not run a specific "complete" test to see if he could achieve a partial fracture by forcing a misaligned riser into a floor hole, or because Oakwood's expert, Mr. Moore, performed other tests or disagreed with some of his conclusions. Oakwood Br. at 35-37.

Yet again, Oakwood does not specify which portions of Dr. Alex's testimony

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[15] Oakwood states that HUD does not ***enforce*** the requirement that metallic pipe and fitting threads comply with B1.20.1. Oakwood Br. at 30. But HUD's decision not to ***enforce*** certain standards does not mean that the standards do not exist. As Mr. Ercanbrack argued in closing at trial, just because police officers choose not to ticket motorists who drive 80 miles per hour on a freeway does not change the fact that the speed limit is 70, and that if a driver kills someone while going 80, the driver was violating the speed limit.

should be ***excluded*** for any of these reasons. Moreover, Oakwood did not preserve these objections to any portions of Dr. Alex's testimony by raising them below. Oakwood did not suggest that Dr. Alex's testimony should be excluded because he did not "try[] to simulate his story through one complete experiment to test its validity," (Oakwood Br. at 36) nor did Oakwood object when Dr. Alex testified that it would take 80 to 100 pounds to move the risers to accommodate the misalignment, but that the underinserted range riser would fail at about 80 pounds. See R. 7008:59-60, Add. Ex. 12.

Further, Oakwood's challenge fails on the merits, because the mere fact that Mr. Moore disagrees with Dr. Alex or decided to run different tests does not mean that Dr. Alex's testimony is inadmissible. Oakwood presents no evidence or expert opinion that a single "complete experiment" was necessary for the particular failure being studied, or that the combination of the tests Dr. Alex ran was scientifically unreliable. Indeed, while Mr. Moore disagreed that a person would be likely to achieve a partial thickness fracture under actual assembly conditions, Mr. Moore did ***not*** suggest that Dr. Alex's methods were inadequate or suspect. And Oakwood cites no other authority suggesting that Rule 702 or Rimmasch require a single "complete experiment." Indeed, this Court has held that even under Rimmasch, the issue is whether the expert's methodology was properly applied, not whether a ***different*** methodology could have been used. Brewer v. Denver & Rio Grande W. R. R., 2001 UT 77, ¶ 23 n.5, 31 P.3d 557.

Similarly, disagreements between Mr. Moore and Dr. Alex as to how rigid the pipe assembly was, how much force would be required to partially fracture a riser, the likelihood of a fracture, and whether arrest marks or oxidation would be expected do not

suggest that Dr. Alex's testimony is inadmissible. The disagreements between Mr. Moore and Dr. Alex do not go to the adequacy of the methods and techniques either expert used in his analysis, but rather to the accuracy of the conclusions they drew. Mr. Moore did not testify that Dr. Alex's methods were inadequate or that the failure to perform a certain test rendered Dr. Alex's results unreliable. This is significant because, as addressed earlier, Rimmasch and other authorities are concerned primarily with the ***principles and techniques*** underlying an expert's opinions, and not the opinions themselves. Adams ¶ 16, 5 P.3d at 647.[16]

It is not surprising that expert witnesses for opposing parties draw different conclusions from the same evidence, and "disagreement among experts, and even between the experts and the judge, is not a valid basis for exclusion of testimony." Alder ¶ 60, 61 P.3d at 1084. As long as evidence is scientific and will assist the jury, it is for the trier of fact to weigh the testimony of opposing experts, determine which testimony is most accurate or believable, and enter a verdict accordingly. Id. The jury did exactly that here.

D. Judge Hilder carefully and appropriately exercised his discretion, and his ruling is entitled to deference.

Because the exercise of discretion "necessarily reflects the personal judgment of

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[16] Oakwood attempts to get a lot of mileage out of Dr. Alex's choice not to examine fracture surfaces with the SEM. Dr. Alex basically "wrote the book" on the use of the SEM for fracture analysis, however, as he was involved in creating the first handbook on the use of electrofractography. R. 7007:231. His conclusions that an SEM examination would not be appropriate, or that a "negative" result of an SEM analysis would not be significant because of the mild steel and the pipe dope, are entitled to a great deal of weight. Further, Dr. Alex ***did*** use an SEM to confirm that arrest marks would ***not*** appear on a pipe that was partially broken, left to sit for six months, and then fully broken. R. 7008:31-35.

the [trial] court," an appellate court "can properly find abuse only if *no reasonable person would take the view adopted by the trial court.*" State v. Brown, 948 P.2d 337, 340 (Utah 1997) (internal punctuation, citations, and brackets omitted). This is not a case like Rimmasch itself, where "little foundation was offered or demanded by the court as to the scientific basis" for the testimony. Rimmasch, 775 P.2d at 395. Judge Hilder clearly did not shirk his "gatekeeping" responsibilities or simply let everything go to the jury. Instead, the record shows that Judge Hilder carefully read each party's filings, considered each party's arguments, and fully participated in the Rimmasch hearing, asking detailed questions of counsel and of Dr. Alex. At the conclusion of the proceedings, Judge Hilder came to a reasoned determination that a sufficient basis existed to enable Dr. Alex to present his opinions. He even gave Oakwood the ability to revisit some of the issues later, though Oakwood failed to do so. There is no justification for this Court to conclude that Judge Hilder clearly abused his discretion in allowing the testimony.

II. THE TRIAL COURT'S DENIAL OF OAKWOOD'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT SHOULD BE AFFIRMED.

A. Oakwood waived its right to challenge the sufficiency of the evidence on appeal.

1. Oakwood failed to move for a directed verdict at the close of all the evidence.

Under Rule 50(b), a party who fails to move for a directed verdict at the close of all the evidence may not pursue a motion for judgment notwithstanding the verdict and therefore cannot challenge the sufficiency of the evidence supporting the verdict:

> Whenever a motion for directed verdict ***made at the close of all the evidence*** is denied or for any reason is not granted, the court is deemed to

> have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than ten days after entry of judgment, a party ***who has moved for a directed verdict*** may move to have the verdict and any judgment thereon set aside . . . .

Utah R. Civ. P. 50(b) (emphasis added).

Applying the identical federal rule, federal circuits hold that a party that fails to renew a motion for a directed verdict at the close of all the evidence is precluded from challenging on appeal the sufficiency of the evidence. See, e.g., Delano-Pyle v. Victoria County, 302 F.3d 567, 572-74 (5th Cir. 2002) (refusing to consider challenge to sufficiency of evidence where party failed to renew motion for directed verdict at close of all evidence).[17] As in Delano-Pyle, Oakwood moved for a directed verdict at the close of Mr. Ercanbrack's case-in-chief. R. 7008:168. Oakwood did not renew its motion, however, choosing instead to wait and see how the jury ruled. R. 7011:224-243.

Rule 50(b) may be harsh, but it is clear: If a party wants to challenge a verdict based on insufficiency of the evidence, the party must renew its challenge ***before*** the case goes to the jury. The party cannot wait to see how the jury rules before pursuing a claim that the evidence was not sufficient. Oakwood decided to take its chances on a jury verdict, which would be essentially immune from attack on appeal, instead of asking for a directed verdict that would be reviewed de novo. Having made that choice, Oakwood cannot raise its challenge now.

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[17] See also Karns v. Emerson, 817 F.2d 1452, 1455 (10th Cir. 1987); Frederick v. Dist. of Columbia, 254 F.3d 156, 161 (D.C. Cir. 2001); Jackson v. St. Louis, 220 F.3d 894, 896 (8th Cir. 2000); Keisling v. Ser-Jobs For Progress, Inc., 19 F.3d 755, 758-759 (1st Cir. 1994); Scala v. Moore McCormack Lines, 985 F.2d 680, 684 (2nd Cir. 1993).

2. Oakwood failed to marshal the evidence.

Further, the Court should disregard Oakwood's challenge to the sufficiency of the evidence supporting the verdict because Oakwood has not marshaled all of the evidence supporting the verdict. To meet the strict marshaling requirement, a party wishing to attack a jury verdict must "marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict." Harding v. Bell, M.D., 2002 UT 108, ¶ 19, 57 P.3d 1093 (internal quotation and citation omitted). The party must assume the role of "devil's advocate" and "fully embrace the adversary's position," which requires marshaling "every scrap of evidence that supports the jury's finding" and explaining why that evidence is insufficient as a matter of law. Id. (internal quotations and citations omitted).

Oakwood has not met its burden. As shown below, Oakwood failed to direct the Court to significant evidence supporting the jury's conclusion that a defect in the propane system, most likely the range riser, led to the explosion. The Court should therefore reject Oakwood's challenge to the sufficiency of the evidence supporting the judgment.

B. Mr. Ercanbrack presented sufficient evidence to allow the jury to conclude that a defect in the propane system caused the explosion.

The jury has the sole responsibility for weighing disputed and contradictory evidence. Accordingly, a court will not overturn a jury verdict unless "the evidence to support the verdict was ***completely lacking*** or was so ***slight*** and ***unconvincing*** as to make the verdict plainly unreasonable and unjust." Jenkins v. Weis, 868 P.2d 1374, 1378 (Utah Ct. App. 1994) (internal quotation and citation omitted) (emphasis in original). A

court will, therefore, reverse a jury verdict "only if, taking the evidence in the light most favorable to the prevailing party, the appellant demonstrates that the findings lack substantial evidentiary support." Keil, 2002 UT 32, ¶ 15, 48 P.3d at 892 (citation omitted). The court does not weigh evidence; instead, the court will "view all evidence and all reasonable inferences drawn therefrom in the light most favorable to that verdict." Id. ¶ 2.

Further, this Court has explained in a similar products liability case that "causation issues are factual issues that generally cannot be resolved as a matter of law." Nay v. General Motors, 850 P.2d 1260, 1264 (Utah 1993). Accordingly, a jury's determination of causation will be upheld when "there is ***any*** evidence upon which a reasonable jury could infer causation." Id. (emphasis added).

In Nay, two men were killed when their truck drove off a curve. Their heirs sued, alleging that the truck's braking system had a "pinch point" between the steering coupling and steering box. The plaintiffs "theorized" that a stone or other small object had wedged in the pinch point and locked the steering.

Three experts testified for the plaintiffs. One stated that a tire "could have" clipped a stone on the road and caused it to ricochet into the steering gear. Another stated that it would be "very easy" for a tire to throw a rock into the gear. The third stated that a stone could bounce into the gear "extremely infrequently." The trial court directed a verdict for the defendants, but this Court reversed, holding that the evidence was sufficient to find that the defective steering gear caused the accident. The Court's reasoning is important for the present case:

Here, the Nays' expert witnesses met the *Butterfield* standard. Taken

> together, their testimony establishes ***a complete, specific theory of both defect and causation***. They identify the defect as the pinch point between the flexible coupling and the steering box. ***They sketch a comprehensive factual scenario of causation in which a tire clipped a stone lying on the road and the stone ricocheted from the fender, onto the top of the tire and into the steering gear, causing the steering wheel to lock***. Certainly, General Motors can and does contest the likelihood, even the possibility, of this scenario. It is free to call its own witnesses to testify that the tire would not have clipped the stone, that the stone could not have bounced into the pinch point, and that even if the stone did bounce into the pinch point, it would not have locked the steering. ***But this very dispute creates an issue of fact within the province of the jury***. Taking the evidence in the light most favorable to the Nays, as we must, [citation omitted], we cannot say that reasonable jurors could not find in favor of the Nays.

Id. at 1264 (emphasis added).

Under these standards, there is clearly enough evidence to support the jury's factual determination that a defect in the home caused the explosion. First, ***the evidence is sufficient to establish that the explosion was caused by a propane leak from one of the three fracture points in the pipe in the crawl space, one of which was at the base of the range riser***. As explained above, Mr. Thatcher's and Dr. Romig's testimony established that the propane leaked from the crawl space and that the system was gas tight everywhere except for the three fracture points, one of which was at the base of the range riser. Because the gas had to come from a breach in the system, and the only breaches in the system were at the fracture points, the propane leak ***had to be*** at one of the fracture points. Oakwood does not challenge this testimony on appeal, and the jury had the right to believe it instead of Oakwood's conflicting evidence that the leak came from outside.

Second, the evidence is sufficient to establish that ***the horizontal pipes were overthreaded and overinserted into most joints, which would be likely to cause forces to***

be placed at the base of the range riser during and after assembly. Oakwood admitted that the horizontal joints had 14 threads and were fully engaged, which reduced the distance between the risers. This reduction made it likely that the assembler would manipulate the risers and the pipe assembly, which would have placed significant bending forces on the base of the risers. Also, the overtorqued joints made the pipe assembly more rigid, increasing the forces on the risers. R. 7008:49, 50.

Third, the evidence establishes that ***the overthreading and underinsertion of the range riser into the elbow joint weakened the riser and rendered it more susceptible to bending forces***. Dr. Alex and Mr. Moore both testified that with eight threads showing, the joint between the riser and the elbow was less able to withstand the forces that would have been applied to align or straighten the risers during the manufacturing process.

Fourth, the evidence shows that ***the subsequent events relating to the home are perfectly consistent with a full fracture temporarily sealed with pipe dope or a partial or full thickness fracture at the base of the range riser and subsequent development of that fracture into a leak***. The forces required to manipulate the risers and the pipe assembly during construction were enough to partially or fully fracture the weakened base of the range riser. R. 7008:55-64. After assembly, the home was driven "wildly" on the back of a truck down a washboard road (R. 7004:19),[18] and then subjected to the tem-

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[18] Because the distance between the holes in the floor was more than the distance between the riser bases, the floor was essentially putting a minimum of 12 pounds of constant "spreading" forces on the risers. R. 7008:58. But every time the home hit a bump on the road, the pipes would move "up," i.e., closer to the floor, thus putting additional spreading forces on the risers.

perature variations of northern Utah. R. 7011:106-109. Meanwhile, the risers were still under constant stress due the continued misalignment of the risers. R. 7008:58. These factors would be sufficient to cause a partial thickness fracture to eventually develop into a full thickness fracture and a leak. R. 7008:65-66. That the propane system was gas tight after delivery and setup in August, but was clearly ***not*** gas tight in January, provides further confirmation that the leak resulted from a partial fracture that did not develop into a full fracture until later, or possibly that the riser was fully fractured and that the pipe dope kept the joint gas tight.

