IN THE

Supreme Court of Virginia

RECORD NO. 161339

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

Appellants,

v.

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

Appellees.

OPENING BRIEF OF APPELLANTS

Brian N. Casey (VSB 26710)
Christopher J. Wiemken (VSB 43299)
TAYLOR WALKER P.C.
555 East Main Street, Suite 1300
Norfolk, Virginia 23510
(757) 625-7300
(757) 625-1504 (fax)
bcasey@taylorwalkerlaw.com
cwiemken@taylorwalkerlaw.com

Robert M. Tata (VSB 30101)
Wendy McGraw (VSB 37880)
HUNTON & WILLIAMS LLP
500 East Main Street, Suite 1000
Norfolk, VA 23510
(757) 640-5300
(757) 625-7720 (fax)
btata@hunton.com
wmcgraw@hunton.com

Counsel for Appellants

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

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I. TABLE OF CONTENTS

I. TABLE OF CONTENTS i

II. TABLE OF AUTHORITIES ii

III. ASSIGNMENTS OF ERROR 1

IV. NATURE OF THE CASE AND THE MATERIAL PROCEEDINGS BELOW 2

V. STATEMENT OF THE FACTS 6

VI. ARGUMENT, AUTHORITIES, AND PRINCIPLES OF LAW 22

A. The Trial Court erred in admitting the testimony of Dr. Allan Lieberman that had not been disclosed in accordance with Rule 4:1(b)(4)(A)(i). (Pertains to Assignment of Error 1.) 22

B. The Trial Court erred in granting an adverse inference jury instruction based on the disposal of the furnace. (Pertains to Assignment of Error 2.) 28

C. The Trial Court erred in admitting the irrelevant and prejudicial testimony of Alan Moore regarding alleged defects in the installation of the new furnace and piping. (Pertains to Assignment of Error 3.) 39

D. Combining four plaintiffs with separate claims into one action permitted the jury to hear otherwise inadmissible evidence. (Pertains to Assignment of Error 4.) 41

E. The Trial Court erred in granting Plaintiffs' motion to increase the ad damnum after the close of the evidence. (Pertains to Assignment of Error 5.) 43

F. The jury's verdicts in favor of Plaintiffs were excessive. (Pertains to Assignment of Error 6.) 46

VII. CONCLUSION 48

CERTIFICATE 49

II. TABLE OF AUTHORITIES

Cases

Allied Concrete Co. v. Lester, 285 Va. 295, 736 S.E.2d 699 (2013) 46, 47
Bull v. United Parcel Serv. Inc., 665 F.3d 68 (3d Cir. 2012) 33
Cain v. Lee, 290 Va. 129, 772 S.E.2d 894 (2015) 30, 40, 41
Carufel v. American Isuzu Motors, Inc., 47 Va. Cir. 529 (Spotsylvania Co. Cir. Ct. 1999) 42
Chambers v. Nasco, Inc., 501 U.S. 32, 115 L. Ed. 2d 27, 111 S. Ct. 2123 (1991) 31
Collins v. Shepard, 274 Va. 390, 649 S.E.2d 672 (2007) 30
Faas v. Sears, Roebuck & Co., 532 F.3d 633 (7th Cir. 2008) 33
Funkhouser v. Ford Motor Co., 285 Va. 272, 736 S.E.2d 309 (2013) 41
Greyhound Lines, Inc. v. Wade, 485 F.3d 1032 (8th Cir. 2007) 33
Hamrick v. Shifflett, 55 Va. Cir. 423 (Rockingham Co. Cir. Ct. 2001) 42
Hyundai Motor Co., Ltd. v. Duncan, 289 Va. 147, 766 S.E.2d 893 (2015) 22
Isle of Wight County v. Nogiec, 281 Va. 140, 704 S.E.2d 83 (2011) 47
Jenkins v. Woody, 2017 U.S. Dist. LEXIS 9581, 2017 WL 362475 (E.D. Va. Jan. 21, 2017) 31, 36, 37, 38
John Crane, Inc. v. Jones, 274 Va. 581, 650 S.E.2d 851 (2007) ... 22, 23, 39
King v. Ill. Cent. R.R., 337 F.3d 550 (5th Cir. 2003) 33
McNeir v. Greer-Hale Chincilla Ranch, 194 Va. 623, 74 S.E.2d 165 (1953) 39
Mikhaylov v. Sales, 291 Va. 349, 784 S.E.2d 286 (2016) 27, 28
Norfolk & Portsmouth Belt Line R.R. Co. v. Wilson, 276 Va. 739, 667 S.E.2d 735 (2008) 39
Parrish v. Hicks, 28 Va. Cir. 475 (Albemarle Co. Cir. Ct. 1992) 42
Penalty Kick Mgmt. Ltd. v. Coca Cola Co., 318 F.3d 1284 (11th Cir. 2003) 33
Peterson v. Castano, 260 Va. 299, 534 S.E.2d 736 (2000) 44
Poulston v. Rock, 251 Va. 254, 467 S.E.2d 479 (1996) 47
Powell v. Sears, Roebuck & Company, 231 Va. 464, 344 S.E.2d 916 (1986) 44, 45
Russell Lumber Co. v. Thompson, 137 Va. 386, 119 S.E. 117 (1923) 44

Silvestri v. GMC, 271 F.3d 583, 2001 U.S. App. LEXIS 24413, 51 Fed. R. Serv. 3d (Callaghan) 694 (4th Cir. Md. Nov. 14, 2001) 30, 32
Virginia Elec. & Power Co v. Dungee, 258 Va. 235, 520 S.E.2d 164 (1999) 41
Virginia Hot Springs Co. v. Hoover, 143 Va. 460, 130 S.E. 408 (1925) 42
Vodusek v. Bayliner Marine Corp., 71 F.3d 148 (4th Cir. 1995) 32
Wolfe v.Virginia Birth-Related Neurological Injury Compensation Program, 40 Va. App. 565, 580 S.E.2d 467 (2003) 35

Statutes

VA. CODE §8.01-5 41

Rules

Fed. R. Civ. Proc. 37(e) 31, 32, 33
Va. Rule of Evidence 2:402(a) 40
Va. Sup. Ct. Rule 4:1(b)(4)(A)(i) 22, 23

III. ASSIGNMENTS OF ERROR

1. The Trial Court erred in admitting the testimony of Dr. Allan Lieberman that had not been disclosed in accordance with Rule 4:1(b)(4)(A)(i). *[Error preserved at App. 118-178, 198].*

2. The Trial Court erred in granting an adverse inference jury instruction based on the disposal of the furnace because there was no finding of bad faith, the Defendants had no reason to foresee that the furnace would be material evidence in litigation because all of the evidence indicated the leaks were from the flue pipes, and Plaintiffs failed to present evidence that the furnace was material. *[Error preserved at App. 198, 1346, 1368-69].*

3. The Trial Court erred in admitting the irrelevant and prejudicial testimony of Alan Moore regarding alleged defects in the installation of the new furnace and piping, where such defects were after-the-fact and patently not the cause of the carbon monoxide leak. [*Error preserved at App. 118, 198, 894, 900, 903, 913].*

4. The Trial Court erred in overruling Defendants' Motion to Drop Misjoined parties where each of the four plaintiffs had distinct and independent claims against the Defendants. *[Error preserved at App.10, 198].*

5. The Trial Court erred in granting Plaintiffs' motion to increase the ad damnum after the close of the evidence and over Defendants' objection. *[Error preserved at App. 198, 1365-67]*.

