*In the*

# Supreme Court of Virginia

*At Richmond*

**Record No. 161339**

EMERALD POINT, LLC
and
THE BREEDEN COMPANY, INC.,

*Appellants,*

– v. –

LINDSEY HAWKINS, PAUL HARMON,
THOMAS ZAMARIA, and WILLIAM GUIRE,

*Appellees.*

# BRIEF OF APPELLEES

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## STATEMENT OF THE CASE
## AND OF THE MATERIAL PROCEEDINGS BELOW

On November 13, 2014 the Plaintiffs Hawkins, Zamaria, Harmon, and Guire filed suit for compensatory and punitive damages against the Defendants Emerald Point, LLC and The Breeden Company. The Complaint alleged the Defendants were negligent in using unlicensed and unqualified employees who negligently failed to repair a gas furnace in the Plaintiffs' apartment, causing the Plaintiffs to suffer long-term carbon monoxide (CO) poisoning and permanent personal injuries (App. 1). After answering (App. 58) the Defendants filed a Motion to Drop requesting separate trials (App. 8), and the Trial Court denied the motion (App. 10).

Each of the Plaintiffs' Answers to Interrogatories filed on June 26, 2015 designated, among other medical providers, Allan Lieberman, M.D., a specialist in Environmental Medicine and Toxicology and one of Hawkins' treating physicians, as an expert witness (App. 209-14, 746-48, 764-66, 783-86). Hawkins' expert designation incorporated by reference (App. 210) a CD containing reports and photos (342-71), the medical records of each Plaintiff (App. 373-731), and the C.V. of Dr. Lieberman (App. 732).

Each of the Plaintiffs' designations referenced the others' injuries, including their neurological symptoms, oxygen deprivation, memory impairment, and brain damage. A reference in Hawkins' designation to the

other Plaintiffs was noted with an "*" and went on to detail the chronological progression of all of their injuries and symptoms (App. 211). Each of the designations for Zamaria (App. 746-50), Harmon (App. 764-68), and Guire (App. 783-87) listed their respective injuries and symptoms and expressly noted with regard to the designation of Dr. Lieberman that Hawkins' injuries were more severe. The designations stated:

> The subject matter of each medical care providers' / experts' testimony will be the nature of the injury sustained, that is carbon monoxide exposure and oxygen deprivation with nausea, vomiting and the constellation of symptoms described in these answers to interrogatories such as vomiting, headaches, nausea, malaise, fatigue, diarrhea, short term memory loss and cognitive difficulties as a result of CO and combustion byproducts inhale[d] over the several month period that he was in the apartment. [The medical providers are] expected to testify that the cause of the symptoms was oxygen deprivation and CO poisoning which resulted in deprivation of oxygen to the brain and brain damage . . . While the plaintiff Lindsey Hawkins sustained more severe damage, with respect to causation, Dr. Lieberman will be called to render his opinion as to the effects of carbon monoxide poisoning/exposure to combustion byproducts and oxygen deprivation and to the extent the injury and symptoms were experienced that the plaintiff suffered permanent microscopic injury and deficiency which can be expected to reflect itself in some means of memory deprivation and [cognitive] deficit.

(App. 747-48, 765-66, 784-86) (Emphasis added).

Hawkins' designation elaborated on the greater severity of her injuries as reflected in her medical records (App. 203, 210-14, 420-710). Her designation stated that the subject matter of the medical providers'

testimony would be: (a] "[the] care, treatment, symptoms, and injuries that Ms. Hawkins sustained as a result of the CO and gas poisoning," (b) "the fact that she sustained serious and permanent injuries, particularly to those areas of the body which are still symptomatic which are set out in the medical records produced," (c) that "the incident was the cause of the plaintiffs' injury, e.g., the physiology and pharmacology of the poisoning and effects on the body," (d) the reasonableness and necessity of the treatment to date and . . . in the future, and (e) "with regard to the nature and extent of the injury, causation, permanence, reasonableness of the bills and future medical costs." (App. 210-11) (Emphasis added).

Hawkins' designation also outlined her severe injuries "from carbon monoxide exposure and combusted byproducts . . . [and that] her injury is a permanent disability that [a]ffects home life, recreation and causes a wage earning capacity loss . . . as set out in the medical records provided and same will tend to get worse with aging, and thus require continued treatment [in the] future [and] medical expense[s] [commensurate] with the increase in symptoms." (App. 213) (Emphasis added).

Hawkins' designation stated Dr. Lieberman is "an expert in environmental health [and] in toxicology and injury from chemical exposure [and] is of the opinion that [Hawkins] sustained serious and permanent

injury with symptoms as set forth in his records" (App. 213). The designation identified her injuries as including loss of memory, "difficulty with word finding," and "ataxia," indicating permanent neurological damage (App. 212-13).

Hawkins' designation stated "[t]he grounds for the opinions . . . will be their treatment and examination of the Plaintiff [and] review of the films and their training and experience of the medical care provider[s] . . . and their knowledge of how the accident happened as supplied to them by Plaintiff and through the discovery process" (App. 213-14).

Hawkins' incorporated medical records dating back to 2013 show she has suffered a continuous debilitating headache, fatigue, vision change, palpitations, lightheadedness, nausea, vomiting, neck and shoulder pain, paresthesia in the hands and feet , difficulty with balance, night sweats, lack of sleep, restless leg syndrome, photophobia, phonophobia, anxiety, difficulty finding words, mental confusion, irritability and anger outbursts, depression, attention problems, difficulty making decisions, short-term memory loss, explosive and aggressive behavior, cognitive impairment, difficulty learning, and decreased concentration (App. 420-710).

On December 3, 2015 Hawkins supplemented her discovery with an itemization of her total medical expenses and her treatment with Dr. Lieberman through November 26, 2014 (App. 223-79).

The Defendants designated S. Rutherfoord Rose, PharmD, FAACT, and Professor of Emergency Medicine Chair, Division of Clinical Toxicology Director, Virginia Poison Center, as their expert witness (App. 12).

The Plaintiffs filed a spoliation motion to bar the Defendants from claiming the CO leaks were limited to the flue pipes in the attic. The Plaintiffs contended the furnace also had a cracked heat exchanger but that the Defendants had thrown it away (App. 14).

The Defendants took Dr. Lieberman's discovery deposition prior to his video deposition being taken for use at trial, and the Plaintiffs objected to the Defendant's failure to pay him (App. 191). At the May 6, 2016 video deposition the Defendants objected only once to an answer being outside of the scope of the designations, and Judge Padrick granted the objection by striking most of that answer (App. 119 at ¶ 5, 287-88).

The Defendants filed a motion in limine to preclude the testimony of City inspector Allen More, who on January 18, 2013 flunked the installation of the new furnace and the repair of the old flue pipes (App. 37).

The Honorable James C. Lewis held a trial on May 16-19, 2016. At the outset the Trial Court denied the Plaintiffs' spoliation motion to instruct the jury the heat exchanger was cracked (App. 812). The Trial Court also denied the Defendants' motion to exclude More's testimony (App. 913-14).

After the evidence, the Trial Court struck the misrepresentation and punitive damages claims (App. 1345). The Trial Court granted a motion by Zamaria, Harmon, and Guire to increase their ad damnum for compensatory damages by the amount of the dismissed punitive damages to equal the total of $450,000 originally claimed in the Complaint (App. 1365-67). The Trial Court also granted a jury instruction on spoliation:

> If a party has exclusive possession of evidence which a party knows, or reasonably should have known would be material to a potential civil action and the party disposes of that evidence, then you may infer, <u>though you are not required to do so</u>, that if that evidence had been available it would be detrimental to the party that disposed of [it in] its case. You may give such inference whatever force or effect you think is appropriate under all the facts and circumstances.

(App. 48, 1345-46, 1375-76) (Emphasis added).