Fifth, there is substantial evidence, which Oakwood failed to marshal, from which the jury could conclude that ***Oakwood did not drill a new hole or unblock the gas line to accommodate the misalignment of the risers on the Ercanbrack home***. To reiterate what was said above, no one testified that a new hole was drilled or the line unblocked, the traveler does not say that a new hole was drilled or the line unblocked, and the piece of tin for the old hole was never seen by anyone upon inspection or found at the scene. Also, Oakwood personnel admitted that holes were <u>not</u> always redrilled when the risers were not vertical (R. 7004:155, 158-159); that Oakwood employees would "jiggle" pipes when they did not fit right (R. 7008:180; Oakwood Br. at 28); and that even though pipes were off from vertical 5 to 10 percent of the time (R. 7004:158), holes were drilled, at most, only 1 to 30 times during Mr. Gibson's years at Oakwood (R. 7004:155). Finally, an assembler easily may have just chosen to jerk the pipe assembly over by 1.3 inches instead of stopping his or her work on the assembly line to drill a new hole.

The evidence discussed above is more than sufficient to support a finding that a

defect in the home, most likely a fracture at the base of the range riser, caused the explosion that killed Mr. Ercanbrack's wife, son, and daughter. Indeed, the evidence is sufficient to support the judgment ***even without Dr. Alex's testimony***. Mr. Thatcher and Dr. Romig established that the explosion was caused by a leak in the crawl space pipes. There is no evidence that anyone but Oakwood ever even touched those pipes. That the home exploded six months after it was sold, due to a leak in pipes that only Oakwood touched, indicates that the most likely explanation is defective manufacture or assembly.

Under the "product malfunction" doctrine, as reflected in the Restatement of Torts, if a product malfunctions under circumstances in which a defect is the most likely or reasonable explanation, a jury may infer that the product was defective even if the plaintiff cannot identify the specific defect:

> It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, ***without proof of a specific defect***, when the incident that harmed the plaintiff:
>
> (a) was of a kind that ordinarily occurs as a result of product defect; and
>
> (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.

Restatement (Third) Torts: Products Liability § 3 (1998) (emphasis added). See, e.g., Welge v. Planters Lifesavers Co., 17 F.3d 209, 210 (7th Cir. 1994) (when plaintiff was injured by shattered jar, court held that because the plaintiff testified that he did not damage the jar, then as a matter of logic, "the defect must have been introduced earlier,

when the jar was in the hands of the defendants.").[19]

Utah has long recognized this concept. More than fifty years ago, this Court held that evidence that a truck wheel collapsed in an accident that took place only six months after the truck was bought could support an inference that the wheel was defective when sold. See Hooper v. General Motors Corp., 123 Utah 515, 260 P.2d 549 (1953). The Court held that even if the mere fact of separation was not enough to prove a defect, circumstantial evidence such as the newness and low mileage of the truck, the lack of prior damage, and other evidence "may have provided the requisite force to tip the scales in favor of plaintiff. ***Certainly, reasonable men from the cumulative factual total could infer, and with the consideration of rim-spider separation may have inferred, that the wheel was defective at the time of assembly.***" Id., 260 P.2d at 551-52 (emphasis added). See also Hewitt v. General Tire & Rubber Co., 3 Utah 2d 354, 284 P.2d 471 (1955) (discussing when causation may be inferred from circumstantial evidence).[20]

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[19] For more analysis and authority on the malfunction doctrine, see David G. Owen, Manufacturing Defects, 53 S. Car. L. Rev. 851, 871-84 (2002); Annotation: Strict Products Liability: Product Malfunction or Occurrence of Accident as Evidence of Defect, 65 A.L.R.4th 346 (1988) (collecting dozens of cases).

[20] While Mr. Ercanbrack did not explicitly rely on the "malfunction doctrine" below, he pursued a theory below of *res ipsa loquitur*, which is a close relation. Moreover, an appellate court may affirm a trial court's ruling on any ground appearing in the record.

Indeed, Mr. Ercanbrack specifically requested that the trial court instruct the jury on *res ipsa loquitur* (R. 6692-6694), but the trial court rejected the instruction, evidently on the ground that Oakwood was not in control of the home for the six months prior to the explosion. See R. 3885-86. The trial court erred in so ruling, because under Utah law, a plaintiff need not show that the defendant was in sole control, only that the defendant "was responsible for all the likely causes of the accident." See Walker v. Parish Chemical Co., 914 P.2d 1157, 1159-60 (Utah Ct. App. 1996). The testimony of Mr. Thatcher and Dr. Romig established that the leak must have come from the crawl space, and the

There is sufficient evidence to infer a defect in the present case. The home's propane system obviously malfunctioned, as such systems are not supposed to leak and explode six months after they are bought. Cf. R. 7005:133-34 (Oakwood would not expect gas lines to leak). The only other explanation offered for the explosion was a leak in the regulator box, but Thatcher and Romig testified that a leak there could not have caused the explosion. And no one suggested that Mr. Ercanbrack or anyone else worked on the pipes in the crawl space or altered or misused the pipes in any way.[21]

Once Dr. Alex's testimony and the other evidence discussed above is considered, it becomes even more clear that the jury had enough evidence to conclude that the defect in the propane system led to the explosion. Oakwood complains that there is no ***direct*** evidence that its personnel actually manipulated the pipes to insert the risers, but Oakwood misses the point: It was permissible for the jury to ***infer***, based on substantial circumstantial evidence, that the pipes were manipulated. The overinsertion of the horizontal pipes caused misalignment of the risers with the floor holes, thus creating a situation in which manipulation of the pipes was likely; the underinsertion of the range

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pipes in the crawl space were all made and installed by Oakwood. Thus, in reliance on this testimony, the jury could have reasonably concluded that the requirements of *res ipsa loquitur* were satisfied.

[21] Mr. Ercanbrack did build the box around the regulator and bury the lines leading to the home. But neither of these actions contributed to the accident. NFPA 58 specifically recommends that a regulator in "snow country" be protected by a box (to prevent accumulations that could break the regulator), and Mr. Ercanbrack built the box on the recommendation of Summit Propane. R. 7001:26. Indeed, one of Oakwood's experts, confirmed that it was proper for Mr. Ercanbrack to build the box over the regulator. R. 7011:216. Moreover, burying the outside gas lines had no effect on the accident, because those lines were found after the explosion to be leak free. R. 7011:172.

riser exacerbated the effects of any such manipulation; the forces that would be required to align the risers would be enough to fracture the riser; and the subsequent events, including manifestation of a leak six months later, are exactly what one would expect to happen with such a fracture. The jury to considered evidence and resolved this question of fact in Mr. Ercanbrack's favor.

Either Oakwood drilled a hole to accommodate the misaligned risers, or Oakwood manipulated the pipes to make the risers fit. Because Oakwood admitted that its personnel were allowed to "jiggle" pipe (which ***itself*** violates HUD procedures, according to Mr. Slifka (see R. 7009:148)), there is substantial doubt about Oakwood's claim that its standard procedures really would have required a new hole to be drilled. Also, while there was no evidence that the hole ***was*** redrilled, there ***was*** evidence that the hole was ***not*** redrilled. Further, given the inconveniences involved and the fact that the misalignment would have appeared minor and easily correctable (1.3 inches), one can easily understand why an assembler might ***not*** redrill a hole in such circumstances. Finally, once again, the subsequent chain of events is consistent with a new hole ***not*** being drilled. Thus, the jury was certainly not compelled to conclude that the hole was redrilled in the Ercanbrack home, but was allowed to infer that the pipes were manipulated instead.

Just as in Nay, Mr. Ercanbrack's evidence "sketch[es] a comprehensive factual scenario of causation" in which the risers were misaligned and the risers and pipe assembly were manipulated, placing extra force on the weakened joint at the base of the range riser and causing a fracture, which eventually developed into a full thickness fracture due to thermal contraction and expansion. Notably, in Nay there was no direct evid-

ence that a stone actually was kicked up from the road and into the steering gear; rather, the experts testified that a stone "could have" been kicked up, which would have caused the accident to happen just as it did. This Court held that such evidence is sufficient to support a finding on causation, which is a highly factual matter. At ***worst***, Mr. Ercanbrack is in the same position as the plaintiffs in Nay.

In determining what inferences may "reasonably" be drawn from circumstantial evidence, one must consider whether alternative explanations are equally or more consistent with that evidence. If one scenario is plausible and no ***other*** scenarios are plausible, then the first scenario becomes "probable." Cf. Welge, 17 F.3d at 212 (if the probability that the defect arose after the product was sold is small, "then the probability that the defect was introduced by one of the defendants is very high"). We know that propane leaked and exploded, and the only other explanation Oakwood offered was that something happened to the connection at the regulator to cause a leak there, and gas then migrated out of the regulator box, through snow lying on the ground, and into a vent that led into the crawl space. But Oakwood presented no evidence that anything happened to the connection at the regulator or that gas leaked there, Mr. Ercanbrack testified without contradiction that there ***was*** no snow linking the regulator box to the vent,[22] and Mr.

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[22] Indeed, it is curious that Oakwood accuses Mr. Ercanbrack and Dr. Alex of ignoring "undisputed facts" with their theory of causation. As Mr. Freeman acknowledged, Oakwood's whole theory of the case depends on there being snow "over the box ... and at least part way up the vent." See R. 7011:220. But Mr. Ercanbrack testified that he shoveled the snow away from the vents (R. 7001:50-54), and there is ***no*** evidence in the record to the contrary. Thus, it ***is*** undisputed that there was no snow that would have allowed propane to migrate from the regulator box into the vent, but this did not stop Oakwood from presenting their theory.

Thatcher and Dr. Romig both testified that an outside leak could not have caused the explosion. The jury was certainly not compelled to believe Oakwood's "story," and as such the scenario Mr. Ercanbrack presented was the only remaining plausible explanation. It was therefore at least ***reasonable*** for the jury to accept it.

Oakwood's remaining arguments on the sufficiency of the evidence can be easily rejected. Oakwood claims that there was no evidence that the pipe joints were defective, because Mr. Slifka testified that the home "would pass the applicable regulations" and "did not have a defect." Oakwood Br. at 47. Oakwood is wrong, however.

The "defect" that led to the explosion was not merely the improper threading and insertion, but also the ***fracture at the base of the range riser***. As explained above, the jury concluded from the evidence (including the evidence of improper threading and insertion) that when the home was delivered to the Ercanbracks, there was most likely a fracture in the base of the range riser, which ended up causing an explosion. The fracture certainly constitutes a "defect." Cf. Utah Code Ann. § 78-15-6(2) (product is "defective" or "unreasonably dangerous" if it is "dangerous to an extent beyond which would be contemplated by the ordinary or prudent buyer").[23]

Further, there was ample evidence that the improper threading and insertion itself constituted a defect. As stated earlier, Oakwood's own personnel testified that the under-

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[23] Presumably, Oakwood does not deny that a partially fractured gas line is a defect. Oakwood has stated that HUD regulations require only that a home be gas tight when it leaves the facility, but this is highly doubtful. If Oakwood were correct, then a manufacturer could patch a known hole in a gas pipe with a piece of duct tape, and as long as the duct tape held long enough to survive the pressure test, the home would supposedly not be "defective." This simply cannot be.

insertion of the range riser was "unacceptable" and should have been corrected. R. 7004:151-152; R. 7008:270, 301-302, 308-309.[24] This testimony is sufficient to show a defect, regardless of HUD standards. Moreover, as established above, there was a dispute about whether the HUD standards incorporated ANSI B1.20.1, and therefore the jury had sufficient evidence to conclude that the threading and insertion of the pipes violated HUD standards.[25]

Everything points to the base of the range riser. Mr. Thatcher's and Dr. Romig's testimony shows that the base of the range riser was one of only three possible locations for the leak. Dr. Alex's testimony regarding overthreading and overinsertion of the horizontal pipes shows that the base of the range riser would be subject to bending forces during manufacture. And Alex's testimony regarding underinsertion shows that the base of the range riser was more susceptible to such forces. Given the constellation of facts, Oakwood has not shown that the evidence to support the verdict was "completely lacking" or "so slight and unconvincing" as to render the verdict "plainly unreasonable and unjust."

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[24] Richard Gibson, Oakwood's plumbing tester and inspector, even stated that more than 3 to 4 threads showing was unacceptable because of the "possibility of promoting a leak." R. 7004:151.

[25] The Court can also reject Oakwood's contention that the "objective evidence" is inconsistent with a defect existing when the house was sold, simply because the system did not leak until six months later. Once again, Dr. Alex clearly explained how a partial fracture could exist and later develop into a full fracture, i.e., a leak, and no one contradicted his testimony in this respect. Thus, the fact that the structure was gas tight on the date of sale does not mean that it was not defective on that date.

III. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE AS TO THE TIME MR. ERCANBRACK ACTUALLY REPORTED THE EXPLOSION.

A. Oakwood unjustifiably relied on an ambiguous admission.

In its opening statement, Oakwood told the jury that Mr. Ercanbrack was the first person to report the explosion to the Sheriff's Office, through a call at 6:05 p.m. R. 7000:61. Then, clearly insinuating impropriety on the part of Mr. Ercanbrack, Oakwood's trial counsel stated, "I don't know what he did, but there is a lot of time unaccounted for." Id. In doing so, Oakwood's trial counsel clearly adopted an ill-conceived strategy to place blame on Mr. Ercanbrack.

At the time of Oakwood's opening, however, Oakwood was on notice that the call was not made at 6:05 p.m. and that Mr. Ercanbrack had no time that was "unaccounted for" in which he could have engaged in wrongdoing. Indeed, the pretrial record, including the deposition testimony and Investigator Borg's Report, showed that Mr. Ercanbrack reported the explosion at ***5:05*** p.m., rather than 6:05.

Completely ignoring this record, Oakwood latched onto Mr. Ercanbrack's response to Request for Admission No. 12 – badly written by Oakwood – in which Mr. Ercanbrack admitted that he reported the explosion to the Sheriff's Office and that the Sheriff's Office ***recorded*** the call in its report as being received at 6:05 p.m. He did not admit that he called at 6:05 p.m.!

On appeal, Oakwood complains that the trial court erred in admitting evidence contrary to the admission to Request No. 12, and that allowing the evidence was "highly prejudicial to Oakwood and incited the jury's passion against Oakwood." Oakwood Br.

at 50. Oakwood analyzes this issue as though the trial court improperly granted leave to withdraw or amend an admission under Rule 36(b). Oakwood misses the point.

This is not a situation where the trial court granted leave to withdraw or amend the admission. Rather, the trial court admitted Mr. Ercanbrack's response to Oakwood's poorly drafted request for admission, and, in its discretion, properly allowed testimony to explain the admission, stating "my fundamental purpose here is to give the jury the whole picture." R. 6997:30. It did so because Request No. 12 was ambiguous. R. 6997:29-30. Ambiguity in a request for admission is construed against the party whose lawyer drafted the response. See, e.g., Talley v. United States, 990 F.2d 695, 699 (1st Cir. 1993). Construing the request against Oakwood makes the court's determination to let in both the ambiguous admission and evidence regarding the true timing eminently more fair. The court's ruling was particularly appropriate given that the only conceivable relevance of the timing of Mr. Ercanbrack's call to the Sheriff's Office was to create a fictitious 50 to 60 minutes of unaccounted time so that Oakwood could falsely insinuate that Mr. Ercanbrack tampered with evidence at the site of the explosion.