6. The Trial Court erred in failing to set aside the verdicts for each of the Plaintiffs as excessive or, in the alternative, reducing the verdicts or ordering a new trial on damages. *[Error preserved at Defendants' Motion to Set Aside Verdicts or, in the Alterative, for Remittitur or New Trial on Damages; App. 198].*

IV. NATURE OF THE CASE AND THE MATERIAL PROCEEDINGS BELOW

This case arises out of an alleged exposure to carbon monoxide at the Emerald Point Apartments in Virginia Beach, Virginia. After a four day trial, the jury awarded the four Plaintiffs a combined $4.1 million in damages, plus interest. The Trial Court committed multiple errors, including granting an adverse inference instruction based on the disposal of the furnace that was removed from the apartment, admitting expert testimony not disclosed in accordance with Rule 4:1(b)(4)(A)(i) and the trial court's scheduling order, and admitting irrelevant and prejudicial testimony of alleged defective installation of the replacement furnace and piping which was not related to the carbon monoxide leak, all of which undoubtedly impacted the excessive jury verdict rendered in this case. Indeed, three of the plaintiffs had less than $1,000 in special damages, but the jury awarded them $200,000 each.

Plaintiffs Lindsey Hawkins, Paul Harmon, Thomas Zamari, and William Guire filed suit against Defendants Emerald Point, LLC and The Breeden Company, Inc. (collectively "Defendants") on November 13, 2014 in the Circuit Court for the City of Virginia Beach. They asserted claims for

negligence and misrepresentation, and also sought punitive damages. (App. 1-7).

Defendants timely answered the Complaint on December 19, 2014 and filed a Motion to Drop pursuant Virginia Code § 8.01-5 asserting that the Plaintiffs should not have been joined together in one action. The Trial Court conducted a hearing on the Motion on February 20, 2015, and entered an order denying the Motion on April 23, 2015. (App. 10).

Thereafter, the case proceeded with discovery. Pursuant to the Trial Court's scheduling order and interrogatories served by Defendants, Plaintiffs' provided their expert designations in discovery responses served on June 26, 2015, with a supplementation by Hawkins on December 31, 2015. (App. 209-15, 223-79, 746-50, 764-68, 783-87). Plaintiffs identified Dr. Allan Lieberman as an expert and provided copies of his treatment records for Hawkins (he never examined the other Plaintiffs). Dr. Lieberman was not available for trial, so Plaintiffs took his *de bene esse* deposition on May 6, 2016. Defendants objected to testimony that was beyond the scope of Plaintiffs' expert designation and/or that lacked an adequate foundation. (App. 118-178, 793). A hearing was held on the

objections prior to trial, and the majority of the objections were overruled. (App. 118-78, 793).[1]

Defendants also filed a pre-trial motion in limine addressing certain evidence anticipated to be offered by Plaintiffs. (App. 37-44). This motion sought, among other things, exclusion on relevance grounds of the testimony of Alan Moore, a City of Virginia Beach employee, who inspected the premises *after* the furnace was removed and a new furnace was installed.

A jury trial was held before The Honorable James C. Lewis beginning May 16, 2016. At the conclusion of the evidence, and upon motion of the Defendants, the Trial Court struck Plaintiffs' claims for misrepresentation and for punitive damages. (App. 1345). Plaintiffs then moved to increase the ad damnum for Plaintiffs Zamaria, Guire, and Harmon from $100,000 to $450,000 each. Plaintiffs' motion was granted over the objection of the Defendants. (App. 1365-67). The Plaintiffs also sought an adverse inference jury instruction as a sanction for Defendants' disposal of the

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[1] The Lieberman Order attaches excerpts from Dr. Lieberman's deposition and references the page numbers from the excerpts. The deposition, as played for the jury, is in the trial transcript. (App. 936-1012). And, a complete copy of the deposition transcript was submitted for the record with Defendants' Third Notice of Filing of Transcript dated August 15, 2016.

furnace. The Trial Court granted the following instruction over the Defendants' objection: (App. 1345-46, 1368-69).

> 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, though you are not required to do so, that if that evidence had been available it would be detrimental to the party that disposed of its case. You may give such inference whatever force or effect you think is appropriate under all the facts and circumstances.

(App. 48). As read to the jury by the judge, according to the transcript, the last clause of the instruction's first sentence states, "that if that evidence had been available it would be detrimental to the party that disposed of *it in its* case." (5/19/16 trial transcript p. 761) (italics added).

On May 19, 2016, the jury returned a verdict in favor of Harmon, Zamaria, and Guire in the amount of $200,000 each, plus interest. (App. 196). The jury awarded Lindsey Hawkins damages in the amount of $3,500,000, plus interest. (*Id*).

On May 31, 2016, the Defendants filed a motion to set aside the jury verdicts awarded in favor of each of the Plaintiffs or, in the alternative, to remit the verdicts or order a new trial on damages. The Trial Court conducted a hearing on the Motion on June 3, 2016, and subsequently entered an Order overruling the Defendants' motion and entering a final judgment in favor of Plaintiffs in accordance with the jury award. (App.

195-98). The Defendants timely filed their Notice of Appeal on July 11, 2016.

On December 22, 2016, the Defendants filed a motion for leave to correct a mistake in the record under Virginia Code § 8.01-428(B). This Court directed the Trial Court "to review the June 17, 2016 order ruling on the objections to the deposition testimony of Allan D. Lieberman, MD, determine if the order contains a mistake, and enter an order either correcting the June 17 order or stating no mistake is contained within the June 17 order." (Order dated 2/2/17). The Trial Court entered an order correcting the June 17 order to accurately state that the ruling on Defendants' objections to Dr. Lieberman's testimony was made on May 13, 2016. (App. 793).

V. STATEMENT OF THE FACTS

Emerald Point, LLC owns the apartment complex known as Emerald Point Apartments, and The Breeden Company manages the apartment and supplies the staff. (Tr. 514-16). Plaintiffs signed a lease for the apartment located at 2163 Dunbarton Drive on or about September 19, 2012, and moved into the apartment shortly thereafter. (App. 1142-43, 1263-64). The apartment was equipped with a carbon monoxide detector with an alarm. (App. 1069, 1144). This case involves two incidents in which separate flue

pipes in the attic above the apartment disconnected, causing the alarm to activate.

November 26, 2012, Carbon Monoxide Alarm

Between the time Plaintiffs moved in and November 26, 2012, the carbon monoxide alarm did not go off. (App. 1165-66). On November 26, 2012, as the Plaintiffs were preparing to go to bed, the carbon monoxide detector began to beep. (App. 1144, 1174). Plaintiffs contacted the apartment complex's maintenance department which responded around midnight or 1:00 a.m. (App. 1145). The maintenance person indicated that the problem is usually the batteries, which he replaced. (*Id.*). After the maintenance person left, the alarm began beeping again, and Plaintiffs removed the batteries in order to get some sleep. (App. 1341).

The next day, November 27, 2012, Hawkins called Virginia Natural Gas ("VNG"). (App. 1174, 1379). VNG dispatched Charles Basnight to the apartment. He tested for carbon monoxide ("CO"), and obtained an elevated reading of 37 parts per million ("ppm"). (App. 825-26, 1379). Basnight did not open the furnace or look inside, and he did not make any determination as to the source of the CO in the apartment. (App. 844).

Basnight turned the valve to the furnace off, and placed a red-tag on the furnace. (App. 828, 830-33, 1380). VNG sent a copy of the red-tag to

the Code Enforcement Department of the City of Virginia Beach, and this ended VNG's involvement related to the November 26, 2012 alarm. (App. 834, 840-41).

After the furnace was red-tagged, the Defendants dispatched Calvin Morris, a maintenance man with Emerald Point Apartments, to the apartment. (App. 1083, 1084). Morris received a work order that stated "VNG red-tagged - heat exchanger cracked?" (App. 1087, 1089-90, 1390). The reference to a cracked heat exchanger on the initial work order did not indicate that there was actually a cracked heat exchanger, as no one had yet inspected the furnace's heat exchanger. (App. 1053-54). The question mark merely indicated that this potentially could be the problem. (App. 1123).