The jury awarded Zamaria, Harmon, and Guire each $200,000 and Hawkins $3.5 million (App. 195). The Trial Court denied a motion to set aside the verdicts or for remittitur or a new trial on damages (App.195-98).

On June 17, 2016 over the Plaintiffs objection the Trial Court entered an order the Defendants had drafted ruling on the objections made at Dr.

Lieberman's deposition (App. 118). The Trial Court also ordered the Defendants to pay for Dr. Lieberman's discovery deposition (App. 191).

On December 22, 2016 the Defendants filed in this Court a motion for leave to correct an alleged mistake in the record regarding the June 17, 2016 order. Upon remand the Trial Court entered an order amending the June 17 order to state that the rulings resolving the objections to Dr. Lieberman's testimony were made "on May 13, 2016" (App. 793).

## STATEMENT OF FACTS

Per R. 5:28(c) this statement of facts corrects the Defendants' statement that the Plaintiffs were exposed to CO only on the two days when the leaks were supposedly repaired. Substantial evidence shows the Plaintiffs suffered long-term CO exposure from four sources: the flue pipes to the Plaintiffs' apartment, the flue pipes to the adjoining apartment, the lack of firestopping, and a cracked heat exchanger in the old furnace.

The Defendants owned and operated Emerald Point Apartments (Tr. 518). The Plaintiffs signed a lease on September 19, 2012 and moved into 2163 Dunbarton on the 21st (App. 1142, 1189, 1287). The Plaintiffs' apartment was upstairs in a quadplex building with two downstairs and two upstairs units. A gas furnace was in a closet in each of the apartments, one furnace directly over the other. The Defendants had installed in each

of these closet doors a vent for air to be drawn into the furnace for combustion. The downstairs furnace flue pipe went through a hole in the floor of the upstairs apartment where it connected with the upstairs furnace flue pipe, continuing as one pipe through the ceiling into the attic and out the roof. [1] There was no firestopping at the holes in the floors to stop free flow of air among all of the apartments from the furnace closets up into the attic and back down (App. 1043-46, 1099, 1211-12, 1398-99, 1406).

The complex was constructed in 1965-71, and the Defendants purchased it in 2004 (Tr. 518). The Defendants had no records indicating the age of the furnace at 2163 Dunbarton at the time the Plaintiffs moved in or showing the furnaces and flues in the complex were inspected or serviced. The Defendants only cursorily checked a heating system upon unit turnover to see if it operated (App. 1060-61, 1068, 1070). Gas furnace manufacturers recommend a qualified technician service such a furnace annually (App. 1248-49). The Defendants' employees did not annually service the furnaces and had no professional qualifications or licensing to repair or replace them (App. 1015, 1029, 1085).

[1] The photos at App. 1398-1406 are upside down. When oriented correctly they show a small flue pipe comes from the downstairs up into a "T" with the upstairs pipe, joining a larger pipe into the attic and out of the roof.

The original 1970's furnaces were from Carrier and at some point were replaced by Goodman furnaces. The Goodman furnaces had a 10-year life expectancy and a 10-year warranty for the heat exchanger (App. 1206-09). The serial number on the Plaintiffs' furnace (or a photograph of it) would have shown the year and month of manufacture and whether or not it was beyond its useful life (App. 1227-28). The Defendants, though, discarded the furnace and got rid of the photographs in July 2014 before the Plaintiffs could inspect the furnace (App. 1040, 1077, 1127-28).

City inspector Allen More, with 36 years of HVAC experience and with a master's mechanical license, testified how gas furnaces and heat exchangers work (App. 891-92). Burning gas warms the heat exchanger. A fan inside the unit blows air across the heat exchanger, and that air is forced through the vents to heat the apartment. The exhaust gases from combustion and the air that blows across the heat exchanger move through separate components and should not mix (App. 891-92). The exhaust is supposed to exit the combustion chamber through a B-vent flue pipe, a double-walled pipe made out of aluminized steel. There is air space between the inside and outside pipes of about a half inch. The flue pipe comes in sections with fittings on each end to secure them, and if the flue

pipe is properly locked together the combustion gases go up through the inner liner and out through the roof (App. 890-892, 1208-15, 1220-21).

A byproduct of the combustion of natural gas is CO (App. 822). CO is an odorless, colorless gas. When a person is exposed to CO it displaces oxygen and may be stored in the body for a long time, creating a hypoxia which attacks the nervous system and the brain (App. 943-44). There are acute exposures to CO, with high concentrations of the gas and elevated ppm readings, and then there are chronic exposures at lower levels (such as 3-9 ppm) (App. 952-53, 955-57, 982-83). While acute CO poisoning kills many people, for a survivor a low-level, long-term exposure to CO is more dangerous than a high-dose, transient exposure (App. 946, 957, 982-83).

In October 2012 the Plaintiffs began using the furnace at night, and as the weather got colder by November the Plaintiffs used the furnace more. Late on November 26, 2012 the CO alarm next to the furnace beeped (App. 1144, 1173). A UL-rated CO detector does not sound until the CO level is more than 30 ppm (App. 950, 1102). One of the Plaintiffs called the Defendants' emergency on-call (EOC) number. Early on November 27, 2012 one of the Defendants' employees showed up <u>without a CO meter</u> and replaced the batteries and assured the Plaintiffs everything was safe, so the Plaintiffs went to bed (App. 1145-46, 1150, 1193, 1264).

Zamaria felt unnerved by the nonchalance of the Defendants' employee and called Virginia Natural Gas (VNG) (App. 1147, 1175). Charles Basnight of VNG arrived after 8:30 a.m. and checked the CO level next to the furnace and got a reading of 37 ppm (App. 825-26, 1379). Basnight ordered the windows and doors opened, turned off the furnace, and "red-tagged" it, meaning that the Plaintiffs could not operate the furnace until it was fixed, the CO reading was normal, and VNG had inspected it (App. 829-33, 1147-48, 1380). Basnight noted a "cracked heat exchanger" in his records, and the "red tag" he wired to the furnace read:

> DO NOT CONNECT OR USE THE TAGGED APPLIANCE(S) OR CUSTOMER PIPING UNTIL YOU HAVE A PROPERLY LICENSED AND QUALIFIED AGENCY/ PERSON PERFORM THE NECESSARY REPAIRS.

(App. 831, 1380). When a furnace is "red- tagged" a ten-year experienced and licensed contractor is required to come fix it (App. 896).

Calvin Morris, a maintenance technician who was not licensed to do HVAC repairs, arrived at the apartment (App. 1085, 1089-92). Morris testified he found a small gap between two flue pipe sections going up through the attic above 2163. He attempted to repair this joint in the pipe by pushing the ends of the sections together and affixing zip screws (App. 1094). According to the manufacturers, one should never put screws in a B-vent flue pipe (App. 1217). Morris believes the flue pipes were original

equipment (App. 1114, 1403-05, 1508-11). City employee Danny Carlson and Morris re-checked CO levels18 inches off the floor in the apartment and got no reading (App. 854-55). Carlson took Morris' word on the flue pipe repairs and did not go in the attic (App. 855).

Morris checked CO readings only at the vents and at the return and did not check in the attic or in the other apartments (App. 1105-06). Morris did not inspect the heat exchanger even though the work orders note a possible crack and that Morris still got a CO reading of 3 ppm after repairing the flue pipe, which meant the problem was not fixed (App. 1093, 1110, 1251-52, 1390-91). The Defendants' records refer to a "cracked heat exchanger" at least four times, two on November 27, 2012 and two on January 4, 2013 (App. 1024, 1035-38, 1072, 1074-76, 1390-91, 1393-96). A cracked heat exchanger is a frequent cause of CO leakage (App. 822-23). The CO escaping a cracked heat exchanger mixes with the air being blown across it and enters the living space (App. 1222).