B. To the extent Rule 36 applied, its prerequisites were met.

Even if the prerequisites of Rule 36(b) applied before the trial court could properly exercise its discretion to allow the evidence, those prerequisites were met. First, the timing of the call clearly would promote the presentation of the merits of the case. "To show that a presentation of the merits of an action would be served by amendment or withdrawal of an admission, the party seeking amendment must (1) show that the matters deemed admitted against it are relevant to the merits of the underlying cause of action,

and (2) introduce some evidence by affidavit or otherwise of specific facts indicating that the matters deemed admitted against it are in fact untrue." Langeland v. Monarch Motors, Inc., 952 P.2d 1058, 1062 (Utah 1998). These showings were made easily. When Oakwood insinuated impropriety on the part of Mr. Ercanbrack, based on the false claim there was "a lot of time unaccounted for," the overwhelming evidence of the true time of the call became relevant.

Second, Oakwood failed to meet its burden to show it would be prejudiced by the trial court's allowing testimony showing the time Mr. Ercanbrack actually called. The prejudice contemplated by Rule 36(b) "relates to the difficulty a party may face in proving the case, e.g., cause[d] by the unavailability of key witnesses, because of the sudden need to obtain evidence with respect to the questions previously answered by the admissions." Id. at 1063 (quotation and citations omitted). Oakwood was not prejudiced in that regard – the evidence of the timing of the call was readily available.

Indeed, the very evidence Oakwood challenges was freely admitted throughout the trial without objection. See, e.g., R. 7003:92-96, 102-03, 157-58; R. 7004:39-40. Much of this evidence was elicited by Oakwood itself! Oakwood introduced the Fire Marshal's Report of Investigation, which clearly stated that Mr. Ercanbrack reported the explosion at "5:05 p.m." Add. Ex. 5. Additionally, Oakwood itself extensively examined Mr. Ercanbrack about the timing of his call. R. 7003:90, 96. Thus, Oakwood has no valid basis to complain.

Nevertheless, Oakwood complains that it "had already relied on the admission and made representations to the jury regarding the admission." Oakwood Br. at 52. As dis-

cussed above, however, Oakwood's reliance on the admission was wholly unreasonable.

Oakwood also complains that "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." Id. at 52-53. That is flat wrong. Oakwood's counsel chose to ignore the deposition testimony and Fire Marshal's report. Oakwood should have fully considered this issue before adopting its strategy. The trial court had the discretion to allow the testimony in question. In doing so, the trial court not only did not abuse its discretion, the trial court exercised its discretion justly, with the utmost regard for fairness and truth.

IV. THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A NEW TRIAL BECAUSE OF REMARKS IN CLOSING ARGUMENT.

"The determination of whether remarks made during closing argument improperly influenced the verdict is within the sound discretion of the trial court." Green v. Louder, ¶ 35, 29 P.3d at 647. Indeed, the trial judge is "of necessity, clothed with a great deal of discretion in determining whether an objectionable question is so prejudicial as to require a retrial, ... and he is in a far better position to measure the effect of an improper question on the jury than an appellate court which reviews only the cold record." Harris v. Zurich Ins. Co., 527 F.2d 528, 231 (5th Cir. 1975).

"The general rule concerning abuse of discretion is that 'this [C]ourt will presume that the discretion of the trial court was properly exercised unless the record clearly shows the contrary.'" Donohue v. Intermountain Health Care, Inc., 748 P.2d 1067, 1068 (Utah 1987) (quotation omitted). Here, the trial court properly exercised its discretion in determining that remarks made by plaintiff's counsel did not improperly influence the

verdict. In attempting to overcome the presumption, Oakwood mischaracterizes the context of counsel's statements, and overstates or dramatizes the statements themselves.

A. Mr. Ercanbrack's counsel did not improperly urge the jury to punish Oakwood by "sending a message."

Oakwood cites a number of cases that address an invitation to the jury to "respond in damages" in order to "send a message" to the other party.[26] The context of the argument in this case, however, had nothing to do with damages. Rather, the argument was clearly made in direct response to Oakwood's argument regarding ***liability***, that is, that Oakwood did nothing wrong. In the clear context of arguing liability, plaintiff's counsel argued that by continuing the refrain that it did nothing wrong, Oakwood was effectively saying that it did not have to comply with applicable safety standards because the federal government is lax in enforcing them. In that context, plaintiff's counsel argued that if HUD, effectively, will not teach Oakwood that there are safety standards they should meet in manufacturing Oakwood's homes, then it is up to the jury to tell Oakwood that it should meet applicable safety standards, whether or not the federal government enforces those standards. R. 7012:19. This entire argument was made largely without objection by Oakwood. Id. When Oakwood objected, not only did the trial court give the jury a curative instruction – "that punitive damages are not an issue, [and that] any damages award must be to compensate not to punish," – but plaintiff's

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[26] E.g., Fisher v. McIlroy, 739 S.W.2d 577 (Mo. Ct. App. 1987) (counsel invited the jury "to respond in damages" to show plaintiff that his behavior was almost wanton); Murphy v. Murphy, 622 So.2d 99, 102 (Fla. Dist. Ct. App. 1993) (send a message through damages); Masson v. Kansas Power & Light Co., 642 P.2d 113 (Kan. Ct. App. 1982) (condemnation trial focused solely on computation of damages due to a taking).

counsel himself quickly explained, "I'm not saying to punish them. That's not what I'm saying." R. 7012:21. He then proceeded, without any objection, to give the jury an example of what he meant, through the use of an analogy to speeding regulations. That such a safety standard is not enforced does not absolve one of wrongdoing for not violating it, as Oakwood was contending. R. 7012:22.

Thus, the so-called "send a message" argument had nothing to do with asking the jury to "respond in damages" to "send a message" to Oakwood.[27] This situation is not unlike that in Green v. Louder, 2001 UT 62, 29 P.3d 638, where the Court instructed that "the use of the 'golden rule' argument is improper only 'with respect to damages.'" Id. at ¶ 36. "[T]he use of golden rule arguments is not improper when urged on the issue of ultimate liability." Id.

The trial court's curative instruction, together with plaintiff's counsel's own explanation that he was not saying to ***punish*** Oakwood, his further explanation of the point by use of the speeding analogy, and the fact that counsel plainly was not discussing damages at that time, was clearly enough for the jury to understand the liability – rather than the damages – context. To argue otherwise does not give the jury its due.

B. The other challenged arguments were not improper.

Oakwood argued in its closing that it owed no duty based on any standards because the standards asserted by Mr. Ercanbrack did not apply. R. 7012:39-41. In

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[27] Indeed, plaintiff's counsel was not even discussing damages when he made the message statement. It was well after the "message" colloquy that counsel expressly turned the attention of the jury to the subject of ***damages***. R. 7012:28.

direct rebuttal, plaintiff's counsel argued that there were applicable standards that created a legal duty. R. 7012:69-70. In doing so, counsel did not improperly comment on the merits of Mr. Ercanbrack's case. While Oakwood objected that plaintiff's counsel was arguing how the court would have ruled or not ruled, Oakwood did not ask for any curative instruction, and, in the court's exercise of its discretion, none appeared needed.

In support, Oakwood cites Donohue v. Intermountain Health Care, Inc., 748 P.2d 1067 (Utah 1987), which instructs that "pleas plainly designed to elicit sympathy or to inspire passion or prejudice should not be allowed." Id. Mr. Ercanbrack's rebuttal to Oakwood's argument was not such a plea, nor was it an improper comment on the merits. As the Court in Donohue instructed, "Trial courts are in a much better position than are appellate courts to assess the overall effect of attorney misconduct at trial." Id. The trial court properly exercised its discretion in this regard.

Oakwood also complains that "plaintiff raise[d] the ire of the jury by pointing out that the defendant is an out-of-state large corporation that is only interested in profit." Oakwood Br. at 61. Contrary to Oakwood's mischaracterization, plaintiff's counsel remarked that Oakwood manufactures large numbers of homes "for making a profit just like any other corporation." R. 7012:15. Viewed in proper context, plaintiff's counsel was only arguing that Oakwood should not be permitted to manufacture homes for sale around the country while ignoring governmental and industry safety standards. R. 7012:15-16 ("[Y]ou got to at least follow the standards."). Oakwood's characterization of Mr. Ercanbrack's argument – "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" – is patently inaccurate and merely an attempt to make something out of what Oakwood already acknowledges "may not be sufficient to require reversal and remand for a new trial." Oakwood Br. at 61. Moreover, there were other references throughout the trial – by both sides, and all without objection – to the obvious fact that Oakwood is a large, out-of-state corporation. Oakwood's counsel even raised this issue in his own closing, expressly mentioning the jury instruction explaining that the corporate status should make no difference to them, and that they should decide on the evidence. R. 7012:64. If there was some prejudice, Oakwood cured it.

Finally, plaintiff's counsel did not improperly argue credibility. Oakwood deliberately placed the credibility of Mr. Ercanbrack at issue. Oakwood's trial counsel expressed his own personal opinion that someone was lying, either SS Supply or Mr. Ercanbrack, and argued Mr. Ercanbrack had the motivation to lie and SS Supply did not. R. 7012:46, 49 ("***I know*** this extra pipe was added, ***I know somebody's not telling us the truth***. It's either SS or it's Mr. Ercanbrack but it's not Oakwood."). Oakwood now complains that plaintiff's counsel improperly argued the credibility of SS Supply and Mr. Ercanbrack, yet, once again, Oakwood failed to object or request a curative instruction, and did not even raise this issue in its motion for a new trial.

In arguing credibility, plaintiff's counsel remained within the record, reminding the jury about Mr. Bailey's (of SS Supply) manner of testifying (R. 7012:75), arguing an inference that Mr. Bailey was on Oakwood's side, having taken a position early in the litigation that focused blame away from SS Supply and directly at Mr. Ercanbrack. R.

7012:76. In response to SS Supply and Oakwood both pointing to Mr. Ercanbrack as the liar, plaintiff's counsel merely said, "Bill's not lying." R. 7012:76. That remark is merely the other side of the coin – that there is no evidence that Mr. Ercanbrack is lying.[28] Moreover, the jury was specifically instructed that they were the exclusive judges of the witnesses' credibility. There is no basis to conclude that the jury believed that counsel was commenting on Mr. Ercanbrack's credibility from his personal knowledge.

Even if there was error – and there was not – it is certainly not established that the error should have been obvious to the trial court. Indeed, Oakwood did not object or request a curative instruction, which waives the improper argument. See Nesseth v. Omlid, 574 N.W.2d 848, 851 (N.D. 1998).[29]

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[28] There is nothing in the record to indicate that the statement was made based on the ***personal knowledge*** of plaintiff's counsel or that it was based on anything other than the evidence, and inferences from the evidence, in the record. For example, plaintiff's counsel did not preface the statement with "I know ..." or "I believe ..." or "From my review of the evidence, I think ..." that "Bill's not lying."

[29] Oakwood has not shown how the allegedly improper argument was sufficiently prejudicial to warrant reversal – that "absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant." State v. Medina-Juarez, 2001 UT 79, ¶ 18, 34 P.3d 187. The issue on which Oakwood asserted that either SS Supply or Mr. Ercanbrack was a liar is a non-issue. The issue went to who placed the stub-out – SS Supply or Mr. Ercanbrack. Since the evidence was clear that neither the stub-out nor its connections leaked, and that no matter who placed the stub-out, it presented no problem when the regulator was installed (R. 7009:62, 133), the jury did not need to determine who was a "liar." The outcome of the case should not have differed, one way or the other, and therefore any error in this regard was harmless.

V. THE TRIAL COURT DID NOT ERR REGARDING SS SUPPLY.

Oakwood first contends that the trial court erred by not instructing the jury that SS Supply was a proximate cause of plaintiff's injuries. But Oakwood's trial counsel expressly told the jury in his opening statement that the court had ruled as a matter of law that SS Supply was at fault (R. 7000:36-37) and had settled with plaintiff, and argued in closing that SS Supply had "considerable fault in this case," pointing out Jury Instruction No. 48, in which the defectiveness of SS Supply's tank was conclusively established (R. 7012:53-58). ***The jury actually found in its verdict that SS Supply was a proximate cause of plaintiff's injuries and apportioned fault to them.*** R. 7013:5-6.

Oakwood also complains that the trial court did not disclose to the jury the amount of SS Supply's settlement. As Oakwood acknowledges, however, "instances would be rare when the amount of the settlement should be disclosed." Slusher v. Ospital, 777 P.2d 437, 444 (Utah 1989). It was the jury's province to attribute the relative fault, which it did. Under Utah's comparative fault scheme, a defendant is only liable for the portion of the plaintiff's damages attributable to that defendant's own conduct. Whether *another* party paid a substantial settlement, or was bankrupt and paid nothing, is irrelevant on the issue of the defendant's liability to the plaintiff. Disclosure of the amount of the settlement with SS Supply, which was irrelevant, could only have prejudiced the jury.[30]

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[30] Perhaps as a testament to the collective wisdom of juries, the apportionment of fault in this case reflects almost exactly the settlement, i.e., the total damages awarded was $8,953,600, of which SS Supply's share of the fault was 40% or $3,581,440, and it had settled for $3.25 million! Indeed, on that basis, the jury could hardly be said to have been prejudiced, and its passion incited, through the trial court's alleged errors or the conduct of Mr. Ercanbrack's counsel.

VI. THERE WAS NOT AN ACCUMULATION OF ERRORS SUBSTANTIAL AND PERVASIVE ENOUGH TO WARRANT A NEW TRIAL.

Oakwood's feigned challenge based on the amount of time it had to put on its case is disingenuous. The trial court spoke in great detail during the trial with counsel for the parties about time considerations (e.g., R. 7009:88-93), and assured Oakwood that it would have time to "get [its] case on." R. 7009:88. ***At no time in that context did Oakwood's trial counsel object to the schedule or the amount of time that Oakwood had to put on its case, nor did Oakwood request additional time to call additional witnesses.***[31]

Second, Oakwood complains about the trial court's exclusion of a belated expert test, the results of which were first presented to plaintiff ***during the trial.*** In the exercise of its discretion, the trial court ruled that he would not allow a new expert test to be offered for the first time during trial unless the test was offered in rebuttal to surprise testimony from the plaintiff. R. 6997:22. Oakwood has made no showing that such a ruling was an abuse of the trial court's discretion or otherwise was clearly in error. See Whitehead v. American Motors Sales Corp., 801 P.2d 920, 923 (Utah 1990) ("In reviewing questions of admissibility of evidence at trial, deference is given to the trial court's advantageous position; thus, that court's rulings regarding admissibility will not be overturned unless it appears that the lower court was in error.")