When Morris went to the apartment, he was looking for the source of the carbon monoxide. (App. 1125). He started by looking at the furnace to make sure all the components were working. He then took readings and checked the pipes. (App. 1125). Morris found a small gap in a flue pipe in the attic. He put the pipe back in place, installed some screws, and secured the pipe. (App. 1094). After repairing the flue pipe, Morris tested for the presence of carbon monoxide while the furnace was running. (App. 1100). After getting readings of 3 ppm and later 0 ppm, well within normal

limits, he concluded that no further work was needed. (App. 1125-26). Entries were made on the work order to reflect that Morris repaired the flue pipe on November 27, 2012, and that the status of the work order was closed. (App. 1391).

The next to inspect the apartment was Danny Carlson, who has 25 years of experience with gas furnaces. Carlson is employed with the Code Enforcement Department of the City of Virginia Beach. (App. 846-48). His department became involved upon receiving the red-tag notice from VNG. (App. 852). Carlson went to the apartment two times. (App. 862). He believes that he went out there on November 27, when Code Enforcement got notice of the red-tag, and then on November 29 to verify the repair that Morris had made. (App. 862-63).

Carlson's purpose in going to the apartment was to ensure that the apartment was safe to occupy. (App. 857). He went to the apartment with Morris, and they took carbon monoxide readings — while the furnace was running — at each vent and below 18 inches on the floor throughout the apartment and inside the unit itself, and detected no carbon monoxide. (App. 854, 857-58). Carlson reviewed a document from the management company that stated that they found a vent pipe loose in the attic, and that it was repaired. (App. 855, 1108, 1115-16, 1384). Based on the

documentation provided and his own observations that the carbon monoxide testing did not show anything, Carlson accepted Morris' work repairing the flue pipe as a proper repair. (App. 861-62). Carlson then gave Emerald Point authority to remove the red-tag from the furnace because he felt that the apartment was safe. (App. 858).

The carbon monoxide alarm did not go off between November 27, 2012 and January 4, 2013. (App. 1160, 1184-85). Prior to January 4, 2013, none of the Plaintiffs reported any concerns to the apartment complex related to carbon monoxide or any illnesses. (App. 1080, 1166-67, 1185-86).

January 4, 2013, Carbon Monoxide Alarm

In the early morning hours of January 4, 2013 there was a separate incident where the carbon monoxide alarm sounded. (App. 1153-54, 1177). Maintenance was called and a technician responded. (App. 1154). The technician did not find any evidence of carbon monoxide. (Id.). Zamaria then left the apartment to be at work at 6:00 a.m. At about 8:30 a.m., Guire decided to call VNG. (App. 1155, 1381). Basnight, the same VNG employee that responded to the November 27 incident, responded on January 4, 2013. (App. 834-36, 1381). Basnight reported finding high CO readings, and placed another red-tag on the furnace. (App. 838, 1381-82).

Because of the red-tag, the furnace was turned off on January 4 and the residents did not have heat. To restore heat to the apartment, the Defendants — on the same day — removed the furnace and immediately replaced it. (App. 1035-36, 1056-57, 1393). After completing installation of the new furnace, the Defendants' maintenance technicians took another carbon monoxide reading and it showed elevated levels of about 30-40 ppm of carbon monoxide. (App. 1036, 1393-94). In other words, replacement of the red-tagged furnace did not abate the elevated carbon monoxide levels. Maintenance staff then entered the attic to investigate the venting system and noted that the flue above 2163 Dunbarton was properly venting, but the flue from the adjoining apartment, 2157 Dunbarton, was disconnected. (App. 1036, 1393-94). The Plaintiffs' apartment, 2163 Dunbarton, shares the same attic as 2157 Dunbarton. (App. 1032-33). Maintenance corrected the disconnected flue, and the CO readings then dropped to a normal range. (App. 1036, 1393-94). The work repairing the flue was documented in the maintenance records for the apartment. (App. 1031-32, 1392).

After the red-tagged furnace was replaced and the flue in the attic reconnected, Plaintiffs returned to the apartment later in the day on January 4 and called the Virginia Beach Fire Department to come out and

check the carbon monoxide levels. (App. 1158). Captain Shelly responded and confirmed there were no safety concerns. (App. 879, 882, 884-85, 887, 1385). He testified that the fire department does not consider a reading of less than 9 ppm to be hazardous. (App. 887).

The Plaintiffs also hired Lester White of Ambient Air Care, Incorporated, to inspect the apartment in January 2013, after the furnace was replaced. (App. 1205, 1226, 1256). White did not take any carbon monoxide readings when he visited the apartment. (App. 1255). He testified at trial as an expert "in the field of thermodynamics, HVAC, and specifically gas residential heating systems, repair and maintenance." (App. 1217). Although he visited the property, he never asked to examine the furnace that had been removed on January 4. (App. 1256). It was in storage at the time and available. (App. 1040, 1077, 1128).

After White's inspection, Plaintiffs contacted the City of Virginia Beach to conduct an inspection of the new furnace installation. (App. 1180, 1226). The apartment was inspected by Alan Moore from the City Permits and Inspections Department on January 18, 2016. (App. 902). After January 4, the CO detector alarm did not sound and there were no more reports of any elevated levels of carbon monoxide. Plaintiffs do not dispute that the CO leak was resolved as of January 4, 2013. Nevertheless,

Plaintiffs presented the testimony of Moore regarding his inspection of the new furnace installation on January 18, 2013. (App. 902-912). Defendants objected to this testimony and related documents as irrelevant to the events giving rise to the CO detected in the apartment. (App. 37-44, 894, 903). The Trial Court overruled Defendants' objections. (App. 894, 903, 913-14).

Moore testified that he received a complaint on January 16, 2013, that the apartment complex had replaced a gas appliance without a permit. (App. 901). He first went to the apartment on January 18, 2013, two weeks after the CO leak was resolved, at which time he issued a stop work order based on the lack of permit. (App. 902, 904). A permit was obtained on January 22 by Green Run Heating and Cooling. (App. 905-06). Moore inspected the premises again on January 23, 2013, and rejected Green Run's work because he found that the B-vent was not properly locked and it lacked firestopping at the ceiling and floor by the vents. The work to install the new furnace passed inspection on January 28, 2013. (App. 912). (App. 908). Moore had no information about the condition of the vents or firestopping at the time of the carbon monoxide leak. (App. 916-17). He had no personal knowledge about CO leaks or levels at the apartment. (App. 919).

Inspection and Disposition of Furnace

As noted above, the Defendants determined that the cause of the November 27, 2012 carbon monoxide leak was a dislocated flue pipe in the attic space above Plaintiffs' apartment, and the January 4, 2013 leak was from a flue pipe in the adjoining attic space. The Defendants found no indication that the furnace had a cracked heat exchanger or was otherwise damaged. And notably, the CO problem was not resolved by replacement of the furnace, but by repair of flue pipes in the attic.

The maintenance supervisor at Emerald Point Apartments during the relevant time frame was Anthony Hamill. (App. 1013). After the furnace was removed and replaced, Hammill inspected the furnace and looked for a cracked heat exchanger. He performed a visual inspection and also ran his hand over the heat exchanger to feel for any voids or cracks, and found none. (App. 1055, 1058). He is familiar with what a cracked heat exchanger looks like and what it feels like. (App. 1056). He found no defect.

Calvin Morris also inspected the furnace. During the course of his education and work, he became familiar with what a heat exchanger is and what a cracked heat exchanger looks like. (App. 1118-20). He looked inside the furnace when it was removed and did not observe any problems

or defects with the heat exchanger. (App. 1120). He looked at all sides of it for damage, cracks, rust, or anything else. (App. 1121). In his investigation of the CO alarm incidents in November 2012 and January 2013, Morris did not see anything that caused him to believe the furnace had a cracked heat exchanger. (App. 1126). The returns portion of the furnace was, however, bent in the removal process on January 4, 2013. (App. 1059-60).