The Defendants' employees told the Plaintiffs that the CO leak had been fixed, that the CO was coming from the apartment downstairs, and that 2163 was safe (App. 1149-50, 1175-76, 1267). Heeding the Defendants' assurances that the leak was repaired, the Plaintiffs continued to live in the unit and by mid-December were each suffering severe and

lingering headaches, confusion, body aches, nausea, and vomiting (App. 1151-52, 1176, 1195-98, 1268). They had no reason to know that long-term CO poisoning was the cause and attributed their maladies to a shared seasonal flu (App. 950, 999-1000, 1151-52, 1176, 1195-98, 1268).

Zamaria felt so bad he got a prescription for an antibiotic and told friends not to visit for New Year's Eve (App. 1177). Due to her symptoms Hawkins began missing work at Home Depot and spending more time in the apartment (App. 964-65, 1197). By the end of December Hawkins was vomiting violently on a regular basis, to the point she was vomiting blood (App. 962, 1197-98). She felt so bad she cancelled a vacation and spent the entire time attempting to rest in the apartment (App. 1198). When Guire was out of the apartment visiting friends he started to feel better for a while (App. 1153). When Harmon was out of the apartment for more than a few hours his headache subsided somewhat (App. 1269).

At 4:00 a.m. the morning of January 4, 2013 the CO alarm in the apartment began sounding loudly (App. 1153, 1175, 1198, 1270). One of the Plaintiffs called the EOC number, and employee James Malewicz showed up with what he said was a CO meter, but he stated that usually the batteries to the alarm need to be replaced, so he replaced them again and assured the Plaintiffs they were safe (App. 1153-55, 1177, 1270).

Zamaria went to work at Home Depot at 6:00 a.m., but the others went back to sleep. Zamaria was now wary of the Defendants' competence, so he called VNG from work (App. 1178, 1270). Basnight from VNG responded at 8:50 a.m., got a CO reading of 54 ppm, evacuated everyone, turned off the furnace, and "red-tagged" it again (App. 836-38, 1155, 1200, 1271). Basnight wrote: "Smells gas inside and the CO detector is beeping. Roommates have headaches, vomiting. [Zamaria] isn't home so I advised to call 911" (App. 837, 1381). Basnight also wrote "Checked meter for leak. No leak found, but did find high CO readings when furnace comes on. Red-tagged unit" (App. 837, 1381).

An assistant maintenance supervisor Justice Golden, also unlicensed in HVAC repair (App. 1015), arrived and stated the furnace would be replaced within a few hours (App. 1035, 1393). In repairing or replacing a "red-tagged" furnace the Uniform Statewide Building Code requires that a qualified and licensed contractor do the work and that he get a permit from the City Permits and Inspections Office (App. 896-97, 922, 926, 1226).

The Plaintiffs went to the ER, complaining of headaches, nausea, dizziness, and vomiting. Each of them had elevated carboxyhemoglobin levels (App. 430, 949, 1009-10, 1414, 1440, 1456). The hospital

diagnosed them with CO poisoning and gave them 3-4 hours of oxygen (App. 381-88, 406-09, 428-31, 717-21, 975, 1157, 1180, 1201, 1272).

Morris was again dispatched to 2163, and starting at 2:00 p.m. he removed the furnace and installed a new one (App. 1036, 1109, 1393). Morris testified on cross that he looked at the heat exchanger upon removal of the furnace, and it appeared to be in good condition (App. 1121). Judge Lewis was prompted to remark, without objection, “I'm a little perplexed at how this young man remembers so vividly inspecting the heat exchanger. When Mr. Halloran questioned him, he didn't remember anything unless it was in the work order. I don't understand that” (App. 1121).

Morris installed a new furnace yet still got a reading of 30-40 ppm (App. 1111-12, 1394). Morris went into the attic and saw the flue pipe from the neighboring apartment at 2157 was disconnected, so he tied the pipe ends together (App. 1116, 1392, 1394). The Manager’s Inspection Report states that Morris got a CO reading in “normal range” (App. 1394), but the work order does not refer to a CO level reading on January 4 (App. 1392). Morris testified that he checked the CO in the apartment after he fixed the 2157 flue pipe but does not remember the ppm reading (App. 1116).

Zamaria was still wary of the Defendants’ repairs, and when he returned he called the Virginia Beach Fire Department (VBFD) (App. 1180).

Zamaria called VNG, and VNG informed him that the Defendants did not have the required permit to replace the furnace (App. 1085, 1180). A VBFD captain responded at 7:26 p.m. and still got a reading of 4 ppm (App. 879, 882, 1385, 1394). Zamaria later called the City to complain about the Defendant's lack of a permit (App. 900, 1180).

On January 10, 2013 after the Manager's Incident Report was filed (App. 1393), Amy Mendez from Breeden e-mailed City employee Carlson complaining the Plaintiffs were "kids" trying to "take advantage of the situation" and asking him if he could reply with some exculpatory statements in case the matter ended up in court:

> On Monday we briefly told you of a situation at this address from the Friday before. The CO alarm went off in their apartment and we linked the problem to a disconnected flue at the apartment next door (2157). They are trying to say that the problem was from the same incident that occurred back in November and that problem was never corrected. Barry asked me if you could write something up on our behalf that you were present when the problem was resolved. <u>These residents are young kids and it looks like they are trying to take advantage of the situation. We just want to cover all our tracks in case it ends up in court</u>.

(App. 1517) (emphasis added).

The Plaintiffs called Lester White, a local HVAC company owner, who conducted an independent inspection on January 16, 2013 (App. 1160, 1211). White discovered the old flue pipes above 2163 had been

incorrectly installed by joining them upside-down and backwards, not locking the sections tightly together, and misaligning the seams, causing condensation, corrosion, and leaking of CO gas (App. 1229-37, 1508-11).

White had pictures taken of the flue pipes (App. 1508-11).[2] One picture showed the leak in the old flue pipe sections that Morris had screwed together. This picture also showed rust stains from condensation dripping downward from the upside down and backwards connection (App. 1508). A second picture shows a leak at a separation of two sections of pipe, which White marked as a "slip" caused by a failure to lock the pipe and align the seams (App. 1509). Another picture labels leakage at a misaligned seam (App.1510). The fourth picture shows a failure to lock two sections and that the joint was 1½ inches out of place. This joint was also upside down, backwards, and affixed with screws (App. 1511).

On November 27, 2012 Morris had not repaired the CO leakage from four joints of the flue pipe. Instead of replacing the sections which were too short, he had shoved two of them together at one joint and secured them with screws allowing the pipe to continue to leak (App. 1094). White testified that manufacturers prohibit securing the flue pipe sections with screws because it damages the integrity of the system (App. 1217, 1231).

[2] The pictures at 1508-11 are not oriented correctly, but the proper orientation can be deduced from White's notations on the pictures.

White testified as an expert witness for the Plaintiffs. He stated that the Defendants had violated the professional protocol for inspecting a heat exchanger and in isolating CO leaks, which includes running the furnace at least three hours with continuous CO metering after repairs. Any CO reading over -0- ppm is unacceptable. If the Defendants' had followed the protocol the cracked heat exchanger would have been discovered (App. 1240-50). White was of the opinion that both the loose flue pipes in the attic and a cracked heat exchanger in the furnace caused the continuous CO leak through January 2013 that injured the Plaintiffs (App. 1252-53).

On January 18, 2013 City employee Allen More inspected the furnace system based on Zamaria' s complaint. More issued a stop work order because the Defendants installed a new furnace without a permit. More also flunked Morris' work because of "improper venting" (App. 347, 902).

Finally, the Defendants hired Green Run Heating and Cooling (GRHC), a licensed HVAC contractor who on January 22, 2013 acquired the proper permit (App. 350, 905-06). GRHC repaired the flue pipes in the attic, but More re-inspected the pipes and flunked the repair due to an unlocked B-vent pipe and the lack of firestopping (App. 352, 908).