This is not a case where there is an accumulation of errors sufficient to warrant a

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[31] Oakwood contends in its brief that "Oakwood was forced to exclude several witnesses it had intended to call," citing R. 7007:17-20. Br. at 67. There is no reference in those pages of the record, however, to any discussion of the time Oakwood had to put on its case.

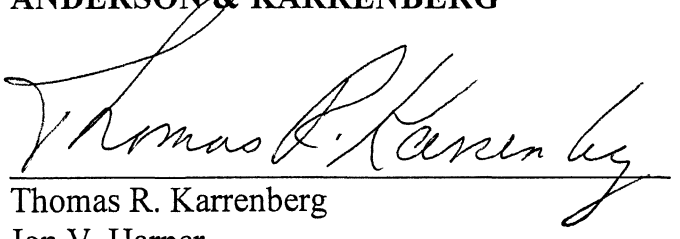
new trial. Unlike Whitehead, the trial court in this case ***did not*** erroneously exclude or erroneously allow evidence. Oakwood was "entitled to a fair trial but not a perfect one, for there are no perfect trials." See McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 553 (1984). These are nothing more than after-the-fact, makeweight arguments to compensate for the fact that Oakwood has no legitimate basis for appeal.

CONCLUSION

Mr. Ercanbrack therefore respectfully requests that the Court affirm the judgment and remand for an award of costs incurred on this appeal.

DATED: February 6, 2004.

ANDERSON & KARRENBERG



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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the law firm Anderson & Karrenberg, 50 West Broadway, Suite 700, Salt Lake City, Utah, and that on the 6th day of February, 2004, I caused two true and correct copies of the foregoing **BRIEF OF APPELLEE** to be served, via U.S. Mail, postage prepaid, upon:

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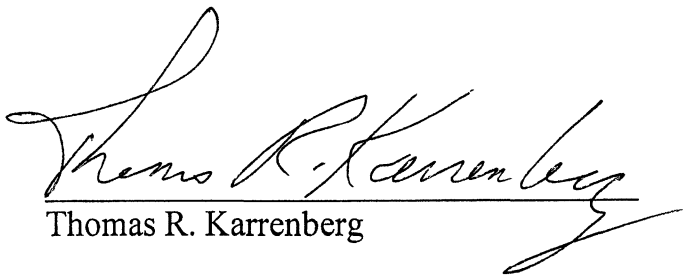


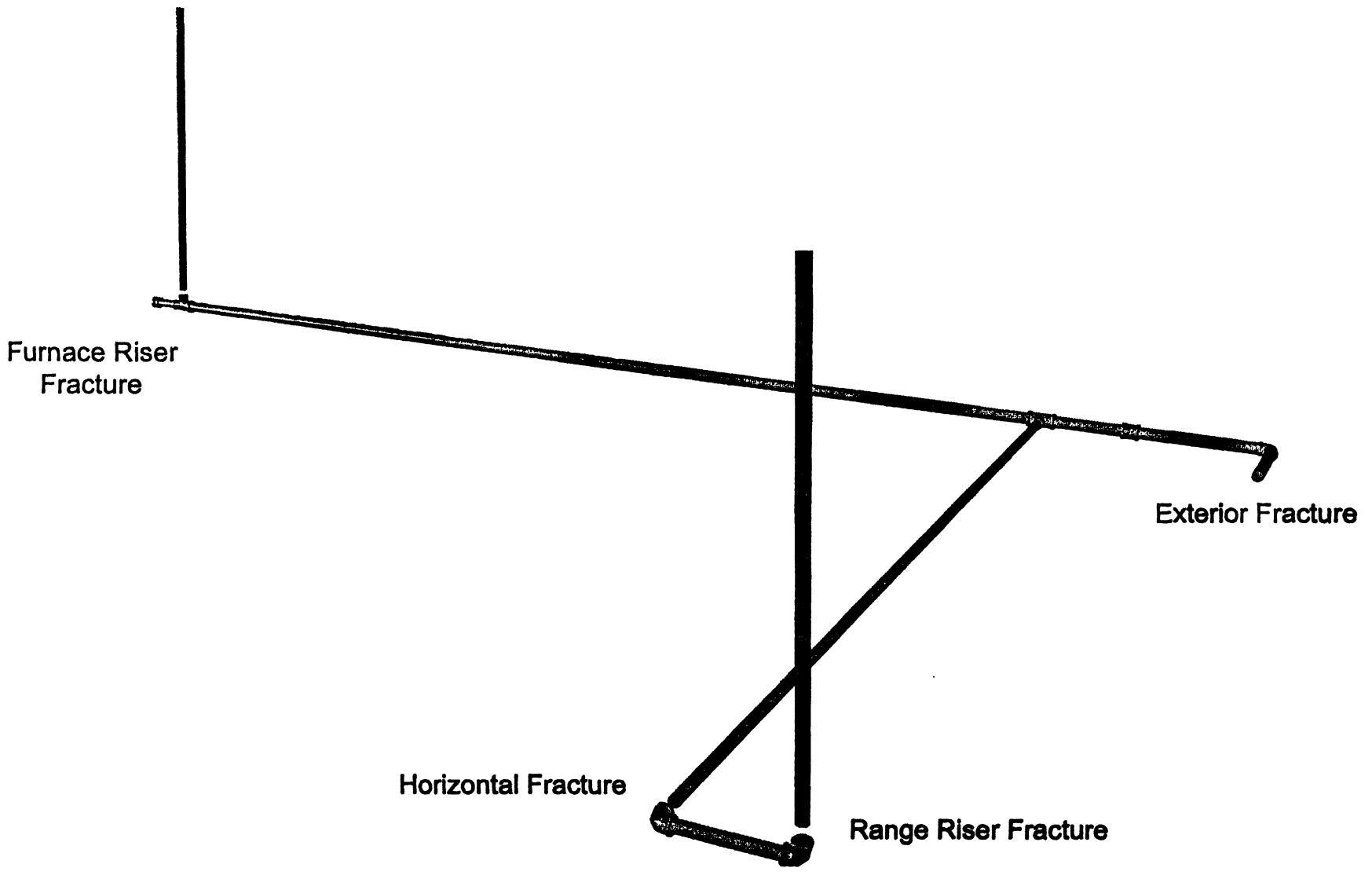
Thomas R. Karrenberg

Exhibits

ADDENDUM

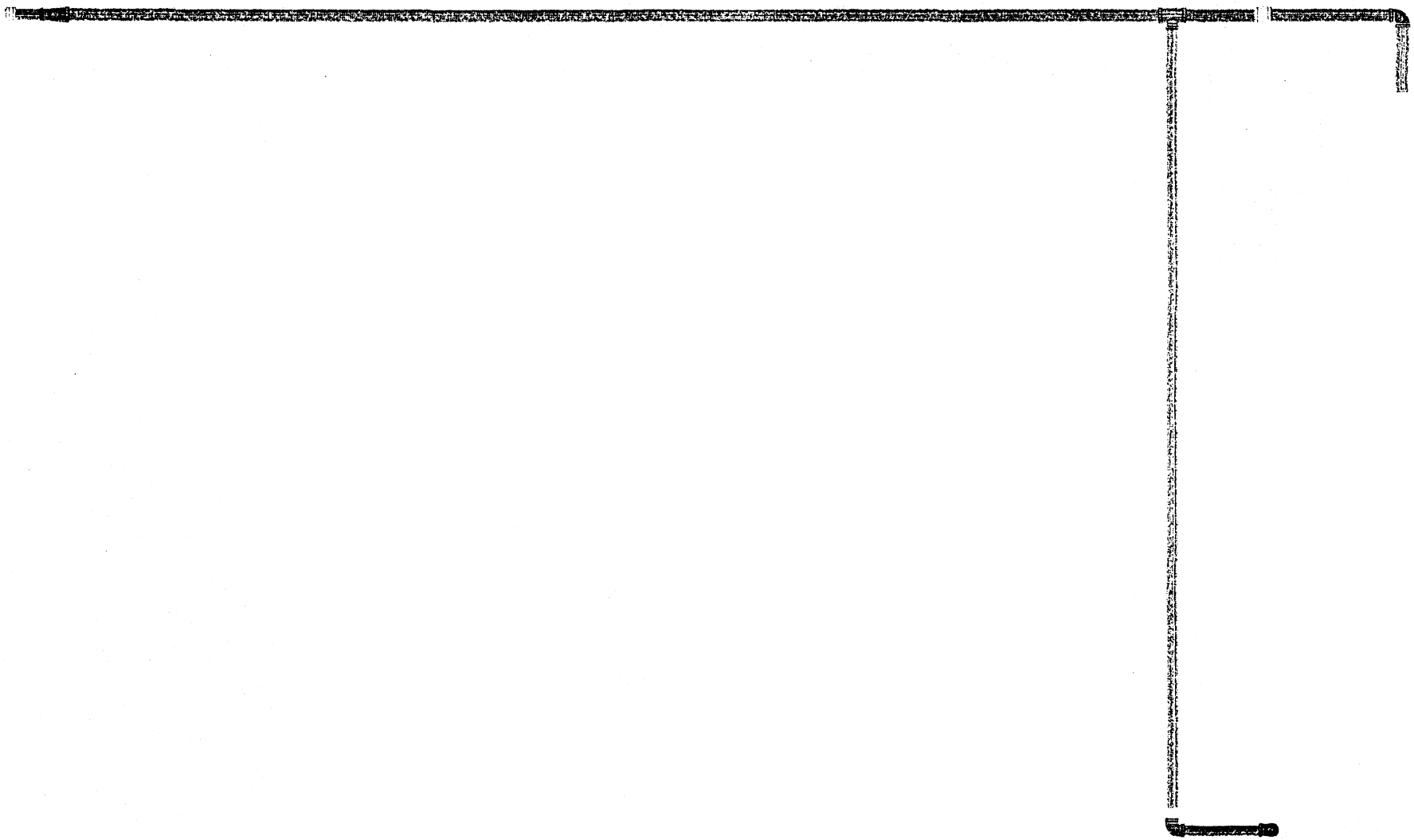
Exhibit 1	-	Pipe and Fracture Diagram
Exhibit 2	-	Traveler
Exhibit 3	-	William Ercanbrack Deposition pages 52-56, 142
Exhibit 4	-	Lynn Borg Deposition pages 24-25
Exhibit 5	-	Department of Public Safety, Utah State Fire Marshal's Office Report of Investigation
Exhibit 6	-	Utah R. Civ. P. 36(b)
Exhibit 7	-	Utah R. Civ. P. 50(b)
Exhibit 8	-	Utah R. Evid. 103(a)
Exhibit 9	-	Utah R. Evid. 702
Exhibit 10	-	Utah R. Evid. 703
Exhibit 11	-	Trial Transcript, R. 7008:15-21
Exhibit 12	-	Trial Transcript, R. 7008:59-60

Exhibit 1


Furnace Riser
Fracture
Exterior Fracture
Horizontal Fracture
Range Riser Fracture

N24256

Overhead View of Pipes



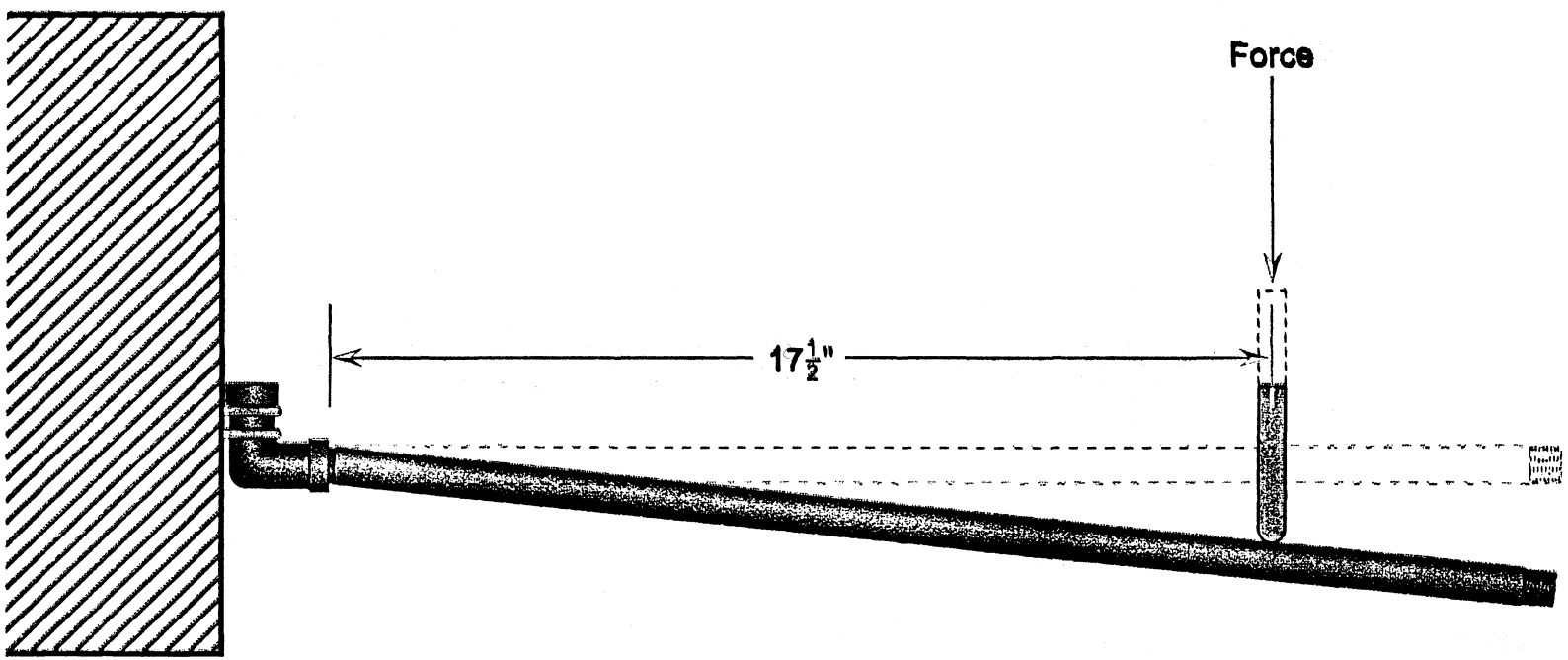

Force
17½"