The Defendants stored the removed furnace in a maintenance bay for approximately a year and half, e.g., until the middle of 2014. (App. 1040, 1077, 1128). Eventually, the furnace was discarded. Defendants' employees did not recall who made the decision to discard it, but it was likely part of a routine clean up. (*Id).* No one told the employees to keep the furnace. (App. 1077).

Plaintiffs' counsel sent a letter of representation on April 16, 2013. (App. 808, 75). The letter did not identify any potential defect in the furnace, request an inspection, or direct the Defendants' to preserve it. (App. 75). The first time any request related to the furnace was made was in the context of discovery after suit was filed, when the furnace had already been discarded.

The Trial Court found that there was no evidence that Defendants discarded the furnace in bad faith. (App. 1373-74). However, over Defendants' objection, the Court granted Plaintiffs' motion for sanctions for spoliation and request for an adverse inference jury instruction which permitted the jury to infer that if the furnace had been available it would be detrimental to the Defendants. (App. 48, 1346, 1350, 1368-69).

Dr. Allan Lieberman's Testimony

The trial court entered a pre-trial scheduling order pursuant to Rule 1:18 which required the disclosure of all expert witness information discoverable under Rule 4:1(b)(4)(A)(i). The Defendants also served interrogatories requesting the information discoverable under the rule.

Hawkins designated Dr. Allan D. Lieberman as an expert in environmental health to offer opinion testimony that Hawkins sustained permanent injury and had a variety of listed symptoms caused by carbon monoxide exposure, and required follow-up care including a detoxification program at a cost of approximately $9,000.00. (App. 213). The disclosed grounds for Dr. Lieberman's opinions were his treatment and examination of Hawkins, training and experience, and knowledge of how the accident happened as supplied by Hawkins. (App. 213-14).

Harmon, Zamaria and Guire also designated Dr. Lieberman to offer opinions "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 plaintiffs suffered permanent microscopic injury and deficiency which can be expected to reflect itself in some means of memory deprivation and cognizant deficit." (App. 748, 766, 785-86). The above quoted passage was the total disclosure by Harmon, Zamaria and Guire of the facts and opinions to be offered by Dr. Lieberman.

At trial, plaintiffs presented the audiovisual recording of the deposition testimony of Dr. Lieberman in lieu of live testimony. (App. 936-1012). Defendants' objections to portions of Dr. Lieberman's testimony as being outside the scope of the disclosed opinions were ruled on by the Court prior to trial, on May 13, 2016. (App. 118-178, 793). Over defendants' objections, Dr. Lieberman testified to facts and opinions not disclosed in discovery or in accordance with the scheduling order, including the following:

a. "[T]he long-term effect of people who have been exposed to carbon monoxide is that of dementia. A much, much higher

percentage of people developed dementia later on in life." (App. 946-47).

b. ". . .56,000 patients die as a result of exposure to carbon monoxide." (App. 946).

c. In a study of Japanese coal miners, "59% of those miners still had almost a daily headache 33 years later after the initial exposure." (App. 955).

d. "[L]ow-level chronic long-term exposure is far more dangerous than an acute high dose transient exposure." Dr. Lieberman then stated that plaintiffs' exposure was chronic. (App. 957).

e. Plaintiffs inhaled carbon monoxide plus carbon dioxide, nitrous oxide, sulphur dioxide, formaldehyde, and other particulates. (App. 959-60).

f. Plaintiffs "have personality disturbances." "And ultimately, of course, they can end up with Parkinsonism, which is a major cause in Parkinson's disease, is carbon monoxide." (App. 961).

g. "The pathophysiology and the actual mechanism of injury is that of hypoxia. All of [Hawkins'] tissues became anemic because they're not getting oxygen. When that happens, you end up with a little

injury to tissue. Tissues cannot live without oxygen for a certain length of time." (App. 982)

h. To a reasonable degree of medical certainty, Hawkins' brain was injured. (App. 983).

i. Hawkins cannot do the same types of employment she was capable of before being exposed, and suffered a wage earning capacity loss. (App. 996-97).

Dr. Lieberman also testified to other opinions and facts not mentioned in the expert designation.

Plaintiffs' Damages

Harmon (by deposition), Zamaria, and Guire, testified generally that sometime between early to mid-December 2012, that they began to experience headaches, lightheadedness, confusion, and flu-like symptoms. (App. 1151-52, 1182, 1268). On January 4, 2013, the three men went to the emergency room and were given oxygen treatment. At the emergency room, Harmon, Zamaria, and Guire complained to varying degrees of headaches, nausea, dizziness, and light headedness. (App. 1407-1467). After a same-day discharge, they all reported significant improvement in their symptoms. (App. 1157-58, 1272). However, they complained of some residual headaches and lightheadedness that resolved within thirty

(30) days. (App. 1168, 1182, 1273). None of these three Plaintiffs have experienced any mental or physical problems as a result of carbon monoxide exposure since that time and have fully recovered. (App. 1168, 1183, 1274). Nevertheless, Plaintiffs' counsel improperly asked the jury to consider and award a recovery based upon what might happen to these three men in the future. (App. 1361-62).

Harmon, Zamaria, and Guire, each presented special damages of $924 for their respective treatment at the emergency room. (App. 1407, 1427, 1450). None of them presented any evidence that they missed time from work. For each of them, the jury awarded $200,000, which is more than 216 times the amount of their respective special damages. (App. 196).

Hawkins also testified that she experienced flu-like symptoms in December 2012. (App. 1196). She presented to the emergency room on January 4, 2013, complaining of various symptoms, including headache, muscle aches, and nausea. (App. 1201-1289). She continued to seek medical treatment after January 4. (App. 1297-1318). She testified that she continues to suffer from severe headaches and other symptoms which she believes have impacted her ability to work. (App. 1321-23).

Hawkins presented $32,027.92 in past expenses for medical treatment and $1,000 to $2,000 for future neuropsychological testing. (App. 1009, 1468-1507). She missed some time from work although it was not quantified, and she also sought loss of earning capacity damages. She testified that she was terminated from her job at Home Depot because of absences related to her illness. (App. 1321). She secured another job; however, she voluntarily quit in May 2015, after receiving a promotion. (App. 1333). Hawkins testified that she was currently seeking employment. There was no evidence that any physician had placed her on any medical restrictions. (App. 1333-34). Plaintiffs' counsel asked the jury to calculate her lost future wages as if she was totally incapable of working for the rest of her life. He asked the jury to make its calculation based upon what she could have earned had she been able to continue working at Home Depot and been promoted and received raises. (App. 1358-59). Plaintiffs' counsel provided numbers ranging from $32,000 to $50,000 as the basis for its calculation and asked the jury to project out based on that speculation. (App. 1358-59). Plaintiffs' counsel asked for $1,312,000 and then told the jury they could go over $2,000,000 if they wished. (App. 1358). The jury awarded Hawkins a total of $3.5 million in damages, plus interest. (App. 196).

VI. ARGUMENT, AUTHORITIES, AND PRINCIPLES OF LAW

A. The Trial Court erred in admitting the testimony of Dr. Allan Lieberman that had not been disclosed in accordance with Rule 4:1(b)(4)(A)(i). (Pertains to Assignment of Error 1.)

The Trial Court allowed Plaintiffs' expert, Dr. Allan Lieberman, to testify to facts and opinions that were not properly disclosed in his expert designation. This testimony was improper and prejudicial, and should have been excluded. This error is subject to an abuse of discretion standard of review. *Hyundai Motor Co., Ltd. v. Duncan*, 289 Va. 147, 155, 766 S.E.2d 893, 897 (2015).

Rule 4:1(b)(4)(A)(i) of the Rules of the Supreme Court of Virginia requires a party, when asked in an interrogatory, to identify its trial experts and "to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion."