At the time the apartments were built no firestops were required between floors (App. 923-24). A firestop is a metal disc that surrounds the

flue pipe. The disc is caulked to the flue pipe and to the ceiling or floor to prevent airflow between the upstairs and downstairs and attic (App. 910, 1213, 1238). Lack of firestops allows any leaking CO to flow between the attic and the apartments (App. 910, 1238- 39). Even though Emerald Point was grandfathered, More required firestops for safety reasons (App. 924). GRHC fixed the flue pipes and installed the firestops, and More passed the repairs on January 28, 2013 (App. 353, 905-06, 927-31, 1181-82).

On January 4, 2013 the Defendants had moved the replaced furnace to a maintenance bay where it sat for 18 months (App. 1040, 1077, 1127-28). On April 16, 2013 counsel notified the Defendants of his representation of the Plaintiffs (App. 75). The Defendants' insurer wrote on June 3, 2013 requesting recorded statements (App. 76). The insurer inspected the furnace and photographed it (App. 80, 1135-36; Tr. 519-20). The insurer denied liability on January 7, 2014 (App. 77). The Defendants then disposed of the old furnace in July of 2014 because they "needed the room," and "no one had told" the employees to keep it (App. 1040, 1077, 1127-28; Tr. 519). Maintenance supervisor Anthony Hamill testified he had discarded a perfectly good furnace because of a return bent during removal (App. 1060). Morris said it was not damaged (App. 1128).

Zamaria, Harmon, and Guire each still felt lingering headaches, lightheadedness, body aches, and nausea for a few weeks to a month, but exposure to clear air resolved their immediate symptoms (1164, 1182, 1273). Hawkins, however, has continued to suffer devastating injuries from long-term CO poisoning (App. 223-79, 420-710, 961-997, 1289-1318).

Hawkins testified at trial in conformity with her designation and her medical records regarding all of her injuries and symptoms, including her headaches, confusion, lack of concentration, difficulty in learning, memory impairment, cognitive deficit, and her loss of wage-earning capacity (App. 210-13, 223-79, 420-710, 961-997,1289-1329).

Due to her illness Hawkins could not work, and Home Depot eventually fired her because of absenteeism. Zamaria, also a merchandiser at Home Depot, has been promoted with a pay increase from $12 to $15 per hour, since the longer one works for the company the more one advances (App. 1172,1319, 1325-26). Hawkins got a job at a call center but had to quit because she was too ill (App. 1322-23).

Hawkins incurred financial trouble and moved back in with her father. Her income tax records show her loss of income between 2012 and 2014 when she otherwise would have kept progressing up the ladder at Home Depot (App. 1319-31, 1512-16). She testified that as a result of her CO-

related illness she cannot work, has no social life, cannot engage in hobbies she once enjoyed, struggles in her activities of daily living, and is in constant fear of greater injury in the future (App. 1330-31).

Hawkins sought treatment at the ER on January 16, 2013, spent three nights in the hospital in April 2013, saw local neurologists from January 2013 – October 2013, had a sleep study done in August 2013, and went to a family physician in December 2013. She had a spinal tap test which recorded an abnormally high pressure reading of 23 in her cerebrospinal fluid (App. 688, 967-68). She sought treatment from Dr. Lieberman starting in October 2014 (App. 420-710). She testified that no treatment or medicine has given her any relief (App. 1329-30).

Dr. Lieberman testified by video deposition at trial (App. 936-1012) and in conformity with the expert designations, as follows: He described the physiology, pharmacology, mechanism, and effect of CO exposure (App. 943); CO poisoning is underdiagnosed because its symptoms mimic routine maladies like the flu (App. 943-46); There is an increased risk of dementia from chronic CO poisoning (App. 946); He listed the symptoms of chronic CO exposure (App. 952-53); Other combustible byproducts are emitted with a CO leak (App. 959-60); He testified with a reasonable degree of medical certainty that the chronic CO exposure Hawkins suffered

is the medical cause of her permanent injuries (App. 961-97, 971-72, 979-81); The pathophysiology and mechanism of CO exposure-related injury is that of tissue hypoxia (oxygen deprivation) (App. 982); Hawkins was in the apartment more often, and CO exposure is worse for females, explaining the difference in the magnitude of injuries between Hawkins and her three male roommates (App. 964-65, 983, 1012); Low-level, long-term CO exposure is more dangerous than an acute, high-dose, transient exposure (App. 946, 957, 982-83); and Hawkins is incapable of her same employment and has a loss of wage-earning capacity (App. 996-97).

## ARGUMENT

### 1. Dr. Lieberman's Testimony was within the Scope of the Expert Designations, and the Defendants Did Not Make Timely Objections to Those Parts to Which They Now Contend on Appeal to Have Been Outside of the Scope.

#### a. Standard of Review

This Court gives "deference to a trial court's ruling to exclude or admit expert testimony and that ruling will not be disturbed on appeal unless it is plainly wrong and amounts to an abuse of discretion." *Condominium Services, Inc. v. First Owners' Association of Forty Six Hundred Condominiums, Inc.*, 281 Va. 561, 576, 709 S.E.2d 163, 172 (2011).

### b. The Defendants Waived Their Objections First Raised in This Appeal to Dr. Lieberman's Testimony.

The Defendants got a February 23, 2017 order added to the record in an attempt to preserve alleged error on appeal. The Defendants had asked their June 17, 2016 order be changed to reflect they had argued the beyond the scope objections on May 13, 2016 before Judge Padrick (App. 793). The May 6, 2016 Lieberman deposition transcript shows the Defendants objected to <u>only one</u> answer of Dr. Lieberman's as being outside of the scope of the designations (App. 136).

The Defendants drafted the June 17, 2016 order, to which the Plaintiffs objected, describing each objection upon which Judge Padrick had ruled (App. 118-27). Paragraphs 8-9, 12-14, 16, 20, 28-29, 50-51, and 60-61 in the June 17 order noting an objection to testimony as being outside of the scope of the designations are contrary to the transcript (App. 118-27, 131-71). Plaintiffs' counsel objected to the entry of the February 23, 2017 "nunc pro tunc" order because the Defendants neither made the objections at the deposition nor argued them before Judge Padrick.

There is no transcript of the May 13, 2016 hearing before Judge Padrick. It is the obligation of the petitioner/appellant to ensure that the record is sufficient to enable the Court to evaluate and resolve the assignments of error." R. 5:11(a)(1); *see, e.g., Prince Seating Corp. v.*

*Rabideau*, 275 Va. 468, 470, 659 S.E.2d 305, 307 (2008). "This Court will not consider an objection made to the trial court without a proper showing of what that objection was. As with excluded evidence, absent a transcript . . . that captures the arguments made at trial, this Court has no basis upon which to review the trial court's ruling." *Galumbeck v. Lopez*, 283 Va. 500, 507, 722 S.E.2d 551, 555 (2012).

Judge Padrick sustained the Defendants' sole objection regarding the scope of the designations by striking most of that answer, at p. 7, line 17 through p. 8, line 15 (App. 119 at ¶ 5, 286-88).

Accordingly, the Defendants waived their objections to the opinions of Dr. Lieberman as being outside of the scope of the designations, and these unpreserved objections first raised in this appeal are not subject to review (Appellant's Brief at 17-18 at ¶¶ c - i, 24-27); *see* R. 5:25; *Bitar v. Rahman*, 272 Va. 130, 139, 630 S.E.2d 319, 324 (2006).