Exhibit 2

No. 4, 6

QUALITY CONTROL MEASUREMENT

NO.: F01973A LIST ALL NON-CONFORMANCES MODEL NO.: 3515

Dept	Date	Sta		Corr. By	Acc. By
Plumb.	6/23/97	#5	Blocks for gas-unit installed by #10 m/B	[illegible]	
Plumb			No [illegible] Plumb + set tub later	[illegible]	
B-P-			~~Back Panel to be done in~~		
			~~STA 13#~~	[illegible]	
BP			Acces [illegible]	[illegible]	
Wall	Bld	—	Marriage wall Double Studs not		
			Fastened 16" O.C.	[illegible]	

EXHIBIT 98

DEFENDANT EXHIBIT 207(a)

QUALITY CONTROL MEASUREMENT

J.: F0197BB LIST ALL NON-CONFORMANCES MODEL NO.: 3515

ept	Date	Sta		Corr. By	Acc. By
K	6/23/97	#3	GAS LINE BUILT WRONG NEEDS TO BE FIXED	Ken	
ood	6-23	2	Hitch Needs paint		
mp			NO TOPS Plumb + [redacted] Later	Ken	
ing d	6-24		Hole in kitchen ceiling panel needs changed, Re staple ceiling diphragm	SA SA	
P-			Kitchen & Util Loan to be complete after ceiling Repair (MOR 4:30-)	MK	
P.			Access done in Final	dm	
ct			Switch in closet Panel change		

98-048

DEFENDAN EXHIBIT

Exhibit 3

IN THE THIRD JUDICIAL DISTRICT COURT
FOR SUMMIT COUNTY, STATE OF UTAH
---oooOooo---

WILLIAM G. ERCANBRACK, : Plaintiff, : Civil No. 980600223
: Judge Pat B. Brian
vs. : Deposition of:
OAKWOOD MOBILE HOMES, INC., a North Carolina Corporation, et al., : Defendants. : WILLIAM G. ERCANBRACK

SS SUPPLY, INC., : Third-Party Plaintiff, :
vs. :
UNION PACIFIC RESOURCES COMPANY and EATON METAL PRODUCTS COMPANY, : Third-Party Defendants. :

Deposition of WILLIAM G. ERCANBRACK, taken at the instance and request of the Defendant SS Supply and Summit Propane, at the law offices of D'Elia & Lehmer, 7620 Royal Street East, Suite 201, Park City, Utah, on the 14th day of June 1999, at the hour of 9:20 a.m., before David A. Thacker, a Certified Shorthand Reporter, Registered Professional Reporter, Utah License No. 22-105417-7801 and Notary Public in and for the State of Utah.

---oooOooo---

Pencil Corrections are Bill's 8/10/99

A P P E A R A N C E S

For the Plaintiff: Gerry D'Elia, Esq., D'ELIA & LEHMER, P.O. Box 626, 7620 Royal Street East, #210, Park City, Ut 84060

For the Defendant SS Supply and Summit Propane: Fred R. Silvester, Esq., SILVESTER & CONROY, 230 East 500 South, #590, salt Lake City, UT 84102

For the Defendant Oakwood Homes: Terry Plant, Esq., PLANT, WALLACE, CHRISTENSEN & KANELL, 136 East South Temple, #1700, Salt Lake City, UT 84111

For the Defendant Union Pacific Resources: Richard G. Schneebeck, Esq., HOLLAND & HART, 2515 Warren Ave., Suite 450, Cheyenne, WY 82001-3162, (307) 778-4229

Also Present: James E. Gritzner, Esq.,

---oooOooo---

I N D E X

E X H I B I T S

---oooOooo---

P R O C E E D I N G S

WILLIAM G. ERCANBRACK,
called as a witness for and on behalf of the Defendant SS Supply and Summit Propane, being first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. SILVESTER:

Q. Mr. Ercanbrack, would you state your full name for the record, please.

A. William G. Ercanbrack.

Q. Where do you presently live?

A. I am right now off and on at 3000 North Clarks Canyon Road.

MR. PLANT: Mr. Ercanbrack, you're going to need to speak up, just so you know.

Q. (BY MR. SILVESTER) What town is Clark Canyon Road in?

A. Coalville.

Q. I introduced myself before, I'm Fred Silvester, and I represent SS Supply and Summit Propane. Have you ever had a deposition taken before in any matter?

A. No.

Q. The purpose of this deposition is to get as much factual information as we can from you.

In order to do that, the lawyers will be asking questions of you, and it will be important for us to get the best information you have. It's not a very natural process to be taking down questions and answers and turning them into some written document, so there will be certain rules we'll have to follow during the deposition.

I will wait until you finish your answers before I begin my questions, if you'll give me the same courtesy and wait till my question is done before you start your answer. If we talk at the same time, we cause problems for the court reporter. It will be also necessary to answer out loud with either yeses or nos or full answers. Nods of the heads and uh huhs and huh uhs leave the court reporter to interpret our answers.

There will be times during the day that we will be talking about matters involving the explosion at your former house that will be difficult for you. If you at any time need to take a break, please let us know. Certainly this is your testimony, you're the one that's under oath, so we want to make sure that you feel okay about continuing to testify.

You may already be aware of this, but this

foot, maybe 18 inches or so, it teed and it went down to the range. And that's all there was.

Q. And both those lines went up to the floor that hooked to those appliances?

A. Yes.

Q. September when you were under the house I guess preparing it for winter, did you notice anything unusual about those gas lines?

A. No.

Q. Do you recall any occasion after you moved into the home, when the gas lines were disconnected at any point?

A. No.

Q. So the range was never unhooked or the furnace was never unhooked, as far as you know?

A. No.

MR. PLANT: Let me make sure I understood that. At any time after it was initially connected, it was never disconnected again. Did I understand that right?

THE WITNESS: Not to my knowledge.

MR. PLANT: Sorry.

MR. SILVESTER: No, that's no problem.

Q. (BY MR. SILVESTER) Do you remember whether or not at the time the home was set on the

foundation, there were any checks done of the gas line?

A. I don't know. I assumed Oakwood would when they set it up. The gas company, Summit Propane, supposedly put one. But I found out later Oakwood wasn't responsible, they just set it up.

Q. And I probably didn't ask very good foundation questions, so let me make sure we got that clear. Were you there when the home was set on the foundation?

A. I was there the day it got there and they pulled it over the foundations, and they still had to jack it together and put it up. And a couple of nights after work I stopped in as they was shutting down for the day, the setup crew, I talked to them a little bit. But the only time I was really around there was, you know, when the home initially arrived that day and after work, you know, they'd been working through the day and doing the jacking and blocking.

Q. So I think you said just a minute ago that it was your understanding that Oakwood did not do any inspections or tests of the gas line. Is that what you testified to a minute ago?

A. Once the home was delivered--

Q. Right.

A. --they didn't do any.

Q. How did you come to that understanding?

A. Went through some paperwork that they'd sent.

Q. Was that paperwork that you went through after the explosion?

A. Yes.

MR. D'ELIA: Just for clarification, are you talking about the depositions and Answers to Interrogatories, things like that?

THE WITNESS: Yes, uh huh. Yes.

Q. (BY MR. SILVESTER) That helps, because my next question was going to be: Did you have paperwork available to you that you'd gotten delivered with the home?

A. Yes.

Q. That was another bad question. We all saw the site of the explosion and realized there was massive damage. I'm wondering if you were able to retrieve any of your paperwork from the explosion site?

A. Most of the paperwork I retrieved I had to go get copies. Some was in my desk that some of the drawers didn't blow out, get blew out whole. There

was a little paperwork but not a lot.

Q. Do you remember whether or not the paperwork you got out of your desk related to the home that you bought?

A. Yes.

Q. And do you remember what that paperwork was?

A. It seemed like it was some of the paper, a contract, how much a month, and the insurance papers was there where Oakwood had insured the home.

Q. What time did you leave the home the day of the accident?

A. Approximately 6:15, 6:20.

Q. And were you working for Geary Construction at the time?

A. Yes.

Q. Were you at the gravel pit at the time?

A. Yes.

Q. And did you work all day?

A. Yes.

Q. Tell us what happened after you finished work.

A. Well, our plans for that afternoon when I got off work, was to meet my wife in town at four o'clock and from there we'd go to Park City and get

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our grocery shopping done. That would save me a trip of going to home and back to Coalville. And I give them till 4:30, and when they didn't show I went home.

Q. Where were you going to meet?

A. At Geary's shop in Coalville. In town.

MR. D'ELIA: If at any point in time, Bill, you want to take a break, you just tell us, we'll take a break.

Q. (BY MR. SILVESTER) Yes. Absolutely.

Prior to going home, did you attempt to contact them by telephone?

A. No.

Q. You did have a telephone at the home at the time?

A. Yes.

Q. And so you went back up Chalk Creek and up Clark Canyon. Correct?

A. Yes.

Q. And when you arrived, what did you see?

A. I could see my house all--everything was all blew up and destroyed.

Q. At the time you arrived was there any fire anywhere?

A. Yes.

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Q. And can you tell us where you saw fire?

A. It was coming out of the propane line where it come out of the ground into the home. The flame was coming out burning there.

Q. That's the area where the second stage regulator had been?

A. Yes. Yeah.

Q. What did you do when you arrived?

A. When I first pulled up to where the corral in my old house is, I seen everything all blew up, and I don't know, I lost my mind. I seen a trail of yellow coming down the road and I thought, you know, it was a do not cross barrier like the authorities had been there. And I run in my old house to call the sheriff department to see if everybody was okay or whatnot, but the phone wouldn't work because it was on the same line as up to my new house, and the wires was melted together and the phone was out there.

And so I, I don't know, my mind went completely crazy with what I saw and walked into, that I whirled around and beat it down the canyon to the nearest phone to see if my family was okay. And about halfway down the canyon my mind started telling me there's no tracks here. If something

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like that there would be tracks here, people around, authorities would have been contacting me. But I was down the canyon committed far enough I had to go make a phone call to notify people and find out about my family.

Q. Where did you go to make that call?

A. I first stopped at the first house west of the gate on the main road, and nobody was home. And so I went down to the next home, nobody was home. And the next home the residence of Gerald Richins, they was home, is where I made the call.

Q. And you called the county sheriff's department?

A. We couldn't remember the number, and I think I'm the one that dialed 911 because they couldn't remember the number right offhand. And just dialed 911. I think that's what happened.

Q. How long did you stay at the Richins?

A. Long enough to find out that the accident hadn't been reported. And then I just threw them the telephone and went to look for my family.

Q. When you got back there then, what did you do?

A. I pulled right up as close as I could to the scene to stay out of the debris and whatnot, and

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I was 100 feet or so down the hill. I first went up and I found my wife. And I took my coat off and put over her. And then I walked out through the rubble past this flame and I found my daughter, and I took my shirt off and put over her. And I couldn't find our baby. And it was then when I was walking through the rubble and out looking for the baby, it dawned on me there's gases leaking and burning. And I walked over to the bottle and turned the valve off at the gas bottle at that time while I was looking for my boy.

Q. Other than the flame that you saw where the piping was, was there any other area burning that you remember?

A. There was it showed where things had burnt, but the fire had burnt itself out. You could see timbers and where the fire had been, but it was mainly the main line coming out which was burning. There was some walls and that you could tell where the electrical panels, all them had burnt themselves out in black ashes.

Q. Were any of the walls on the home still standing when you first got there?

A. No.

Q. Were there any areas where the home had

moment. I want to know prior to moving into the home or after you moved into the home or any time prior to the explosion, someone from Oakwood told you that they would not do any--on-site inspection of the propane line, for example, to make sure that it was intact?

A. Nobody said they wouldn't. But the question is it never arose. Say I assumed it was done.

Q. And your belief to the contrary, does that come about from discussions you've had with Mr. D'Elia as well as responses to interrogatories that Oakwood has filed? Is that correct?

A. Is--

Q. That you have read the responses to interrogatories of Oakwood, spoken with your attorney, and that's the basis, your sole basis, that the line may not have been inspected on site by Oakwood. Is that correct?

A. Yes.

Q. Again in keeping with my skipping around questioning here, I want to talk to you a little bit about the day of the explosion. My understanding is you were supposed to meet your wife at four to go shopping.

A. Yes.

Q. And she didn't come, and you went home to check on her. Correct?

A. Yes.

Q. How far would it have been from the Geary shop, that's where you were waiting for her, right?

A. Yes.

Q. That's right in Coalville?

A. Yes.

Q. What kind of a distance are we looking at between there and your home?

A. Eleven miles.

Q. Was there a phone available at the Geary shop?

A. Not at the shop. There was phones available at my brother or gas station.

Q. Is there a reason you chose not to call?

A. The reason I chose not to call at the time, is my wife kept schedules down, she was there. I--it went through my mind on the way up the canyon that she run off the road in the bar ditch, she's stuck. You know, coming down the road, she's stuck, maybe the car wouldn't start, maybe she come out of the house, there was ice coming off the backboard, maybe she slipped and fell, she got hurt. I know

BACK PORCH

that I'll just find her in the road in a snowbank or something on the way.

Q. Your oldest daughter was Tina?

A. Yeah.

Q. Did she go to school?

A. Yes.

Q. What time typically would she have left to go to school?

A. I took her with me in the mornings down to the road and she caught the school bus. I took her with me.

Q. What day of the week was the accident?

A. Saturday.

Q. That explains why she was off schedule?

A. Yes.

Q. I realize you don't know, but I would like to know if you have any theory or belief as to what might have caused this explosion. Based upon kind of the culmination of everything you know about living there, being there, looking at what occurred afterwards, you have a unique position to answer that question. And I would like you to, if you know or have any speculation, I'd like to know what that is.

MR. D'ELIA: Could I just ask one question

with respect to what you've asked? Obviously there's a point of ignition, and then there's something to do with how gas got out. Are you asking one or both?

MR. PLANT: Both.

MR. D'ELIA: Thank you.

Q. (BY MR. PLANT) Thank you. Do you have any idea, sir?

A. Yes, I do. And this is totally my theory. I knew my wife and their daily schedule. When we found the clock it kind of put things into my mind what happened.

Q. What time was the clock? I saw it but I just don't remember.

A. 9:25 a.m.

MR. D'ELIA: And that is here, for your information, in case you would like to see it again.

MR. PLANT: I remember seeing that. I remember seeing that.

THE WITNESS: At that time of day when I--when I got up at 5:30, put the coffee on, took my shower, when I got out of the shower my wife got up, fixed my lunch, and the baby was up with her and she was feeding him.

Q. (BY MR. PLANT) The baby was 18 months old.

CERTIFICATE

STATE OF UTAH)
:
COUNTY OF SALT LAKE)

THIS IS TO CERTIFY that the deposition of WILLIAM G. ERCANBRACK, the witness in the foregoing deposition named, was taken before me, David A. Thacker, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, residing at Murray, Utah. That the said witness was by me, before examination, duly sworn to testify to the truth, the whole truth, and nothing but the truth in said cause.