The "application of this rule begins with determining whether the opinion at issue was disclosed in any form." *John Crane, Inc. v. Jones*, 274 Va. 581, 591, 650 S.E.2d 851, 856 (2007). But, the inquiry does not end there. It is not enough that the expert designation identify the subject matter upon which the expert is expected to testify. Rather, the designation must also disclose the "<u>substance</u> of the facts and opinions to which the

expert is expected to testify and a summary of the grounds for each opinion." Va. Sup. Ct. Rule 4:1(b)(4)(A)(i) (emphasis added); *see also John Crane*, 274 Va. at 592-93, 650 S.E.2d at 856-57 (exclusion affirmed where defendant identified topic of testimony but not *substance* of opinions).

Here, Dr. Lieberman's testimony went well beyond his expert designation or anything contained in his treatment records. The most that can be said of the expert designation is that it identified a few (but not all) of the topics on which Dr. Lieberman testified. However, it falls significantly short of identifying the "substance of the facts and opinions" and does not provide a "summary of the grounds" for the opinions. (App. 213-14, 748, 766, 785-86).

Dr. Lieberman was designated to testify that Hawkins sustained permanent injury with a variety of listed symptoms and that she required a week-long detoxification program. (App. 213-14). The disclosed grounds for the testimony were his treatment and examination of Hawkins, his training and experience, and his knowledge of how the accident happened. He was also designated to testify about Zamaria, Harmon, and Guire that "to the extent the injury and symptoms were experienced that [they] suffered permanent microscopic injury and deficiency which can be

expected to reflect itself in some means of memory deprivation and cognizant deficit." (App. 748, 766, 785-86). Almost the entirety of his trial deposition, however, was testimony that well exceeded what was designated, and which was not properly disclosed in accordance with Rule 4:1(b)(4)(A)(i) and the trial court's scheduling order. Some of the more egregious examples are provided below.

Dr. Lieberman testified that dementia is a long-term effect of exposure to carbon monoxide and that he read a paper that said that a much higher percentage of people who have been exposed develop dementia later in life. (App. 946-47, 119 at ¶4). This paper is not disclosed in his designation, nor does the designation discuss dementia or state that it is a long-term effect of exposure to CO. Plaintiffs used this testimony to argue to the jury that Plaintiffs — including the three male plaintiffs with no ongoing symptoms — were at risk of dementia in the future and were concerned about such developments. (App. 1362).

Dr. Lieberman also referenced another undisclosed "paper" from "the Japanese coal miners." According to him, this paper demonstrates the "latency" of injury associated with carbon monoxide poisoning. He testified "Just because you don't have something manifesting initially, can it affect patients later on? And the answer is it certainly can, up to 30 percent."

(App. 954-55, 120 at ¶12). Dr. Lieberman told the jury that based on this undisclosed paper, "59 percent of those miners still had almost a daily headache 33 years later after the initial exposure." (App. 955). Once again, this testimony was used to tell the jury that all of the plaintiffs were at risk for future illnesses associated with the CO exposure, and that that Hawkins' headaches were likely to last indefinitely.

Dr. Lieberman further testified that "low-level chronic exposure is far more dangerous than acute-high dose transient exposure. And this is especially true in terms of the sequelae of what happens to the human body. And that's a very important differentiation there." (App. 957, 120 at ¶13). Dr. Lieberman, without any foundation, then testified that Plaintiffs had chronic exposure to carbon monoxide that began "somewhere in November, at least it probably was before November," at a level that he does not know. (App. 957-58, 120 at ¶14). He went on to describe those symptoms that he associates with chronic and acute exposure – again relying on a document that had not previously been disclosed (a table of symptoms prepared by Dr. Lieberman) (App. 961-62, 121 at ¶20). These facts and opinions are not contained in Dr. Lieberman's expert designation.

Dr. Lieberman also provided testimony comparing carbon monoxide to other toxins, such as pesticides, and told the jury that carbon monoxide

has a higher morbidity and mortality rate, that 56,000 patients die as a result of such exposure, and that carbon monoxide "targets" the heart and brain. (App. 945-46, 119 at ¶4). None of these facts or opinions is disclosed in his expert designation.

Similarly, Dr. Lieberman offered previously undisclosed opinions regarding the normal level of carbon monoxide in the blood, the level of carbon monoxide that will trigger a UL-rated alarm, and that Hawkins had suffered a brain injury. (App. 949, 950-51, 983, 119-20 at ¶8, 9, 22, 29). These opinions are not disclosed in his expert designation.

Dr. Lieberman also testified that the "mechanism of injury" from carbon monoxide is "hypoxia" and that all of Hawkins' tissues were anemic. (App. 982, 122 at ¶28). This opinion regarding hypoxia and tissue damage was not disclosed in Dr. Lieberman's expert designation.

Dr. Lieberman also offered an undisclosed opinion that Hawkins' symptoms were more severe because she spent more time in the apartment and because she is female. (App. 982-83, 1012, 122 at ¶28, 126 at ¶60). These opinions appear nowhere in his expert designation.

Dr. Lieberman also offered undisclosed opinions concerning Hawkins' ability to work. The expert designation, supplemental designation, and treatment records indicated that Dr. Lieberman examined Hawkins in the

Fall of 2014, at which time she was gainfully employed. (App. 223-79). At his deposition — ten days before trial and well after the February 16, 2016 expert disclosure deadline — Defendants learned for the first time that he had seen her again in April 2016. Over Defendants' objections, Dr. Lieberman used this more recent evaluation to testify that she was unable to work. (App. 981, 996-97, 120 at ¶¶28, 29, 125 at ¶¶ 52, 53).

These undisclosed opinions unquestionably had an impact on the jury, and the opinions should have been excluded. In *Mikhaylov v. Sales,* 784 S.E.2d 286, 291 Va. 349 (2016*)*, this Court held that a trial court abused its discretion in permitting expert testimony not disclosed in accordance with the pre-trial scheduling order and the expert discovery rule. In that case, Dr. Lippman was identified by plaintiff to offer expert opinion testimony about the reasonableness and necessity of medical treatment provided to Sales, but the disclosure made pursuant to the pre-trial scheduling order and the rule made no reference to any opinion on future medical treatment.

At trial, Dr. Lippman offered an opinion stating that at some point in the future, Sales would need additional medical treatment, including an anterior cervical discectomy and fusion, and future treatment of meniscus injuries. Mikhaylov objected on the grounds that the opinion appeared

nowhere in any discovery disclosures. Nevertheless, the trial court permitted the testimony. On appeal, this Court found no basis to relieve Sales from her obligation under the rule and the pre-trial scheduling order "to provide a timely and specific disclosure of her anticipated expert testimony," and said, "[t]o hold otherwise would reduce the expert disclosure obligation to the status of a mere recommendation or, worse, a juristic bluff - - obeyed faithfully by conscientious litigants but ignored at will by those willing to run the risk of unpredictable enforcement." *Id*. at 361-62, 782 S.E. 2d at 292.

Here, Dr. Lieberman repeatedly testified to facts and opinions not disclosed as required. This Court should reverse the judgment and remand to correct the error.

B. The Trial Court erred in granting an adverse inference jury instruction based on the disposal of the furnace. (Pertains to Assignment of Error 2.)

The evidence at trial established that both incidents of carbon monoxide alarms were caused by disconnected flue pipes, but the Court erroneously granted a highly prejudicial adverse inference instruction regarding the furnace – which was not the source of the problem. This erroneous instruction, granted as a sanction against Defendants for disposing of the furnace, allowed the jury to infer that the furnace itself was

damaged and defective; and that if it had been available for inspection by the Plaintiffs, the inspection would have revealed evidence unfavorable to the Defendants at trial. This inference not only inflamed the jury against the Defendants for disposing of the furnace, but it allowed the jury to incorrectly conclude that the Defendants did not properly repair the leak on November 27, 2012 (despite clear evidence to the contrary), and that the Plaintiffs therefore suffered continuous exposure to carbon monoxide from November 27, 2012 to January 3, 2013. It also permitted the Plaintiffs to argue to the jury, again incorrectly, that the Defendants got rid of the furnace to purposefully prevent its inspection, telling the jury that it was "deep-sixed." (App. 1351).