**c. Dr. Lieberman Testified Within the Scope of his Expert Witness Disclosure.**

To the extent each of the Defendants' objections is not waived, the Plaintiffs' Answers to Interrogatories were sufficient to disclose Dr. Lieberman's testimony in accordance with R. 4:1(b)(4)(A)(i). "[A]ny application of the rule begins with determining whether the opinion at issue

was disclosed in any form," and the court reviewing a decision to allow expert testimony must examine the content of the pretrial disclosure. *John Crane, Inc. v. Jones*, 274 Va. 581, 591, 650 S.E.2d 851, 856 (2007).

The designations of Zamaria, Guire, and Harmon specified that each expert would testify the Plaintiffs' long-term exposure to CO and other combustion byproducts had led to oxygen deprivation, causing brain damage, short-term memory loss, and cognitive difficulties (App. 747, 765, 784). Their designations each cross-referenced Hawkins' designation and stated specifically Dr. Lieberman would testify Hawkins' injuries were worse and that the Plaintiffs' exposure led to "permanent microscopic injury and deficiency which can be expected to reflect itself in some means of memory deprivation and cogni[tive] deficit" (App. 748, 766, 785-86).

Hawkins' designation incorporated all of the Plaintiffs' medical records (App. 373-731) and stated the experts would testify to her "permanent" injuries being a "result of the CO and gas poisoning from the combustion products" and as to "the physiology and pharmacology of the poisoning and [the] effects on the body" (App. 203, 210, 213). The designation stated the experts would testify she suffered permanent injuries from the exposure "causing a wage earning capacity loss" and that she

"has permanent symptoms . . . and restrictions as set out in the medical records provided and same will tend to get worse with aging" (App. 213).

Her designation specified Dr. Lieberman would testify to her injuries and symptoms as reflected in the incorporated medical records, including a continuous debilitating headache, neurological symptoms, aphasia ("loss or impairment of the power to use or comprehend words usually resulting from brain damage"),[3] mental confusion, irritability and anger outbursts, attention problems, difficulty making decisions, short-term memory loss, explosive and aggressive behavior, cognitive impairment, difficulty learning, and decreased concentration (App. 213-14, 420-710).

The Defendants argue a number of Dr. Lieberman's statements (*italicized* below) are outside of the scope of the designations (Appellant's Brief at 17-18, 24-27).[4] A short review of the designations and the medical records demonstrate that Dr. Lieberman's testimony comports with them and easily refutes the Defendants' objections.

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[3] https://www.merriam-webster.com/dictionary/aphasia

[4] The bullet points below cite to ¶¶ a - i of the Appellants' Brief at pp. 17-19. They also cite to the page numbers in the Brief where each point is argued.

- (¶ a; p. 24) *CO-exposed patients develop dementia later in life* -– Dementia is not necessarily related to age. It is defined as "a usually progressive condition . . . marked by the development of multiple cognitive deficits such as memory impairment, aphasia, and the inability to plan and initiate complex behavior."[5]

  By definition Hawkins already has dementia, and in all likelihood the other Plaintiffs will develop some symptoms of it. Dr. Lieberman's designations stated he would testify regarding:

  > CO poisoning which resulted in deprivation of oxygen to the brain and brain damage . . . While . . . Hawkins sustained more severe damage . . . [each Plaintiff suffered] permanent microscopic injury . . . [which] can be expected to reflect itself in some means of memory deprivation and [cognitive] deficit.

  (App. 747-48, 765-66, 784-86); *see also* designations as to short-term memory loss, cognitive difficulties, irritability, difficulty finding words, mental confusion, anger outbursts, depression, attention problems, difficulty making decisions, and explosive and aggressive behavior that will worsen with aging; *see also* designations as to "the physiology and pharmacology of the poisoning and [the] effects on the body" (App. 210-214).

[5] https://www.merriam-webster.com/dictionary/dementia (Emphasis added)

- (¶ b; p. 25-26) *56,000 people die of CO poisoning; CO toxicity is worse than pesticides; CO targets the heart and the brain*
  -– The designation identified Dr. Lieberman as an expert in "in toxicology and injury from chemical exposure," and his CV as incorporated identifies him as an expert in the study of pesticide toxicity (App. 213, 733). *See* ¶ a, above, particularly as to brain injury and oxygen deprivation; *see* designations as to the physiology and pharmacology of CO poisoning; *see* designations as to Dr. Lieberman's knowledge of CO exposure from more than 30 years of training and experience. Any lay person knows that CO is a deadly byproduct of combustion.
- (¶ c; p. 24-25) *59% of miners had headaches 33 years after exposure*
  -– Dr. Lieberman testified that "from the chronic side, anywhere up to 30 percent of these patients end up with neurologic disease and psychiatric disease," and later elaborated: "what is the latency, for example, of an exposure? And just because you don't see something manifesting initially, can it affect patients later on? And the answer is it certainly can, up to 30 percent." After giving his opinion he referred only anecdotally to a finding that Japanese miners had headaches for many years after CO exposure and did not base his opinion on it

(App. 953-55). *See also* ¶¶ a, b, above, as to the physiology and pharmacology of CO poisoning and as to Dr. Lieberman's knowledge of CO exposure, based on his training and experience as reflected in his CV (App. 732).

- (¶ d, p. 25) *Chronic low-level CO exposure is more dangerous than an acute high dose*

  -– The designations and the medical records recite, and there was substantial evidence that the CO exposure continued from early October 2012 through mid-January 2013. This long-term CO leak persisting at levels below the 30 ppm sensitivity of the detector exposed the Plaintiffs to a much greater quantity of CO than would have resulted from just the two acute exposures. The Plaintiffs' symptoms were proportionate to this long-term CO exposure, not to the two isolated episodes. Dr. Lieberman's list of chronic CO exposure symptoms were his lecture notes he used to refresh his memory, and each CO exposure symptom he recited was included in the designations (Compare Dr. Lieberman's testimony at App. 144-45 to Hawkins' designation at App. 212-13); *see also* ¶¶ a, b, above.

- (¶ e) *Plaintiffs inhaled other gases and particulates in addition to CO*

  -- *See* Hawkins' designation as to suffering injury "from [CO] exposure and combusted byproducts" (App. 213) (Emphasis added). A layman knows the burning of fossil fuels causes byproducts other than $CO^2$ and water, e.g., other gases and pollutants.

- (¶ f) *Plaintiffs have personality disturbances and could contract Parkinson's disease*

  -- Parkinson's is "a chronic progressive neurological disease chiefly of later life . . . marked especially by tremor of resting muscles, rigidity, slowness of movement, [and] impaired balance."[6] *See* Hawkins' designation as to her having "a constellation of neurological symptoms[,] disequilibrium[,] parasthesias of the hands and feet[,] symptoms of muscle spasm, weakness[,] ataxia ["inability to coordinate voluntary muscular movements"[7]], [and] numbness and tingling in her legs in association with the restless leg syndrome" (App. 212-13). These symptoms will "get worse with aging." *See also* ¶¶ a, b, above.

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[6] https://www.merriam-webster.com/dictionary/Parkinson's%20disease

[7] https://www.merriam-webster.com/dictionary/ataxia

- (¶ g; p. 26) *Hypoxia of the tissues causing injury*

  - Hypoxia is "a deficiency of oxygen reaching the tissues of the body."[8] *See* designations as to "the cause of the symptoms was . . . CO poisoning which resulted in deprivation of oxygen to the brain and brain damage . . . [P]oisoning / exposure to combustion byproducts and oxygen deprivation [caused] the plaintiff [to suffer] permanent microscopic injury and deficiency which can be expected to reflect itself in some means of memory deprivation and [cognitive] deficit" (App. 747-48, 765-66, 784-86); *see also* ¶¶ a, b, above.

- (¶ h; p. 26) *Hawkins' has a brain injury*; *CO ppm level of 30 triggers a UL-rated alarm; Re: the normal level of CO in the blood*

  -- *See* ¶¶ a, b, above, regarding Hawkins' brain injury. Dr. Lieberman heads the Center for Occupational and Environmental Medicine, has more than 30 years of training and experience in the field, and lectures on levels of CO exposure causing chronic injury (App. 732). A part of his training and experience is a familiarity with CO levels necessary to cause an alarm and to raise carboxyhemoglobin levels in the blood. *See* medical records incorporated into the designations as to the Plaintiffs' elevated carboxyhemoglobin levels.