That the testimony of said witness was reported by me in Stenotype, and thereafter caused by me to be transcribed into typewriting, and that a full, true and correct transcription of said testimony so taken and transcribed is set forth in the foregoing pages numbered from 3 to 175, inclusive, and said witnesses deposed and said as in the foregoing annexed deposition.

I further certify that I am not of kin or otherwise associated with any of the parties to said cause of action, and that I am not interested in the event thereof.

WITNESS MY HAND and official seal at Salt Lake City, Utah, this 21st day of June 1999.

DAVID A. THACKER, C.S.R.
License No. 22-105417-7801

My Commission Expires:

August 1, 2002

Exhibit 4

IN THE THIRD JUDICIAL DISTRICT COURT
FOR SUMMIT COUNTY, STATE OF UTAH
---oooOoooo---

WILLIAM G. ENCARNACION, : Plaintiff, : Civil No. 980600223 Judge Pat B. Brian
vs. : Deposition of:
OAKWOOD MOBILE HOMES, INC., a North Carolina Corporation, et al., : LYNN B. BORG
Defendants.

SS SUPPLY, INC., : Third-Party Plaintiff, :
vs. :
UNION PACIFIC RESOURCES COMPANY and EATON METAL PRODUCTS COMPANY, : Third-Party Defendants.

Deposition of LYNN B. BORG, taken at the instance and request of the Defendant SS Supply and Summit Propane, at the law offices of Silvester & Conroy, 230 South 500 East, Suite 590, Salt Lake Ctiy, Utah, on the 20th day of July 1999, at the hour of 9:30 a.m., before David A. Thacker, a Certified Shorthand Reporter, Registered Professional Reporter, Utah License No. 22-105417-7801 and Notary Public in and for the State of Utah.

---oooOoooo---

APPEARANCES

For the Plaintiff: Garry D'Elia, Esq., D'ELIA & LEHMER, P.O. Box 626, 7620 Royal Street East, #210, Park City, Ut 84060

For the Defendant SS Supply and Summit Propane: Fred R. Silvester, Esq., SILVESTER & CONROY, 230 East 500 South, #590, Salt Lake City, UT 84102

For the Defendant Oakwood Homes: Terry Plant, Esq., PLANT, WALLACE, CHRISTENSEN & KANELL, 136 East South Temple, #1700, Salt Lake City, UT 84111

For the Defendant Union Pacific Resources: Richard G. Schneebeck, Esq., HOLLAND & HART, 2515 Warren Ave., Suite 450, Cheyenne, WY 82001-3162, (307) 778-4229

Also Present: James E. Gritzner, Esq.,

---oooOoooo---

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---oooOoooo---

EXHIBITS

---oooOoooo---

PROCEEDINGS

LYNN B. BORG,

called as a witness for and on behalf of the Defendants SS Supply and Summit Propane, being first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. SILVESTER:

Q. Mr. Borg, would you state your full name for the record, please.

A. Lynn B. Borg.

Q. We've met before. I'm Fred Silvester, and I represent SS Supply and Summit Propane in this matter.

What is your present position?

A. Chief Arson Investigator of the State Fire Marshal's office.

Q. And can you generally describe for us what your duties are?

A. To investigate fires and determine the cause and origin on them, and take them to court if they're incendiary fires, we can determine who did them, and establish a case. I teach a lot of classes throughout the State of Utah.

Q. What types of classes do you teach?

A. Fire and arson investigation classes.

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Q. Did you have occasion to ask him how often then the furnace would be used as opposed to the pellet stove?

A. Yes, I did.

Q. Do you remember anything about what he told you?

A. He said he very, very seldom used the furnace after December 23rd when the pellet stove was installed, because the pellet stove would keep the house real warm. So he didn't use his furnace after that. It was used very, very little.

Q. Do you remember having any discussion with Mr. Ercanbrack about the first observations he made when he got to the house after the explosion?

A. No. Because when I talked to him he was still pretty traumatized. But he told me that he came up to the trailer house--he had gone to work that morning at six o'clock, was supposed to meet his wife and kids down in Coalville about four o'clock in the afternoon, and they didn't show up. So he thought they had had problems with their vehicle, so he started back up to see if he could find them, locate them, because they was going to go shopping for groceries. And he just told me that when he got up to where he could see the trailer

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house, it was all over the side of the mountain. And he went up and I think he told me he found his wife and the one little girl, if I can remember correctly.

Q. Did Mr. Ercanbrack tell you that he actually left the scene, went and made telephone calls, before he then went back up to find his wife and daughter?

A. I can remember he told me that when he saw it he went down to the nearest house down the canyon and called in the situation.

Q. Did he tell you that he went to the Richins' house? Did he identify those people by name?

A. I can't remember the name of the people he told me.

Q. Have you ever interviewed anyone who said that they were there when he called the fire department?

A. No, I have not.

Q. The 1st of February when you were on the scene, after the boy's body was recovered, do you recall noting any particular areas where there was major burning that had taken place?

A. The whole inside of the trailer house had

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been burned. Well, down underneath the steel framework.

Q. Did you make any determination as to the fuel source for that burning?

A. Fuel source?

Q. Yes. Was it the floor continuing to burn, was there gas in that area, did you make any determination?

A. It was just the combustible loading that didn't get blown out of the trailer at the time of the explosion. You know, everything was pretty well burned up that was left in there.

Q. Did you also have occasion to look at the area where the gas line came out of the ground?

A. Yes, I did.

Q. And what do you recall seeing at that area?

A. It was 14 inches underneath the ground where the main line that came out of the propane tank, it would have been a yellow polyvinyl or polyurethane half-inch line tied into approximately a six foot flex line that came up to the north side of the trailer house, and would have tied into a secondary regulator right on the north end of the trailer house.

Q. And it appeared as though there had been

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some sort of continuing burning in that area?

A. Well, I talked to Bob Berry, and you could see the end of it was burnt badly. There were pieces of the secondary regulator laying down on the ground, which I didn't bother because I knew other people would want to examine that material.

But when Sergeant Henley arrived, he was the first one to arrive on the fire scene from what I was told, fire was still coming out of that flex line, three-quarter inch flex line, that tied into--would have tied into the secondary regulator. It was still burning, and Sergeant Henley turned the propane off at the propane tank.

Q. Did Detective Berry give you any estimate of about what time of the day that tank was turned off?

A. Detective Berry told me that some snowmobilers clear across the valley on the south side I believe it was, yeah, it would have been the south side as you go up the front of the trailer side across the valley, saw smoke around eleven o'clock. They determined--

Q. My question was a little unclear, so let me ask again.

A. Okay.

SHEET 4 PAGE 25

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Q. I'm wondering if he told you what time of the day Sergeant Henley turned the tank off?
A. I don't remember exactly when it was. It would have been shortly after 1705 when they were notified of the fire and the explosion. So they would have been immediately responded up there.
Q. Okay. On that first day when you were on the scene, were you able to trace any more of the gas piping besides the piping that went from the tank to the trailer?
A. We could see where the metal pipe had gone underneath the frame through the cinderblock wall and back underneath where the trailer house had been. But there was pieces of it that were missing, and I didn't pull it out. As a matter of fact, it wasn't pulled out until the engineers came up and removed that pipe from underneath the trailer.
Q. Which was on the 4th?
A. That's correct.
Q. I think you've actually recorded this both in diagrams and photographs. But on the 1st of February you also tried to locate all of the gas-burning appliances. Is that correct?
A. There was only two of them. But yes, I did locate them.

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Q. And that was the furnace and the stove?
A. That's correct.
MR. PLANT: Do you mind if I look to those photographs?
THE WITNESS: No. Sure. Don't mix them up.
MR. PLANT: I won't.
Q. (BY MR. SILVESTER) You trust a lawyer not to mix things up.
You found the stove and the furnace on the 1st February. Is that right?
A. Sure.
Q. And they weren't moved at all on that day. Is that correct?
A. No, they were not moved that day. At least they weren't moved by me and I never saw anybody move them.
Q. Did you have any discussions with Detective Berry about whether or not either of those appliances had been moved in the body search the day before, or the evening before?
A. No, they had not been moved, that I can remember.
Q. Did you have any discussions with Detective Berry about whether or not any of the piping had to

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be moved during the body recovery?
A. No, I don't believe. Because the bodies were--the little girl was on the south side of the trailer house and the mother would have been on the west. So I don't think they moved any. I don't recall him telling me anything that they moved.
Q. But at least with the information that you gathered, it was your impression that neither the appliances nor the piping had been moved after the explosion?
A. No. I don't think anything was moved. Because they were called up there and it was night, so I'm sure they tried to preserve the scene as best they could so they could do their investigation during daylight hours. That's why I didn't go up that night, because they didn't want to try to do an investigation in the dark.
Q. After Mr. Carling arrived, what assignment, if any, did you give him?
A. He just went around with me, because I was trying to find an ignition source that might have ignited that material, and had Mr. Carling tell me if he could determine what might have ignited that. And I remember Mr. Carling telling me, I asked him about the furnace, the pilot light. He said it was

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a sealed combustion furnace. He didn't know how that could have done it. The stove, which was about 20 feet north of the trailer house, had an electronic igniter on it, so you wouldn't have had a pilot light. And we couldn't determine exactly what would have ignited the propane down underneath the house. And I just had Mr. Carling explain how the propane tank worked, how the regulators worked, how far down the pressure was reduced, and things like that.
Q. During that initial investigation, did you or Mr. Carling reach any conclusions about where the gas had escaped the system?
A. I would say, and Mr. Carling would say also because I was with him, that it escaped underneath the trailer house.
Q. That was an unclear question so I got an unclear answer.
A. I'm sorry.
Q. I'm wondering if you identified a piece of equipment, a piece of piping or regulator or anything in the propane delivery system?
A. The exact location, no.
Q. Okay.
A. And I never have since.

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A. Well, I mean, you know, I would say the debris on page No. 2 was blown closer to 100 yards than 100 feet.

Q. And he said that he intended to talk with the fire marshal personnel. Did this gentleman ever, to the best of your knowledge, speak with you?

A. No. Huh uh. So that's just some of the things that I thought I wondered about, you know.

MR. D'ELIA: Thank you. I have nothing further.

(Discussion held off the record.)

(Whereupon, at 1:15 p.m., the deposition was concluded.)

---oooOooo---

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C E R T I F I C A T E

STATE OF _____)
: ss.
COUNTY OF _____)

I HEREBY CERTIFY that I have read the foregoing testimony consisting of 162 pages, numbered from 4 to 165 inclusive, and the same is a true and correct transcription of said testimony with the exception of the corrections I have listed below in ink, giving my reasons therefor.

1. Page ____ Line ____ Correction _____
Reason _____
2. Page ____ Line ____ Correction _____
Reason _____
3. Page ____ Line ____ Correction _____
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4. Page ____ Line ____ Correction _____
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11 Page ____ Line ____ Correction _____
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12 Page ____ Line ____ Correction _____
Reason _____

_____
LYNN B. BORG

SUBSCRIBED AND SWORN to at _____,
this _____ day of _____, 19____.

_____
NOTARY PUBLIC
My commission expires: Residing at

PAGE 167

C E R T I F I C A T E

STATE OF UTAH)
:
COUNTY OF SALT LAKE)

THIS IS TO CERTIFY that the deposition of LYNN B. BORG, the witness in the foregoing deposition named, was taken before me, David A. Thacker, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, residing at Murray, Utah.

That the said witness was by me, before examination, duly sworn to testify to the truth, the whole truth, and nothing but the truth in said cause.

That the testimony of said witness was reported by me in Stenotype, and thereafter caused by me to be transcribed into typewriting, and that a full, true and correct transcription of said testimony so taken and transcribed is set forth in the foregoing pages numbered from 4 to 165, inclusive, and said witnesses deposed and said as in the foregoing annexed deposition.

I further certify that I am not of kin or otherwise associated with any of the parties to said cause of action, and that I am not interested in the event thereof.

WITNESS MY HAND and official seal at Salt Lake City, Utah, this 26th day of July 1999.

_____
DAVID A. THACKER, C.S.R.
License No. 22-105417-7801

My Commission Expires:

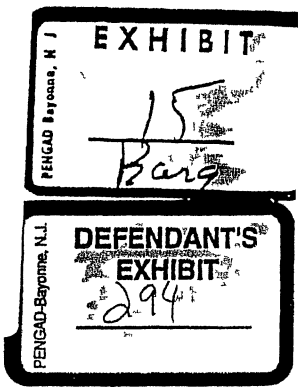
August 1, 2002

Exhibit 5

DEPARTMENT OF PUBLIC SAFETY

UTAH STATE FIRE MARSHAL'S OFFICE

98-048



REPORT OF INVESTIGATION

CASE FILE #: 98511

REQUESTING AGENCY: . . . . . Summit County Sheriffs Office

OWNER OR INSURED: . . . . . Bill Ercanbrack

OCCUPANT OR TENANT: . . . . . Mr. and Mrs. Bill Ercanbrack and Family

DATE OF LOSS: . . . . . January 31, 1998

TIME OF LOSS: . . . . . Between 0600 and 1100

LOCATION OF LOSS: . . . . . Chalk creek Canyon

COUNTY OF LOSS: . . . . . Summit County

ORIGIN OF LOSS: . . . . . Accidental

TYPE OF BUILDING: . . . . . Double wide Trailer house

RESPONDING FIRE DEPT.: . . . . . Coalville Volunteer Fire Department

EXAMINATION DATE: . . . . . .February 1, 1998

SYNOPSIS:

At approximately 1700, on January 31, 1998, a fire/explosion was reported at the home of Mr. and Mrs. Bill Ercanbrack. The home was located approximately eight miles up Chalk creek Canyon. Chalk creek Canyon is the canyon east of Coalville, Utah. Coalville Volunteer Fire Department responded to the fire/explosion that occurred in a double wide trailer but there was virtually nothing remaining because there had been an explosion prior to the fire. The explosion tore the entire trailer house to pieces spreading the trailer house in every direction. The fire completely consumed all of the combustible materials that remained in the trailer house after the explosion. Mr. Bill Ercanbrack left for work at approximately 0600, on January 31, 1998. After

work Mr. Ercanbrack was going to meet his wife and children at 1600 hours in Coalville. Mr. Ercanbrack waited for approximately thirty minutes in Coalville and then decided that his wife and family had car trouble so he decided to head up Chalk Creek Canyon to look for his family. When he arrived home, he discovered the fire/explosion and his deceased wife and deceased daughter. Mr. Ercanbrack went down the canyon to the nearest home and reported the fire/explosion at approximately 1705 hours. Summit County Sheriffs Deputies and Coalville Fire Department responded to the scene. At approximately 1900 hours, Summit County Sheriffs Dispatcher telephonically notified me of the incident. Due to darkness I made arrangement to meet Summit County Sheriff Detective Rob Berry the following morning in Park City at the Sheriffs Office. On February 1, 1998, I met Rob and we proceeded to the fire/explosion scene. Initial examination determined that there had been an extensive LPG explosion. The trailer house was completely destroyed by the explosion. There were pieces of the trailer house spread in every direction with some of the debris being approximately one hundred yards away from where the trailer initially set. Detective Berry, informed me that Mrs. Ercanbrack and seven year old Tina Ercanbrack had died as a result of the fire/explosion and their bodies had been recovered the night of January 31, 1998. Detective Berry further informed me that eighteen month old, Jeremy had not been found. At approximately 0900 hours on February 1, 1998, Salt Lake County Sheriff's K-9 unit arrived with a search dog. The dog was released into the fire/explosion scene and shortly thereafter the burned body of Jeremy was located and recovered by the State Medical Examiner. Investigation into the fire/explosion scene determined that the fire/explosion was a result of LPG under the trailer house. The LPG built up under the trailer house until it found an ignition source and then the LPG blew up causing the fire/explosion. As a result of the fire/explosion three members of Ercanbrack family died and the double wide trailer house was totally destroyed.