The Trial Court erred in granting the instruction because, based on the undisputed facts presented, the Defendants did not know, nor should have they have foreseen, that the furnace was material to a potential civil suit. Indeed, the furnace was not material because it was found at the time of the carbon monoxide leaks not to have been the culprit for the leaks. Even if the furnace had been material and the Defendants should have preserved it, the Trial Court erred in granting the instruction without a finding that the Defendants acted with the intent to deprive the Plaintiffs of its use in litigation or acted in bad faith to suppress the truth.

1. Standard of Review

The Trial Court found that the Defendants had a duty to preserve the furnace and breached that duty, but did not act in bad faith. Nevertheless, the Trial Court imposed sanctions by granting an adverse inference instruction. Imposition of sanctions is generally reviewed for abuse of discretion; however, whether the Defendants had a duty to preserve the furnace is a question of law. Furthermore, this Court has not ruled on the conduct required for the granting of an adverse inference instruction against a party for spoliation, or on the standard of proof required for a motion for spoliation sanctions, all of which concern issues of law, which are subject to a *de novo* standard of review. *See Collins v. Shepard*, 274 Va. 390, 397, 649 S.E.2d 672, 675 (2007); *Cain v. Lee*, 290 Va. 129, 134, 772 S.E.2d 894, 896 (2015). This case presents an opportunity for the Court to articulate these standards not just for this case, but for future litigants.

2. Spoliation

Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. *Silvestri v. GMC*, 271 F.3d 583, 590, 2001 U.S. App. LEXIS 24413, 51 Fed. R. Serv. 3d (Callaghan)

694 (4th Cir. Md. Nov. 14, 2001). A court's inherent power to control the judicial process and litigation gives rise to the right to impose sanctions for spoliation, but the power is limited to that necessary to redress conduct "which abuses the judicial process." *Chambers v. Nasco, Inc*., 501 U.S. 32, 115 L. Ed. 2d 27, 111 S. Ct. 2123 (1991) (recognizing the inherent power of the courts to fashion appropriate sanctions for conduct that disrupts the judicial process). The right to impose spoliation sanctions may also be granted and circumscribed by rule or statute. See, e.g., Fed. R. Civ. Proc. 37(e).

This Court has not decided the applicable burden of proof for awarding sanctions against a party for spoliation. In *Jenkins v. Woody*, 2017 U.S. Dist. LEXIS 9581, 2017 WL 362475 (E.D. Va. Jan. 21, 2017), while noting that the United States Court of Appeals for the Fourth Circuit has also not yet decided the burden of proof for awarding sanctions for spoliation, the court applied a clear and convincing evidence standard of proof to plaintiff's motion for sanctions, partly because the plaintiff sought the most severe of sanctions, including an adverse inference jury instruction for spoliation of evidence.

Regardless of the applicable standard of proof, a party seeking sanctions based on the spoliation of evidence must first establish that the

alleged spoliator had a duty to preserve material evidence and breached that duty. Courts have generally found that a duty arises "not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation." *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001). Spoliation, however, does not result merely from the "negligent loss or destruction of evidence." *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995). Rather, the alleged destroyer must have known that the evidence was relevant to some issue in the anticipated case, and thereafter willfully engaged in conduct resulting in the evidence's loss or destruction. *Id*.

In federal court cases involving spoliation of electronically stored information, Federal Rule of Civil Procedure 37(e)(2)(B) requires a finding by the court that a party acted with the intent to deprive another party of the information's use in the litigation before an adverse inference instruction may be given to the jury. This requirement applies whether the jury is instructed that “it may” or whether “it must” presume the information was unfavorable to the other party.” Fed.R.Civ.P. 37(e)(2)(B). The Advisory Committee Notes to Fed.R.Civ.Proc. 37(e) explain the policy behind the rule’s intent to deprive standard.

> Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have.

Advisory Committee Notes to Rule 37(e) (2015 Amendment).

Numerous federal courts have held that an adverse inference instruction and certain other sanctions for spoliation are proper only where the party has acted in bad faith or with intentional conduct to suppress the truth. *See Bull v. United Parcel Serv. Inc.,* 665 F.3d 68, 79 (3d Cir. 2012) (requiring bad faith for spoliation sanction); *Faas v. Sears, Roebuck & Co*., 532 F.3d 633, 644 (7th Cir. 2008) (must find defendant "intentionally destroyed the documents in bad faith"); *Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032, 1035 (8th Cir. 2007) (citations omitted) (requires "a finding of intentional destruction indicating a desire to suppress the truth"); *King v. Ill. Cent. R.R*., 337 F.3d 550, 556 (5th Cir. 2003) (adverse inference "is predicated on the 'bad conduct' of the defendant"); *Penalty Kick Mgmt. Ltd. v. Coca Cola Co*., 318 F.3d 1284, 1294 (11th Cir. 2003) ("adverse

inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith").

3. Defendants had no duty to preserve the furnace

Here, the Plaintiffs failed to satisfy their initial burden of establishing that the Defendants even had a duty to preserve the furnace. The evidence is undisputed that on both November 27, 2012 and January 4, 2013, the Defendants determined that the cause of the leak was a dislocated flue pipe. Indeed, two different flue pipes. On both occasions, repairing the flue pipe eliminated the elevated CO readings. Nobody investigating either incident — not VNG, not Virginia Beach Code Enforcement, and not Emerald Point's maintenance team — determined that there was any defect in the furnace itself. Indeed, Danny Carlson of Code Enforcement confirmed that the repair to the flue pipe on November 27, 2012 solved the problem and that the apartment was safe for its occupants. Moreover, inspections of the furnace by both Anthony Hamill and Calvin Morris after it was removed from service did not reveal any crack in the heat exchanger or other damage related to the release of carbon monoxide fumes. And the clincher, when the furnace was replaced on January 4, 2013, the carbon monoxide levels remained elevated. Based on this information, the Defendants had no reason to suspect that

the furnace was material to any future litigation. It simply was not the source of the alleged exposure and the elevated CO readings.

The Virginia Court of Appeals has held that a spoliation inference may only be applied if "at the time the evidence was lost or destroyed, a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action." *Wolfe v. Va. Birth-Related Neurological Injury Comp. Program,* 40 Va. App. 565, 581, 580 S.E.2d 467, 475 (2003). Here, it is clear that since the carbon monoxide detected did not leak from the furnace, but from disconnected piping in the attic, that a reasonable person in the Defendants' position should not have foreseen that the furnace was material to a yet to be filed civil action. The fact the furnace was stored for eighteen months, with no request from anyone that it be preserved, including the Plaintiffs and their counsel, reinforces that Defendants should not have foreseen it as material evidence.

4. Plaintiffs made no request that the furnace be preserved

Plaintiffs took no action to identify the furnace as material evidence. Plaintiffs retained an expert, Lester White, to inspect the premises on January 16, 2013. At no time, did he request an opportunity to inspect the furnace or ask that it be preserved. Similarly, Plaintiffs' counsel sent a

letter of representation on April 16, 2013. The letter did not identify the furnace as a potential source of the leak, and counsel did not request inspection or preservation of the furnace.