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[8] https://www.merriam-webster.com/dictionary/hypoxia

- (¶ i; pp. 26-27) *Hawkins suffered a loss of wage earning capacity*

  -- *See* designations as to Hawkins' injury being "a permanent disability that [a]ffects home life, recreation and causes a wage earning capacity loss to the extent the plaintiff has permanent symptoms . . . and restrictions as set out in the medical records provided and same will tend to get worse with aging" (App. 213) (Emphasis added). *See* the myriad of Hawkins' occupationally-debilitating symptoms detailed in her medical records (App. 420-710) and in the designation incorporating them (App. 210-15). Her Answers to Interrogatories specified her wage loss (App. 207).

- (p. 26) *Hawkins' symptoms are worse because of longer exposure and because she is female*

  -- There is substantial evidence Hawkins was in the apartment on a more regular basis through January 2013. Dr. Lieberman's statement regarding CO exposure causing more severe symptoms in females was not offered as an opinion on direct examination. He was testifying on redirect explaining the "anomaly" of her being more severely injured than her roommates, in response to his cross examination concerning the injuries to her male roommates and the amount of time she spent in the apartment exposed to the CO (App.

1005-06, 1011-12).[9] Hawkins' designation states Dr. Lieberman acquired his "knowledge of how the accident happened as supplied to [him] by Plaintiff and through the discovery process" (App. 214). Hawkins' medical records in the designation reflected her increased absenteeism from work due to her more severe symptoms (App. 234), and Dr. Lieberman testified at trial that "when I looked at some of the history in the hospital charts on the other three roommates, for example, I realized that she was in the apartment much longer" (App. 983). *See* designations as to Dr. Lieberman's familiarity with "the physiology and pharmacology of the poisoning and [the] effects on the body" and his knowledge of CO exposure from more than 30 years of training and experience.

This Court's opinions in *John Crane, supra*, and *Mikhaylov v. Sales*, 291 Va. 349, 784 S.E.2d 286 (2016), are of no help to the Defendants. In *John Crane*, in a wrongful death suit for mesothelioma from exposure to the defendant's asbestos products, the Court affirmed the exclusion of one expert's opinion testimony on the amount of asbestos in the ambient air, where the designation and a report attached to it made no reference to

[9] "On redirect examination, a witness may be examined to explain the testimony which the witness gave on cross-examination." *Virginia Practice: Trial Handbook* § 15:3 (2017).

such an opinion. The Court also affirmed the exclusion of another expert's testimony because the designation referred to his testing of various asbestos insulations and his report on those tests, but the designation did not disclose the conclusions of that report or include the report. As outlined above, Dr. Lieberman's opinions were all disclosed in some form in the designations. *See John Crane, supra*, 274 Va. at 591, 650 S.E.2d at 856 ("[A]ny application of [R. 4:1(b)(4)(A)(i)] begins with determining whether the opinion at issue was disclosed in any form").

In *Mikhaylov*, the plaintiff in a civil suit for assault and battery designated a medical expert whom the trial court allowed to testify that the plaintiff needed future surgery, but this Court reversed. However, as the plaintiff in *Mikhaylov* conceded, the expert's opinion was not included in any form in any of the discovery disclosures. That is not the case here.

The Defendants took a discovery deposition of Dr. Lieberman and had an opportunity to test the substance of his opinions against those of their retained expert. The Defendants designated Dr. Rose from the Virginia Poison Center as an expert defense witness, but the Defendants declined to call him as a witness at trial. The Defendants failure to offer rebuttal expert testimony or, in fact, any evidence at all in their defense belies that their objections are groundless. The Defendants are attempting

to get a trial de novo based on matters that were wholly discretionary with the Trial Court and at worst resulted in harmless error.

### 2. The Defendants Discarded the Old Gas Furnace While Knowing of Potential Litigation, and the Plaintiffs Were Entitled to the Spoliation Instruction.

#### a. Standard of Review

A trial court's decision whether to grant a jury instruction is subject to review for abuse of discretion. *Howsare v. Commonwealth*, __ Va. __, 799 S.E.2d 512, 514 (2017). "[A] litigant is entitled to jury instructions supporting . . . her theory of the case if sufficient evidence is introduced to support that theory and if the instructions correctly state the law." *Bennett v. Sage Payment Solutions, Inc*., 282 Va. 49, 55, 710 S.E.2d 736, 740 (2011). "In deciding whether an instruction was appropriate, the appellate court views the facts in the light most favorable to the instruction's proponent." *Howsare, supra*, 799 S.E.2d at 515.

#### b. The Spoliation Instruction was Proper.

There was substantial evidence that the old furnace was a source of CO leakage in the apartment which was ongoing from the time the Plaintiffs started using the heat on a regular basis in October 2012 through GHRC's final repair of the leaks on January 23, 2013.

A reasonable inference was that the old furnace and heat exchanger were beyond their 10-year useful lives. On November 27, 2012 Basnight of VNG found high CO levels next to the furnace. The Defendants' records referred four times to the possibility of a cracked heat exchanger. After Morris repaired the flue pipes on November 27 he still got readings of 3 ppm, which shows CO was coming from another source, likely the heat exchanger. Throughout December 2012 the Plaintiffs continued to have symptoms of CO poisoning. Upon removal of the old furnace on January 4, 2013, CO levels decreased, pointing to the heat exchanger as a problem. The Defendants' employees, unlicensed in HVAC repair, did not follow the professional protocol in inspecting the old heat exchanger, which would have definitively determined if there were any cracks or leaks.

The Defendants also knew litigation was likely. The Plaintiffs went to the ER for treatment of CO poisoning. Amy Mendez from Breeden admitted in her e-mail to Carlson that the Defendants expected a lawsuit. The Defendants received notice from counsel about his representation of the Plaintiffs. The Plaintiffs filed a claim with the Defendants' insurer, which assigned a claim number but denied liability on January 7, 2014. The serial number on the furnace would have disclosed the month and year of

manufacture. The parties could have had licensed professionals inspect the old heat exchanger to determine whether or not it was cracked.

The Defendants kept the furnace for 18 months because it could be a subject of litigation. The insurer inspected it and took photographs. The Defendants, though, threw out the old furnace in July 2014 because they needed to "make room" in their maintenance bay, and now the insurer's pictures are also gone. The Defendants destroyed the furnace even though their employees (e.g., Mendez) recognized a lawsuit was coming. The Defendants threw it away even though any reasonable person in their situation would know it would be relevant to the eventual suit.

The Trial Court's instruction to the jury that it could make an adverse inference against the Defendants because they discarded the furnace was in accord with Virginia law. This Court has held a jury may infer that missing evidence was adverse to a party if the party was in control of the evidence yet allowed it to be lost or destroyed. *See Blue Diamond Coal Co. v. Aistrop*, 183 Va. 23, 31 S.E.2d 297 (1944) (in a CO-poisoning case the defendant company failed to have its doctors perform the requested autopsy of a deceased coal miner to determine his blood gases); *see also Jacobs v. Jacobs*, 218 Va. 264, 268, 237 S.E.2d 124, 127 (1977) ("where one party to a legal controversy has within his control evidence material to

the issue and does not produce it, there is a strong presumption that such evidence, if produced, would operate to his prejudice").