DETAILS:

Investigation in this case is based upon information telephonically received on January 31, 1998, from the Summit County Sheriffs Office Dispatcher (Nancy). At approximately 1705 hours, Nancy telephonically advised me at my residence that a fire/explosion had occurred earlier during the day. The fire/explosion had occurred up Chalk Creek Canyon in a dwelling and there were three deceased people as a result of the fire/explosion. Nancy advised me that Detective Rob Berry had requested that I come to the scene and assist with the investigation. Due to darkness Detective Berry and myself decided it would be better to begin the investigation the following morning. On February 1, 1998, at approximately 0745, I met Detective Berry in Park City at the Summit County Sheriffs Office. Detective Berry and myself immediately drove to Coalville and then up Chalk Creek Canyon for approximately eight miles to the scene of the fire/explosion. Summit County Sheriffs Office had a command vehicle at the scene and had maintained control of the fire/explosion scene during the night. As we approached the fire/explosion scene there was fiberglass insulation, boards and other debris along both sides of the dirt road, south of the trailer

house for approximately one hundred yards. Arriving at the top of the hill where the trailer house had set, it was obvious that there was debris spread over the top of the entire hill. The debris from the trailer house had blown every direction. There was insulation and debris in the top of quakenaspen trees north of the trailer and there was debris spread clear to the bottom of the hill that the trailer house had set upon. The front of the trailer house had faced south looking down a long canyon. Directly in front of the trailer house the mountain dropped off very steeply. The east side of the trailer house set on the end of the hill and there were no windows or doors in the east end of the trailer. The north side of the trailer house set on the side of the hill facing north up the canyon. There were numerous quakenaspen trees directly north of the trailer house. On the west end of the trailer house there was a door leading out onto a wooden deck and out to the gravel road and parking area. There were several of the Ercanbracks vehicles parked in the parking lot northeast of the trailer house. There was also a five hundred gallon LPG tank and a shed in the parking lot just northeast of the trailer house. The trailer house was twenty eight feet wide and forty eight feet long. The trailer house set on the hill facing south with the length of the trailer extending east to west. The trailer house was purchase through Oakwood Sales, located at 3780 South, Redwood Road, Salt Lake City, Utah. The trailer house was a model BOM, 3515, 1997, Serial # HOCO15F01973. The walls of the trailer house were two by sixes with fiberglass insulation. The attic had cellulose insulation sprayed throughout the Attic area. Under the floor of the trailer house there was eight inch thick battings of fiberglass insulation covered with black plastic. Mr. Ercanbrack stated that the trailer house had been purchased on June 26, 1997 and had been delivered later during the summer. Mr. Ercanbrack stated that he graded the top of the mountain level and then he poured concrete footings for the trailer house to set on. The trailer house was sitting on metal jacks. The metal jacks set on the concrete footings and the top of the jacks were under the steel beams that the trailer house was built on. The jacks were used to level the trailer house and keep the trailer house up off of the ground, approximately two and one half feet. Mr. Ercanbrack had built a four foot cinder block wall around the entire trailer house. Mr. Ercanbrack said he built the cinder block wall around the trailer instead of using aluminum skirting. Mr. Ercanbrack said this was going to be his home forever and he wanted to do it right. Mr.Ercanbrack said he placed molding between the cinder block wall and the trailer so rodents and bugs could not get under the trailer house. Mr.Ercanbrack stated that he also placed four ventilation screens on the north side of the cinder block wall and four screens on the south side. The screens were aluminum frames with metal sliders so the screens could be opened and closed. The cinder block wall around the entire trailer house was blown over during the explosion. There were sections of the cinder block wall eight feet away from the east end of the trailer house after the fire/explosion. Mr.Ercanbrack further stated that he had built a small roof structure over the secondary LPG regulator located on the north side of the trailer house. Mr.Ercanbrack said that he built the roof structure over the regulator so snow and ice would not slide off of the roof and break or damage the regulator. Mr. Ercanbrack had a metal roof installed on the trailer house after the trailer house had been delivered. Mr. Ercanbrack stated he did not want to have to worry about snow building up on the roof. When Mr.Ercanbrack ordered the trailer house he had the roof structure upgraded to an eighty pound roof because of the heavy snow where the trailer would be located. The furnace and kitchen stove inside of the trailer house burned LPG. The furnace was located in the kitchen toward the west end of the trailer house. The furnace was equipped with a pilot light that remained burning at all times. The LPG stove was located against the north wall of the kitchen and used an electronic ignitor to light the burners. These were the only two

appliances that used LPG inside of the trailer house. Investigation determined that all of the control knobs for the stove were in the off position after the fire/explosion. The main gas connection for the trailer house was located under the trailer house on the north side toward the west end of the trailer house. The LPG tank was located approximately twenty feet northeast of the trailer house with an underground line leading from the five hundred gallon tank to the LPG connection located on the north side of the trailer house. The flexible line come up out of the ground where there was a secondary regulator that reduced the gas pressure inside of the trailer house to approximately eight ounces,or eleven inches of water column. The secondary regulator was destroyed by the fire/explosion. The only part of the regulator that remains is the orifice that is still hooked to the end of the flex pipe between the tank and the end of the underground line. The are pieces of the secondary regulator and molten metal on the ground directly below the area where the secondary regulator was located.

Mr.Ercanbrack stated that he had got up around 0530 hours, on January 31, 1998, and was getting ready for work. He stated that he put a pot of coffee on the stove. When the burner ignited, Mr.Ercanbrack stated that the flame came up around the coffee pot further that it normally did. He said the flame was blue and not yellow or orange. He said he turned the other burners on and everything seemed to be normal. He said he slid the coffee pot back a little ways so the handle would not get hot and burn his hand. Mr.Ercanbrack said the flame did not blacken the sides of the coffee pot. Mr.Ercanbrack stated that he did not smell anything and he did not smell gas or hear anything wrong before he left for work at approximately 0600 hours. Mr.Ercnabrack told me that he had never had any LPG problems in the past with the furnace or the stove. Mr.Ercanbrack said that the furnace never comes on because he heats the house with a wood burning pellet stove. He said the stove keeps the trailer house very warm so the furnace never turns on. Mr.Ercanbrack stated that the wood burning stove was installed on December 23, 1997. Mr.Ercanbrack stated that he had the five hundred gallon LPG tank filled August 7, 1997, and just a couple of days after installing the wood burning stove he checked the five hundred gallon L.P.G. tank and it was approximately sixty six percent full. Examination of the wood burning pellet stove determined that the on/off switch was in the off position, the fuel knob was in the "0" position and the fan knob was in the low position. On February 1, 1998, the liquid level gauge read approximately forty two percent full. The five hundred gallon tank did not sustain any fire or explosion damage. When I examined the tank on February 1, 1998, it was still covered with snow up to approximately the three quarter mark on the tank. The cover for the liquid level gauge on top of the tank was still intact and in good condition.

Initial investigation before entering the trailer house showed that there was no flooring , walls, or roof structure left inside of the trailer house. All that remained structurally of the trailer house was the steel framework that the trailer house was built on. The steel framework that remained was bent and distorted from the fire/explosion. Inside of the trailer house there was still the burned remains of the hot water heater, the furnace, two refrigerators,metal roofing and assorted other debris. The LPG stove and the wood burning pellet stove were completely blown out of the Trailer house. The LPG stove and the pellet stove were sitting in the snow approximately twenty feet north of the trailer house. The LPG stove is not bulged as if it had contained gas vapors and exploded.

Before I entered the trailer house, the Salt Lake County Sheriffs K-9, unit arrived. The K-9 unit was called in because eighteen month old Jeremy Ercanbrack had not been found. The dog was released into the trailer house and approximately ten to fifteen minutes later the dog found the

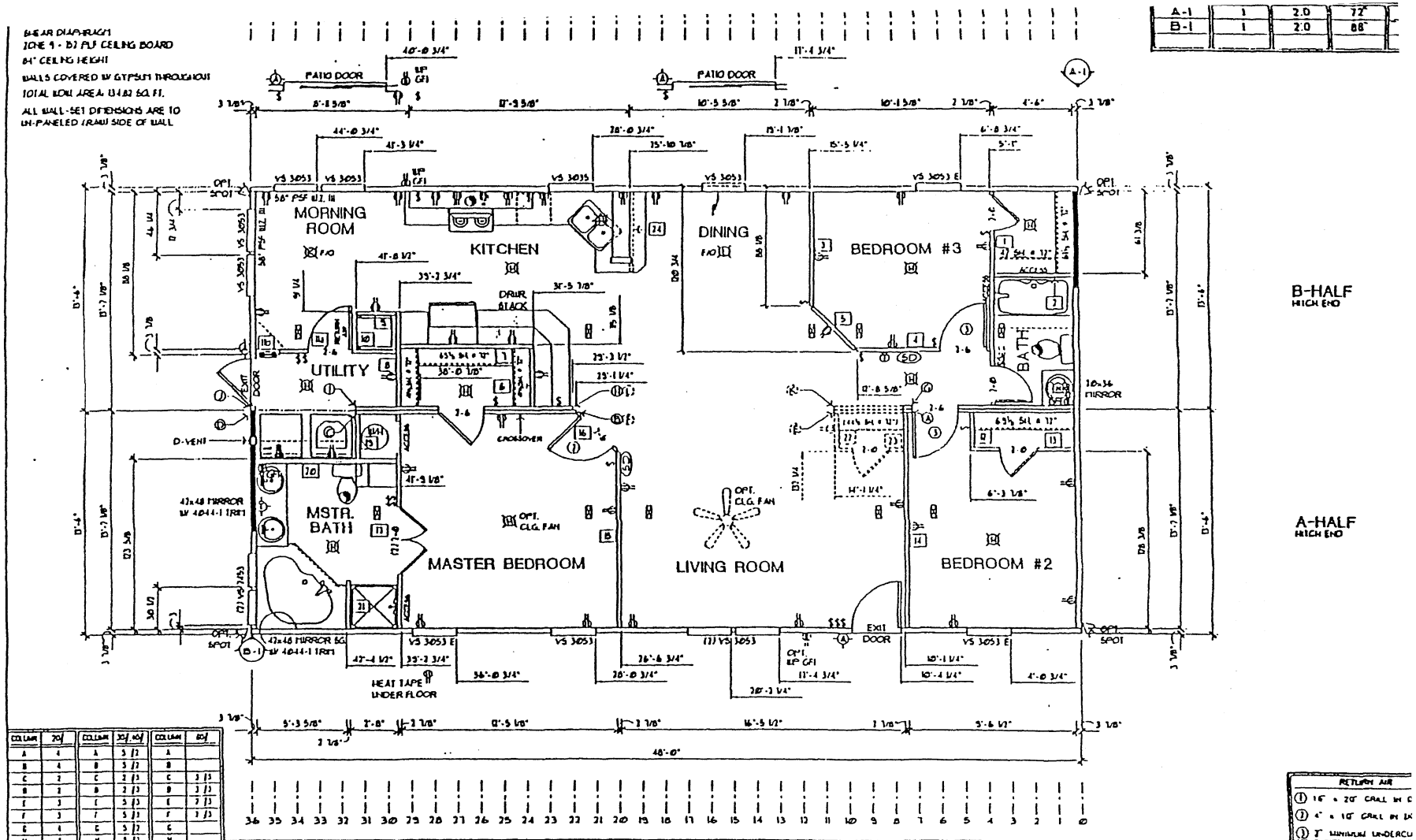
burned remains of Jeremy. The State Medical Examiner entered the trailer house and removed Jeremys burned body. The State Medical Examiner and members of the Summit County Sheriffs Office and Fire Personnel removed the body of Mrs. Ercanbrack and daughter, seven year old Tina the night of January 31, 1998. Mrs. Erbrackenbracks body was located partially under the wooden deck located on the west side of the trailer house. Tinas body was located approximately in the middle of the trailer house along the south wall.
Investigation determined that all of the appliances inside of the trailer were electric except the kitchen stove and the furnace. Just inside of the west door to the trailer house was the washer and dryer. Mr.Ercanbrack told Detective Berry that he had vented the electric dryer out underneath the floor of the trailer house.

Mr. Ray Carling who is a member of the Utah State Liquefied Petroleum Gas Board, traveled to the fire/explosion scene at my request. Mr. Carling has worked in the LPG business for many years and I felt he would be a real asset to have on the scene. Ray examined the fire/explosion scene and agreed that the fire/explosion occurred from LPG under the trailer house. Mr. Carling is authoring a report and his report will be attached to this report. Mr.Bruce Rigby, from Summit Propane, out of Coalvillle, Utah was at the fire/explosion scene. I spoke to Mr. Rigby, and he informed me that Summit Propane had installed the five hundred gallon LPG tank, the underground line and the secondary regulator up to the north side of the trailer house. Mr. Rigby stated that they did not hook the LPG line to the trailer house. Mr. Rigby further stated that they conducted a pressure test on the system and insured that there were no leaks before leaving the site. Mr. Rigby confirmed that Summit Propane did indeed fill the five hundred gallon LPG tank on August 7, 1998. Mr. Rigby showed me a log book confirming when the LPG tank was filled. The tank was filled to eighty five percent or four hundred and twenty five gallons according to Mr. Rigby.
It appears that the fire/explosion occurred between 0600 and 1100 hours on January 31, 1998. Mr. Ercanbrack departed the trailer house at approximately 0600 and everything appeared to be proper. At approximately 1100 hours some snow mobilers across the valley south of the trailer house saw smoke. Detective Berry interviewed the snow mobilers and may have further information.
Before leaving the fire/explosion scene I removed the LPG steel pipe from the back of the LPG stove. The reason I removed the pipe was to have the pipe and pipe threads tested.