5. Defendants did not intentionally or in bad faith dispose of the furnace to prevent its use in litigation.

Even if the furnace was material and the Defendants had a duty to preserve it, they did not dispose of it to intentionally deprive the Plaintiffs of its use in litigation, or otherwise exercise bad faith. The furnace sat in storage for approximately 18 months and was available for inspection. It was on site and in storage when the Plaintiffs' expert, Lester White, inspected the apartment, but he did not ask to see it. Although the exact date that it was disposed of is uncertain, there is no evidence that it was discarded *after* the suit was filed in November 2014. It appears to have been discarded as part of a routine clean-up in the summer of 2014, months before suit was filed. No evidence was presented that the Defendants intended to deprive the Plaintiffs of the use of the furnace in litigation. And the Trial Court expressly found there was no evidence of bad faith on the part of the Defendants in disposing of the furnace. (App. 1373-74).

In *Jenkins v. Woody,* 2017 U.S. Dist. LEXIS 9581, 2017 WL 362475 (E.D. Va. Jan. 21, 2017), the Eastern District found that Sherriff Woody had

a duty to preserve video of an inmate taken in the last hours of the inmate's detention before the inmate died because the Sherriff should reasonably have anticipated litigation as soon as the inmate died. The Sheriff also knew that jail video of the inmate before death was relevant. The court found that the video data was lost because the Sheriff failed to take reasonable steps to preserve it, such as simply copying it to a disk and keeping the disk in a file. The lost video could not be restored or replaced.

Despite these breaches by the Sheriff, the court refused to grant an adverse inference jury instruction that the jury may, or that it must, presume the video was unfavorable to the Sheriff. The court declined to do so because it did not find that the Sheriff acted with the intent to deprive Jenkins of the use of the video in litigation. *Id. at* *44. The court noted that Rule 37(e) now reserves the harshest discovery sanctions, such as adverse inference instructions, dismissals, or default judgments, only for cases in which the court can "fin[d] that the [spoliating] party acted with the intent to deprive another party of the information's use in the litigation." *Id*. at *42. The court imposed lesser sanctions that did not include any instruction to the jury that it "may infer" the evidence was unfavorable or "detrimental" to the defendant. *Id.* at *46.

While *Jenkins* was governed by Fed. R. Civ. Proc. 37(e), which specifically applies to sanctions for failing to preserve electronically stored information, the court's analysis and conclusion is instructive in this appeal. A prerequisite for the granting of an adverse inference instruction for spoliation, including an instruction that the jury "may infer" that the lost evidence was unfavorable, is a finding by the court that a party intentionally deprived another party of the use in litigation of evidence or information it knew or should have known was relevant to anticipated or pending litigation. Here, not only was the furnace not relevant, as discussed above, but no evidence of an intent to deprive was presented.

Under the facts presented, the Trial Court erred in granting the adverse inference instruction. An adverse inference instruction should be used to prevent a defendant from profiting from intentional misconduct — not to create a windfall to a plaintiff where the defendant has acted without any bad intent or motive, but in a reasonable manner or by innocent mistake. This instruction inflamed the jury against the Defendants and resulted in an erroneous and unfair verdict. This Court should reverse the judgment below to correct the error.

C. The Trial Court erred in admitting the irrelevant and prejudicial testimony of Alan Moore regarding alleged defects in the installation of the new furnace and piping. (Pertains to Assignment of Error 3.)

The Trial Court also erred in admitting the testimony of Alan Moore that the installation of the new furnace and piping was not proper. Plaintiffs' counsel used Moore's testimony to argue to the jury that Defendants were negligent in the repair and maintenance of the furnace that was removed. (App. 1353, 1355, 1356). There was, however, no connection between the two carbon monoxide leaks of November 27, 2012 and January 4, 2013, and Moore's January 18, 2013 inspection of the new furnace which was installed after the January 4 leak. The testimony should have been excluded as irrelevant, prejudicial, and confusing. This error is subject to an abuse of discretion standard of review. *See John Crane, Inc.*, 274 Va. at 590, 650 S.E.2d at 855.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to determination of the action more probable or less probable than it would be without the evidence. Rule 2:401; see*, e.g., McNeir v. Greer-Hale Chincilla Ranch*, 194 Va. 623, 628-29, 74 S.E.2d 165, 169 (1953). Evidence must be relevant to be admissible. *See Norfolk & Portsmouth Belt Line R.R.v. Wilson*, 276 Va. 739, 743, 667 S.E.2d 735, 737 (2008). Evidence that is not relevant is not

admissible. Rule 2:402(a). Evidence that is offered only to inflame the passion of and instill prejudice in the minds of the jury is inadmissible. *See Cain*, 290 Va. at 137, 772 S.E.2d at 897-898.

Moore's testimony did not meet the standard for relevance and should have been excluded. Moore first went to the apartment on January 18, 2013, two weeks after the furnace was replaced. (App. 902). Moore had no knowledge and did not offer any testimony as to the cause of the elevated carbon monoxide levels, or of the condition of the furnace and the associated piping as it existed at the time of Plaintiffs' claimed exposure to carbon monoxide. He knew nothing of the maintenance of the furnace and the piping in place at the time of the carbon monoxide leaks. Moore's testimony that the new furnace was installed without a permit and that he failed the work of Green Run Heating and Cooling because of inadequate firestopping and an unlocked vent did not tend to establish the cause of the elevated carbon monoxide readings. It did not provide any information whether the furnace running at the time of the carbon monoxide exposure had a cracked heat exchanger. It did not tend to establish whether the flue pipes in the attic were properly repaired, or make any other fact in issue more probable or less probable. Rather, the testimony was elicited solely to prejudice the jury against the Defendants for an irrelevant matter, and

confuse the issues without connection to a fact in issue. Post-accident evidence used for this purpose is inadmissible. *See Cain*, 290 Va. at 137, 772 S.E.2d at 897-898. The evidence should have been excluded, and this Court should reverse the judgment to correct this error.

D. Combining four plaintiffs with separate claims into one action permitted the jury to hear otherwise inadmissible evidence. (Pertains to Assignment of Error 4.)

The Trial Court erred in overruling Defendants' Motion to Drop parties based on the misjoinder of all four plaintiffs into a single case. This error prejudiced the Defendants because the jury heard evidence regarding Hawkins' more severe symptoms, which led the jury to award a greater amount to the other Plaintiffs than had their cases been tried separately. Hawkins also benefitted from the combined trial because the jury heard about multiple people with alleged injuries. Errors related to the admission of evidence are subject to an abuse of discretion standard of review. *See Funkhouser v. Ford Motor Co.*, 285 Va. 272, 280, 736 S.E.2d 309, 313 (2013) ; *see also Va. Elec. & Power Co v. Dungee*, 258 Va. 235, 245, 520 S.E.2d 164, 170 (1999).

Pursuant to Virginia Code § 8.01-5, the court may drop parties that have been misjoined "as the ends of justice may require." VA. CODE § 8.01-5. The general rule in Virginia is that "several complainants having distinct

and independent claims to relief against a defendant cannot join in a suit for separate relief in each." *Va. Hot Springs Co. v. Hoover*, 143 Va. 460, 465, 130 S.E. 408, 410 (1925); *see also Carufel v. American Isuzu Motors, Inc.*, 47 Va. Cir. 529, 530 (Spotsylvania Co. Cir. Ct. 1999).

Trial courts reviewing this issue have rejected attempts to join together multiple plaintiffs into one action. For instance, in *Parrish v. Hicks*, 28 Va. Cir. 475 (Albemarle Co. Cir. Ct. 1992), the trial court noted that there is a significant presumption that misjoined parties should be dropped, a presumption which the plaintiffs failed to overcome. *See id.* at 478. In *Parrish*, the plaintiffs were riding in the same vehicle that was struck by the defendant. The court found that plaintiffs were misjoined because they had distinct and independent claims for relief and therefore could not be joined in a suit for separate relief. *See id.* at 476-77. *See also Hamrick v. Shifflett*, 55 Va. Cir. 423, 424 (Rockingham Co. Cir. Ct. 2001) (trial court granted motion to drop where four plaintiffs injured in a motor vehicle accident filed a single action).