The Court of Appeals has relied on *Jacobs* and *Blue Diamond* to hold that if the evidence is sufficient the trial court may give the jury a spoliation instruction. "Where one party has within his control material evidence and does not offer it, there is [an inference] that the evidence, if it had been offered, would have been unfavorable to that party." *Wolfe v. Virginia Birth-Related Neurological Injury Compensation Program*, 40 Va. App. 565, 581, 580 S.E.2d 467, 474 (2003) (quoting Charles E. Friend, *The Law of Evidence in Virginia* § 10-17, at 338 (5th ed.1999)).

The test is whether "a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action." *Wolfe, supra*, 40 Va. App. at 581, 580 S.E.2d at 474. There is no question here the Defendants should have foreseen the furnace would be material evidence in likely litigation. Contrary to the Defendants' arguments (Appellant's Brief at 35-36), Virginia law does not require the Plaintiffs to ask the Defendants specifically to preserve the furnace, and any rule requiring such a request, especially pre-litigation, would be unworkable.

The Defendants try to confuse the issues by citing federal cases decided under FRCP 37(c) or FRCP 37(e) to argue that clear and

convincing evidence of bad faith should be required for a spoliation instruction in the Commonwealth's courts (Appellant's Brief at 32-34, 36-38). Both rules are irrelevant. FRCP 37(c) deals with sanctions for failure to provide requested documents subject to a discovery request. FRCP 37(e) deals with sanctions for spoliation of electronically stored information that should have been preserved in the anticipation or conduct of litigation.

The court in *Jenkins v. Woody*, No. 3:15cv355, 2017 WL 362475 at *17 (E.D. Va. Jan. 21, 2017), a recent case dealing with FRCP 37(e) and one to which the Defendants cite extensively, noted that the Fourth Circuit does not require a showing of bad faith for an adverse inference due to spoliation of evidence (citing *Buckley v. Mukasey*, 538 F.3d 306, 323 (4th Cir. 2008) (explaining that spoliation, though not conducted in bad faith, could still be intentional, willful, or deliberate); *Trigon Insurance Co. v. United States*, 204 F.R.D. 277, 287 (E.D. Va. 2001) (explaining that "the intentional destruction of documents does not imply that bad faith is necessary" for imposition of sanctions for spoliation)).

Neither this Court nor any other court in the Commonwealth has ever required a showing of bad faith in order for a jury to make an adverse inference against a party that has destroyed material evidence prior to trial, nor should it be required. The decision of the party in control of the

evidence as to whether it is relevant to potential or pending litigation is the key determination, and the party's intent in discarding it later is immaterial. The evidence is gone whether it is discarded innocently or maliciously. Therefore, the negligence of the party is sufficient.

Finally, the spoliation instruction the Trial Court drafted and read to the jury stated it was not required to infer the evidence would have been detrimental to the Defendants' case. Given the Defendants' conduct, the instruction given was actually more favorable to them compared to what it could have been, and any alleged error here was harmless at worst.

### 3. Allen More's Testimony as to the Workings of a Gas Furnace, the Defendants' Failure to Get the Required Permit to Install the New Furnace, and His Inspections of the Defendants' Flawed Repair of the Flue Pipes was Relevant and Admissible to Explain the Defendants' Negligence.

#### a. Standard of Review

This Court will "review a trial court's decision to admit or exclude evidence using an abuse of discretion standard. . . [and] a great deal must necessarily be left to . . . the [trial court] in determining whether evidence is relevant to the issue or not." *Norfolk and Portsmouth Belt Line Railroad v. Wilson*, 276 Va. 739, 743, 667 S.E.2d 735, 737 (2008).

**b. Allen More's Testimony was Relevant and Admissible.**

"[A] litigant is entitled to introduce all competent, material, and relevant evidence that tends to prove or disprove any material issue in the case." *Barkley v. Wallace*, 267 Va. 369, 373, 595 S.E.2d 271, 273 (2004); R. 2:401. "Opinion testimony by a lay witness is admissible if it is reasonably based upon the personal experience or observations of the witness and will aid the trier of fact in understanding the witness' perceptions." R. 2:701. Likewise for an expert witness' opinion testimony which is based on his knowledge, training, and experience. R. 2:702(a)(i).

More had 36 years of HVAC experience. More's factual observations were relevant and material, and his explanations of the workings of the furnace and air flow assisted the jury in understanding the evidence.

More went to 2163 Dunbarton shortly after the installation of the new furnace and in response to Zamaria's complaint that the Defendants had not acquired the proper permit. He testified about the proper workings of a gas furnace and of the flue pipes designed to carry away exhaust including CO. He testified a CO leak requires a permit for repair whenever there is a reported malfunction within the furnace system. More testified he issued a stop-work order because the Defendants violated the building code by doing the work on January 4, 2013 without a permit. More found

upon inspection that the Plaintiffs' apartment lacked appropriate firestopping, which could allow CO in the attic to flow into the apartment. More testified he found that Morris' January 4 repairs of the flue pipes resulted in improper venting. More's testimony as to the requirements for locking the flues was relevant to the sources of the CO leak and was foundational to White's testimony.

The Trial Court ruled More's testimony was relevant as showing the Defendants' unlicensed employees did not know how to repair the furnace and flues properly. In fact, they did not do so. The Defendants objected to his testimony as not relevant to the old furnace, but the Trial Court recognized its relevance and removed any possible prejudice by stating before the jury what amounted to a limiting instruction (App. 913-14).

More stated that he orders firestopping regardless of grandfathering. More's testimony that a red tag violation triggers the requirement to get a permit was relevant to the negligence occurring on November 27 and on January 4. Had licensed professionals been summoned in accordance with the permitting process the firestopping would have been installed, the CO leaks would have been fixed, and the long-term CO poisoning of the Plaintiffs avoided. More's testimony was relevant and admissible.

The Defendants reliance upon *Cain v. Lee*, 290 Va. 129, 772 S.E.2d 894 (2015), in contending that evidence of post-accident conduct is not relevant, adds nothing to their argument (Appellant's Brief at 41). *Cain* dealt with the issue of an award of punitive damages under Va. Code Ann. § 8.01-44.5 in a DUI-related personal injury case. The court in *Cain* stated that "the evidence the Cains sought to introduce has no direct connection to the incident that precipitated the present case. Indeed, Lee's second DUI and dismissal from the VASAP occurred during the pendency of this case." 290 Va. at 137, 772 S.E.2d at 898. More's testimony, on the other hand, directly related to the Defendants' workers' lack of qualifications that caused their negligent repair of the flue pipes and allowed the ongoing CO leaks until GHRC corrected the Defendants' negligent work.

**4. The Trial Court Was Correct in Denying the Defendants' Motion to Drop as the Defendants Were Not Prejudiced Thereby, Each of the Plaintiffs was Injured as a Result of the Same Conduct of the Defendant, and a Severance of Trials Would Have Wasted Judicial Resources.**

**a. Standard of Review**

"[Whether] to order separate trials or to consolidate claims for a single trial is a matter of procedure, left to the trial court's discretion." *Allstate Insurance Co. v. Wade*, 265 Va. 383, 392, 579 S.E.2d 180, 185 (2003).

**b. The Plaintiffs' Injuries Arose Out of the Same Act or Transaction, and Trying All of their Claims Together was Within the Well-Considered Discretion of the Trial Court.**

Trying four separate cases would have required the calling of the same witnesses and the presentation of the same evidence. Testimony from each the Plaintiffs, even as to his or her particular injuries and symptoms, would have been required in each trial because it was relevant to the issue of proximate cause.

The court in *Clark v. Kimnach*, 198 Va. 737, 96 S.E.2d 780 (1957), noted that trial courts have the "inherent power" to consolidate cases when they "are [of] the same nature, arise from the same act or transaction, involve the same or like issues, depend substantially upon the same evidence, even though it may vary in its details in fixing responsibility, and where such a trial will not prejudice the substantial rights of any party." 198 Va. at 745, 96 S.E.2d at 787. The *Clark* court stated further: "The consolidation of cases for trial . . . merely permits them to be tried together before the same [jury] to avoid unnecessary delay and expense in the administration of justice." *Id.* at 745, 96 S.E.2d at 786.