CONCLUSION:

It appears to this investigator that this fire is of accidental origin. It appears that sometime between 0600 and 1100 hours on January 31, 1998, enough LPG accumulated under the trailer house to reach its flammable limits (between 2.15% lower limit and 9.6% upper limit) and an ignition source came together. The result was a fire/explosion that completely destroyed the double wide trailer house and caused three people to loose their lives. I could not determine where the LPG leak came from however further investigation and testing will be conducted by engineers, LPG personnel, attorneys and other agencies and companies.

Lynn B. Borg
Fire Investigator



A-1	1	2.0	72"
B-1	1	2.0	88"

SHEAR DIAPHRAGM
ZONE 1 - 7/16 PLY CEILING BOARD
84" CEILING HEIGHT
WALLS COVERED W/ GYPSUM THROUGHOUT
TOTAL BOX AREA 1382 SQ. FT.
ALL WALL-SET DIMENSIONS ARE TO UN-PANELED (RAW) SIDE OF WALL

COLUMN	20#
A	4
B	4
C	2
D	2
E	3
F	3
G	4
H	4
I	2
J	2
K	3
L	3
M	
N	

COLUMN	30# / 40#
A	5 / 3
B	5 / 3
C	3 / 3
D	2 / 3
E	5 / 3
F	5 / 3
G	5 / 2
H	5 / 3
I	2 / 3
J	2 / 3
K	5 / 3
L	5 / 3
M	
N	

COLUMN	60#
A	
B	
C	3 / 3
D	3 / 3
E	7 / 3
F	3 / 3
G	
H	
I	3 / 3
J	3 / 3
K	7 / 3
L	7 / 3
M	
N	

COLUMN	STUDS

WALL SCHEDULE

A. 3' x 133 1/2"	B. 3' x 81 1/8"	C. 3' x 76 1/2"	D. 3' x 127 3/8"	E. 3' x 88 1/2"
F. 3' x 54 1/2"	G. 3' x 93 3/8"	H. 3' x 3"	I. 3' x 36 1/8"	J. 3' x 3"
K. 3' x 84 1/2"	L. 3' x 63 3/8"	M. 3' x 3"	N. 3' x 133 1/2"	O. 3' x 3" OPT.
P. 3' x 81 5/8"	Q. 3' x 36 3/8"	R. 3' x 3"	S.	T. 3' x 48" OPT.
U. 3' x 48"	V. 3' x 3"	W. 3' x 133 1/2"	X. 3' x 32 5/8"	Y.

AREA - LIGHT - VENTILATION CHART

ROOM	AREA	LIGHT	VENT	ROOM	AREA	LIGHT	VENT
MORNING ROOM	80.14 SQ. FT.	4.11 SQ. FT.	20.14 SQ. FT.	BEDROOM #3	93.33 SQ. FT.	9.32 SQ. FT.	3.04 SQ. FT.
DINING	100.07 SQ. FT.	5.72 SQ. FT.	3.04 SQ. FT.	BEDROOM #2	110.00 SQ. FT.	9.32 SQ. FT.	3.04 SQ. FT.
LIVING ROOM	220.11 SQ. FT.	11.11 SQ. FT.	10.04 SQ. FT.				
MASTER BEDROOM	157.76 SQ. FT.	11.11 SQ. FT.	10.04 SQ. FT.				

RETURN AIR
① 16" x 20" CALL IN C
② 4" x 10" CALL IN LI
③ 1" MINIMUM UNDERCU

REVISIONS

OAKWOOD HOMES CORP./
DRAFTING SERVICES DEPT.
7800 McCLOUD RD.
GREENSBORO, NC. 27425
(910) 664-2400

DRAWING TITLE: MASTER PLAN

DRAWING FILE INFORMATION: COLORADO #15

DRAWN BY: MONTE T.

PRODUCT: NATIONAL

SQ. FT.: 1296

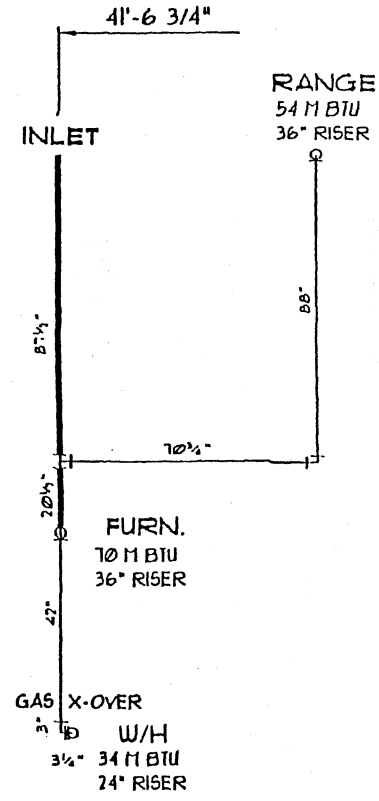
SHEET: 1-A11

MODEL NO.: BOM-35

DATE: 12-16-96

REVISED: MT 01-13-

FM000007



NOTES:
1. DIMENSIONS ARE CENTER TO CENTER
2. ALL FIXTURES HAVE A 5/8" ID FLEX CONNECTOR
3. ALL FIXTURES HAVE A SHUT-OFF VALVE

30'-0" COLUMN 200M BTU (MAX)
188 BTU AS SHOWN

PIPE LEGEN
3/
1/
○ 1/2" RIS
● 3/4" RIS

OAKWOOD HOMES CORP./
DRAFTING SERVICES DEPT.
7800 McCLOUD RD.
GREENSBORO, NC. 27425
(910) 664-2400

DRAWING TITLE: GAS PLUMBING

PRODUCT: NATIONAL
SQ. FT.:
MODEL NO.: BOM-351
DATE: 12-16-96
SHEET: 1-A9
REVISED: MT 01-13-9

DRAWING FILE INFORMATION: COLORADO #15
DRAWN BY: K.A. BRIGHT

FM000008

Exhibit 6

WEST'S UTAH RULES OF COURT
UTAH RULES OF CIVIL PROCEDURE
PART V. DEPOSITIONS AND DISCOVERY

Current with amendments received through 10-01-03

RULE 36. REQUEST FOR ADMISSION

(a) Request for Admission.

(1) A party may serve upon any other party a written request for the admission, for purpose of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. The request for admission shall contain a notice advising the party to whom the request is made that, pursuant to Rule 36, the matters shall be deemed admitted unless said request is responded to within 30 days after service of the request or within such shorter or longer time as the court may allow. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d).

(2) Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

(3) The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission

made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

[Amended effective November 1, 1999.]

Advisory Committee Note

For a complete explanation of the 1999 amendments to this rule and the interrelationship of these amendments with the other discovery changes, see the advisory committee note appended to Rule 26. The Supreme Court order approving the amendments directed that the new procedures be applicable only to cases filed on or after November 1, 1999.

Rules Civ. Proc., Rule 36

UT R RCP Rule 36

END OF DOCUMENT

Exhibit 7

WEST'S UTAH RULES OF COURT
UTAH RULES OF CIVIL PROCEDURE
PART VI. TRIALS

Current with amendments received through 10-01-03

RULE 50. MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

(a) Motion for Directed Verdict; When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific ground(s) therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than ten days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) Same: Conditional Rulings on Grant of Motion.

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

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

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

Rules Civ. Proc., Rule 50

UT R RCP Rule 50

END OF DOCUMENT

Exhibit 8

WEST'S UTAH RULES OF COURT
UTAH RULES OF EVIDENCE
ARTICLE I. GENERAL PROVISIONS

Current with amendments received through 10-01-03

RULE 103. RULINGS ON EVIDENCE

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) Record of Offer and Ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain Error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

[Amended effective November 1, 2001.]

Advisory Committee Note

This rule is the federal rule, verbatim. The 2001 amendment adopts changes made in Federal Rule of Evidence 103(a) effective December 1, 2000.

Rules of Evid., Rule 103

UT R REV Rule 103

END OF DOCUMENT

Exhibit 9

WEST'S UTAH RULES OF COURT
UTAH RULES OF EVIDENCE
ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Current with amendments received through 10-01-03

RULE 702. TESTIMONY BY EXPERTS

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.

Advisory Committee Note

This rule is the federal rule, verbatim. Rule 56(2), Utah Rules of Evidence (1971), was substantially the same.

Rules of Evid., Rule 702

UT R REV Rule 702

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Exhibit 10

WEST'S UTAH RULES OF COURT
UTAH RULES OF EVIDENCE
ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Current with amendments received through 10-01-03

RULE 703. BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Advisory Committee Note

This rule is the federal rule, verbatim, and expands Rule 56(2), Utah Rules of Evidence (1971), which limited facts or data not personally known to the expert to those made known to him at the hearing. The provision that the facts or data upon which the expert relies for his opinion in a particular field may be of the type "reasonably relied upon by experts in the particular field in forming opinions," and need not otherwise be admissible also seems to expand Rule 56(2), Utah Rules of Evidence (1971). But see *Lamb v. Bangart,* 525 P.2d 602 (Utah 1974). Recent Utah cases have tended towards recognition of the position taken by this rule. *Edwards v. Didericksen,* 597 P.2d 1328 (Utah 1979); *Kallas v. Kallas,* 614 P.2d 641 (Utah 1980); *State v. Clayton,* 639 P.2d 168 (Utah 1982).

Rules of Evid., Rule 703

UT R REV Rule 703

END OF DOCUMENT

No. FILED

NOV - 7 2002

By Deputy Clerk, Summit County

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

ORIGINAL

WILLIAM G. ERCANBRACK, Plaintiff, vs. OAKWOOD MOBILE HOMES, INC., Defendant.	Case No. 980600223
	Transcript of: 04-08-02
	TRIAL PROCEEDINGS

BEFORE THE HONORABLE ROBERT K. HILDER

SILVER SUMMIT COURTHOUSE

PARK CITY, UTAH

APRIL 8, 2002

07005

REPORTED BY: CARLTON WAY, RPR
238-7532

or does the pipe collar with the chasers spin?

A. No, the pipe spins and the dye stays stationary.

Q. Okay. And if in fact a pipe is coming through the chaser and gets to the end, when it's being threaded, it gets to the end of the chaser if, in fact, the die is not released at that point quickly, what happens?

A. It will continue to make threads. For every turn you have of the pipe, you have one additional thread.

Q. Okay. Now, regarding your actual theory, you start with a particular point in order to determine what occurred from a failure analysis standpoint of view; right?

MR. PLANT: It is leading, Your Honor.

MR. D'ELIA: Just to the point --

THE COURT: I'll allow it.

THE WITNESS: Well, first of all, recognize that you'd have to take the conditions surrounding the failure, and you have to try to determine what happened based upon those. Number one, we know we had gas under the trailer that caused an explosion. Okay, number two, assuming the gas came from a source under the trailer 100 percent had to be one of the three broken pipes.

Q. Okay.

A. Okay.

Q. Now, you rely upon Dr. Romig and Mr. Thatcher for the fact that the gas could not have come under the trailer from

an outside leak; is that correct?

A. As far as them being gas, yes, I do.

Q. Are there any fracture analysis or failure analysis type of opinions that also assist you in making such a conclusion?

A. Yes.

Q. What?

A. Well, first of all, if it did come from the outside, you have to have conditions being met: The one condition I won't go ahead and say I'm an expert at because that's a passage of the gas into the building. I won't even talk about that.

But the other condition you had to have a dramatic failure of the outside part, either the regulator or pipe or something like that.

Q. And do you hve evidence of anything like that occurring?

A. No.

Q. Now, do you also rely upon Mr. Thatcher's opinion that the thread leak could not have caused a -- or significantly contributed to the explosion?

A. Yes, I do.

Q. Starting at that point now, you then take a look and you've narrowed it down to the three fractures --

A. Okay, you have three fractures --

Exhibit 11

No. _____

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

ORIGINAL

WILLIAM G. ERCANBRACK, Plaintiff, vs. OAKWOOD MOBILE HOMES, INC., Defendant.	Case No. 980600223
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07006

REPORTED BY: CARLTON WAY, RPR
238-7532

scenario as to how much force it would take if only one of the range risers was inserted; correct?

A. That's right.

Q. What's another scenerio?

A. We went ahead as well as inserting the one range riser, we went ahead and fixed the point where the pipe would normally come out of the trailer.

Q. Is that where I am pointing right now?

A. Right.

Q. What did you do with that?

A. If you actually put that into place someplace --

Q. Put this into place?

A. Right. Then you try to slide the other end one and five sixteenth of an inch. It takes -- we had a load equivalent to 70pounds, and we exceeded that. So it took far in excess of 70-pounds to put it into place.

Q. Okay. And you were saying that it takes in excess of 70 pounds?

A. Yes, far in excess.

Q. Were you able to gauge some kind of an approximate specific gauge as to how much force would be placed on that?

A. Oh, I would say between eighty and a hundred pounds.

Q. Between eighty and a hundred?

A. Right.

Q. And how much force did it take to break the

over-threaded and under-inserted range riser?

A. Eighty.

Q. Okay. Did you make any calculations or any opinions with respect to what is the weakest pipe in the system?

A. Yes.

Q. Which one?

A. Well, very obviously the weakest joint -- I'd say the weakest part is where the pipe goes into the elbow on the range riser.

Q. Is that from what you were explaining before of the over-threading and over-insertion?

A. That's right.

Q. Based upon your observations, were you able to form a conclusion at that point in time as to where the leak occurred from to cause the explosion in the Ercanbrack home?

A. Yes.

Q. What?

THE COURT: Wait a minute.

MR. PLANT: Object, now. That has absolutely no foundation whatsoever or evidence that it leaked, and this calls for sure speculation.

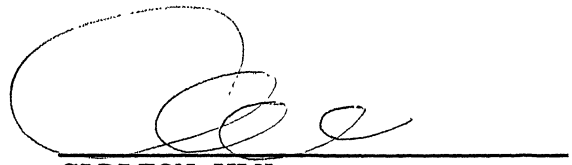
MR. D'ELIA: He's already said that he relies upon everyone else, the leak had to occur underneath the crawl space --

MR. PLANT: Your Honor, the -- the objection is

C E R T I F I C A T E

I, CARLTON WAY, hereby certify that I attended and reported, as official court reporter, the proceedings in the the above-entitled and numbered matter before Robert K. Hilder and that the foregoing is a true and correct transcription of my stenographic notes thereof.

Dated at Salt Lake City, Utah, this 30th day of October, 2002.



CARLTON WAY
OFFICIAL COURT REPORTER