In this case, Defendants timely objected to the misjoinder of the four plaintiffs into a single action. Three of the Plaintiffs, Harmon, Guire and Zamaria, had relatively small special damages, illnesses that were limited in duration to a six to eight week period with full recovery, little to no lost

wages claimed, and no future lost wage claim. Nevertheless, their claims were lumped together with those of Hawkins who alleged a wide variety of ongoing symptoms of greater intensity, and claimed substantially more out of pocket expenses, lost wages, loss of earning capacity, and permanency. Given that the four Plaintiffs had separate and distinct claims for relief, they should not have been joined together for one action. If tried separately, the medical evidence that would have been relevant and admissible as to Hawkins would not have been the same evidence as was relevant to Harmon, Guire, and Zamaria. The size of the verdict for the three gentlemen suggests that it was strongly influenced by the claims of Hawkins. Moreover, including all four claims in a single action may have driven up the amount of the Hawkins' verdict.

In short, the Plaintiffs' claims should not have been tried together. The Court should reverse the judgment to correct this error.

E. The Trial Court erred in granting Plaintiffs' motion to increase the ad damnum after the close of the evidence. (Pertains to Assignment of Error 5.)

The Trial Court also erred in granting the Plaintiffs' Motion to increase the ad damnum clause after the close of evidence from $100,000 to $450,000 for three Plaintiffs — Harmon, Zamaria, and Guire. (App. 1365).

This error is subject to an abuse of discretion standard of review. *Peterson v. Castano*, 260 Va. 299, 302-03, 534 S.E.2d 736, 738 (2000).

This Court has not previously addressed the precise issue presented in this appeal as to whether a trial court errs by granting a motion to increase the ad damnum made after the close of the evidence. There are, however, two prior cases decided by this Court that indicate a post-evidence amendment to increase the ad damnum clause is improper.

In *Russell Lumber Co. v. Thompson*, 137 Va. 386, 119 S.E. 117 (1923), the trial court permitted the plaintiff to amend its pleadings to alter its damage theory after the close of the evidence. This Court reversed, and explained that "there is a danger" that such a late-stage amendment "would tend to complicate proceedings and promote injustice." *Id.* at 394, 119 S.E. at 120. The Court noted, "[i]t is fundamental that the judge, the jury and the litigants should understand the issues being tried before the testimony is concluded." *Id.*

In *Powell v. Sears, Roebuck & Co.*, 231 Va. 464, 344 S.E.2d 916 (1986), this Court held that a post-verdict amendment to increase the ad damnum is prejudicial to the defendant and constitutes reversible error. The Court noted the importance of the ad damnum, which puts the defendant on notice of the potential exposure and impacts the decisions

made in the handling and defense of the case. *See id.* at 468, 344 S.E.2d at 918. The Court recognized that "the decisions made by an insurer with respect to handling a case may vary depending on whether the amount claimed falls within the deductible of a policy, falls within the policy limits, or exceeds the policy limits. Thus, the ad damnum serves a useful purpose." *Id*. The Court relied on *Russell Lumber Co.*, and noted that although that case involved a pre-verdict amendment the same reasoning applied, but with "greater force to post-verdict amendments of the pleadings." *Id.*

In fact, there is little practical difference between granting a motion to amend the complaint to increase the ad damnum after the evidence is closed, and granting an amendment to increase the ad damnum after the jury returns its verdict. In both cases, the defendant has no practical ability to address or counter the impact of the amendment. The decisions about handling the defense of the case have already been made and executed, based in part on the amount sued for, before the close of the evidence. Changing that amount, in this case by a factor of 3.5 for each of three plaintiffs, after the evidence is closed, eviscerates the useful purpose of the ad damnum recognized by this Court in *Powell*.

Here, the sole articulated basis for the motion to increase was for three Plaintiffs to be able to recover in compensatory damages that which

the Court had ruled they could not recover in punitive damages. (App. 1365-66). Defendants, who had defended a compensatory damage claim for each of the three plaintiffs of $100,000, were suddenly exposed to a potential of 3½ times that amount per plaintiff. There was no evidence at trial that justified an increased compensatory damage award. Harmon, Zamaria, and Guire each had less than $1,000 in medical bills and little or no lost wages.

The Trial Court erred in granting the post-evidence motion to amend, and this Court should reverse the judgment to correct this error.

F. The jury's verdicts in favor of Plaintiffs were excessive. (Pertains to Assignment of Error 6.)

The Trial Court also erred in denying Defendants' motion to set aside the jury verdict as excessive, or in the alternative, to order a new trial on damages or remittitur. This error is subject to an abuse of discretion standard of review. *See Allied Concrete Co. v. Lester*, 285 Va. 295, 311, 736 S.E.2d 699, 707-08 (2013).

This Court has held that where "the amount awarded is so great as to shock the conscience of the court and to create the impression that the jury has been motivated by passion, corruption or prejudice, or has misconceived or misconstrued the facts or the law, or if the award is so out of proportion to the injuries suffered as to suggest that it is not the product

of a fair and impartial decision, the court is empowered, and in fact obligated, to step in and correct the injustice." *Id.* at 311, 736 S.E.2d at 707. This Court has recognized that "Courts have the duty to correct a verdict that plainly appears to be unfair or would result in a miscarriage of justice." *Poulston v. Rock*, 251 Va. 254, 258, 467 S.E.2d 479, 481 (1996).

In this case, the verdicts for all four of the Plaintiffs are excessive in light of the evidence presented at trial. The verdicts of $200,000 each for Harmon, Zamaria, and Guire are excessive given the limited nature and duration of their alleged illness and the minimal medical specials incurred. The verdicts can only be the result of passion and/or prejudice on the part the jury.

Moreover, the verdict in favor of Hawkins is tainted by the verdict in favor of the others. The verdicts for the three male plaintiffs demonstrate that the jury was motivated by passion and prejudice, which makes the verdict in favor of Hawkins suspect.

The jury's verdict for Hawkins cannot be justified by a loss of earning capacity claim. Plaintiffs' request for such damages, including in closing argument (Tr. 790), was based on pure speculation and cannot form the basis of a proper jury award. *See Isle of Wight Cty v. Nogiec*, 281 Va. 140, 150-51, 704 S.E.2d 83, 87-88 (2011).

VII. CONCLUSION

For the reasons stated, Emerald Point, LLC and The Breeden Company, Inc., request that this Court reverse the judgment of the trial court and remand the case for a new trial.

Respectfully submitted,

/s/ Brian N. Casey
Brian N. Casey

Brian N. Casey
Virginia State Bar No. 26710
Christopher J. Wiemken
Virginia State Bar No. 43299
TAYLOR WALKER P.C.
555 East Main Street, Suite 1300
Norfolk, Virginia 23510
(757) 625-7300
(757) 625-1504 (fax)
bcasey@taylorwalkerlaw.com
cwiemken@taylorwalkerlaw.com

Robert M. Tata
Virginia State Bar No. 30101
Wendy McGraw
Virginia State Bar No. 37880
HUNTON & WILLIAMS LLP
500 East Main Street, Suite 1000
Norfolk, VA 23510
(757) 640-5300
(757) 625-7720 facsimile
btata@hunton.com
wmcgraw@hunton.com

Counsel for Emerald Point, LLC and The Breeden Company, Inc.

CERTIFICATE

Rule 5:26 has been complied with and a copy of the opening brief of appellants has been e-mailed this 17th day of July, 2017 to

Edward F. Halloran, Esquire
Virginia State Bar No. 16334
Armed Services Civilian Legal Center of Edward F. Halloran, P.C.
5233 Princess Anne Road
Virginia Beach, Virginia 23462
(757) 456-5757
(757) 456-5353 (fax)
ehalloran@halloranlaw.com

/s/ Brian N. Casey
Brian N. Casey