In *Leech v. Beasley*, 203 Va. 955, 960-61, 128 S.E.2d 293, 295 (1962), in an auto accident case involving multiple plaintiffs, the court affirmed the denial of separate trials, holding that "[n]eedless delay,

expense and consumption of the court's time would have been involved in separate trials. It is the policy of the law to avoid this wherever possible." 203 Va. at 61, 128 S.E.2d at 297.

The Defendants rely on *Virginia Hot Springs Co. v. Hoover*, 143 Va. 460, 130 S.E. 408 (1925), and *Carufel v. American Isuzu Motors, Inc.*, 47 Va. Cir. 529 (Spotsylvania Co., Jan. 8, 1999), in arguing they were prejudiced by the single trial. In *Hoover*, though, this Court held joinder was proper because the plaintiffs' similar claims for relief arose from the same conduct of the defendant. 143 Va. at 465, 130 S.E. at 410.

While the circuit court in *Carufel* held that the plaintiffs' claims in an auto accident case should be severed, another circuit court in *Neurology Services v. Fairfax Medical PWH, LLC*, 67 Va. Cir. 1 (Fairfax Co., Jan. 3, 2005), acknowledged *Carufel* in the context of a motion to drop but also noted that if a court can drop one or more of the plaintiffs, then it would also have the discretion to consolidate the cases. The court noted the standards for consolidation enunciated in *Clark, supra*, 198 Va. at 745, 96 S.E.2d at 787. *Neurology Services, supra,* at 27. Applying those factors, the court in *Neurology Services* found it would be wasteful to drop plaintiffs and denied the defendants' motion. *See also Deane v. Mady*, 72 Va. Cir. 304, 2006 WL 3456352 at *3 (City of Charlottesville, December 1, 2006).

Moreover, trying the claims in one case limited the possible recovery to a single $350,000 punitive damages award against the Defendants. *See* Va. Code §8.01-38.1. Trying four cases before separate judges and separate juries could result in inconsistent rulings and findings. Plaintiffs' claims were joined in the interest of judicial economy to prevent the waste of time, costs, and resources of the Trial Court and of the parties.

**5. The Trial Court Acted Within Its Discretion in Allowing the Increase in the Ad Damnum after the Close of the Evidence, as the Total Amounts Sought to be Recovered Remained the Same, and the Defendants' Were Not Prejudiced Thereby.**

**a. Standard of Review**

The Trial Court may within its discretion allow the amendment of the pleadings to increase the ad damnum clause of a complaint, and this Court reviews such an amendment for an abuse of that discretion. *Peterson v. Castano*, 260 Va. 299, 302-03, 534 S.E.2d 736, 738 (2000).

**b. The Amendment Increasing the Ad Damnum Did Not Cause Surprise or Prejudice to the Defendants.**

When deciding a motion to amend to increase an ad damnum clause, "a circuit court must consider whether the defendant will be prejudiced and whether such prejudice will affect the defendant's ability to have a fair trial. The circuit court must also consider the plaintiff's right to be compensated

fully for any damages caused by the defendant's acts or omissions." *Peterson, supra*, 260 Va. at 303, 534 S.E.2d at 738.

The Trial Court, in striking the punitive damages claims of Harmon, Zamaria, and Guire and allowing claims of $450,000.00 in compensatory damages, did not increase the Defendants' exposure above the total amount initially claimed. Defendants suffered no prejudice since the jury awarded only $200,000.00 each. Leave to amend shall be liberally granted in the furtherance of the ends of justice. *See* R. 1:8. Filing of additional pleadings has been allowed after the close of the evidence. *See, e.g., Brown v. Brown*, 244 Va. 319, 324, 422 S.E.2d 375, 378 (1992).

The Defendants cite *Russell Lumber Co. v. Thompson & Lambert*, 137 Va. 386, 119 S.E.117 (1923), and *Powell v. Sears, Roebuck & Co*., 231 Va. 464, 344 S.E.2d 916 (1986), but they are distinguishable. In *Russell*, the plaintiff moved to amend his claim after the close of the evidence to add a new theory of damages, thereby prejudicing the defendant by making it unable to counter it. In *Powell*, the plaintiff's motion to amend came after a verdict had been reached in an amount greater than the total the plaintiff had requested in the original ad damnum clause.

Here, the Plaintiffs' amended ad damnum did not exceed the original total amount. The evidence in support of damages did not change. The

Defendants were not prejudiced. The Plaintiffs had a right to be fully compensated, and the Trial Court was correct in allowing the amendment.

### 6. The Trial Court Acted Within Its Discretion in Denying the Defendants' Motion for a Remittitur.

#### a. Standard of Review

Setting aside a verdict as excessive . . . is an exercise of the inherent discretion of the trial court, and, on appeal, the standard of review is whether the trial court abused its discretion." *Allied Concrete Co. v. Lester*, 285 Va. 295, 311, 736 S.E.2d 699, 707-08 (2013). The Court must consider the evidence in the light most favorable to the prevailing party. *Baldwin v. McConnell*, 273 Va. 650, 654-65, 643 S.E.2d 703, 704 (2007).

#### b. The Jury Verdicts Were Not Excessive.

A trial court may set aside a jury verdict only when it is plainly wrong and without credible evidence to support it. "[W]hen a litigant comes before this court with the favor of a verdict of the jury approved by the trial court he occupies the strongest position known to the law, and that, in such case, the facts should be stated and accepted in the light most favorable to him." *Oney v. Jamison*, 175 Va. 420, 422, 9 S.E.2d 346, 347 (1940).

Harmon, Zamaria, and Guire all suffered chronic CO poisoning for a period of at least three months. They had escalating headaches, gastric

distress, vomiting, and a constellation of neurological symptoms. Their symptoms continued for an additional month. Injurious consequences are likely later in life. Whether or not these complications occur the Plaintiffs will no doubt sustain mental suffering and anxiety worrying if they will.

Hawkins suffered permanent injuries from CO poisoning, as evidenced in her medical records and in hers and Dr. Lieberman's testimony. Her loss of earnings and loss of wage earning capacity are evidenced in her tax returns and by her current debilitated condition that will likely worsen with age. The Defendants also did not object to counsel's argument with respect to damages nor did they ask for a limiting instruction.

A trial court cannot set aside the verdict if there is conflict in the testimony on a material point where reasonable men may differ in their conclusions of facts to be drawn from the evidence. Where there are conflicting inferences from the evidence resolved by a jury, a trial court should not substitute its conclusions for those of the jury. *Lane v. Scott*, 220 Va. 578, 260 S.E.2d 238 (1979), *cert. denied*, 446 U.S. 986 (1980).

The Defendants resurrect their argument from the motion to drop and claim that the $200,000 each awarded to Zamaria, Harmon, and Guire should be reduced because the jury's sympathy for Hawkins' injuries

showed that the jury injected an improper passion and prejudice into their deliberations on the amounts to be awarded to the other Plaintiffs. However, the issue as to each of the Plaintiffs' award is whether it is commensurate with the evidence of his damages. "Although a trial court may grant remittitur on the grounds that the award is disproportionate to the injuries suffered, [this Court has] specifically rejected comparing damage awards [between co-plaintiffs] as a means of measuring excessiveness." *Allied Concrete, supra,* 285 Va. at 312, 736 S.E.2d at 708.

## CONCLUSION

The Court should affirm the Trial Court's judgment in accordance with the jury's verdict as to all of the Defendants' assignments of error.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 11, 2017, the Brief of Appellees was filed electronically via the VACES system with the Supreme Court of Virginia and that three copies of the same were hand delivered to the clerk's office. This same date, a copy of the Brief of Appellees was sent via email to all counsel of record, at the email addresses below:

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