

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

2015 FEB -9 PM 4:43
15-CVS-2819
MECKLENBURG COUNTY, C.S.C.

WALTER L. HART, IV, ADMINISTRATOR OF THE
ESTATES of DARYL D. JENKINS (Deceased) and
SHIRLEY M. JENKINS (Deceased),
Plaintiff,

vs.

BEST WESTERN INTERNATIONAL, INC., AJD
INVESTMENTS, INC., APPALACHIAN
HOSPITALITY MANAGEMENT, INC., all d/b/a
BEST WESTERN BLUE RIDGE PLAZA HOTEL,
INDEPENDENCE OIL & LP/GAS, INC., DALE
THOMAS WINKLER, JR., d/b/a DJ'S HEATING
SERVICES, BARRY DAMON MALLATERE and
THOMAS DANIEL MILLER,
Defendants.

COMPLAINT

NOW COMES the Plaintiff, Walter L. Hart, IV, in his official capacity as Administrator of the Estates of Daryl D. Jenkins (Deceased) and Shirley M. Jenkins (Deceased), by and through his undersigned attorneys and for his causes of action against the Defendants, would respectfully show the Court the following:

PARTIES, JURISDICTION AND VENUE

1. The Plaintiff, Walter L. Hart, IV, is a citizen and resident of Charlotte, Mecklenburg County, North Carolina. He is a duly licensed attorney in the State of North Carolina.
2. The Plaintiff, Walter L. Hart, IV, has been duly appointed as the Ancillary Administrator of the Estates of Daryl D. Jenkins (Deceased) and Shirley M. Jenkins (Deceased) in Mecklenburg County Estate files 15-E-482 and 15-E-481 and he is appearing in that capacity for the purposes of instituting this action.
3. Decedent Daryl D. Jenkins was a citizen and resident of Longview, Cowlitz County, Washington at the time of his death in Watauga County, North Carolina on April 16, 2013.

4. Decedent Shirley M. Jenkins was a citizen and resident of Longview, Cowlitz County, Washington at the time of her death in Watauga County, North Carolina on April 16, 2013.
5. The Defendant, Best Western International, Inc. is a corporation organized and existing under the laws of the State of Delaware or some other state unknown to the Plaintiff. By and through its subsidiaries, employees, franchisees and other agents, it transacts business in the State of North Carolina, contracts to supply goods and services in the State of North Carolina, regularly does and solicits business in the State of North Carolina, and derives substantial revenue therefrom.
6. The Defendant, AJD Investments, Inc., is a corporation organized and existing under the laws of the State of North Carolina or some other state unknown to the Plaintiff. By and through its subsidiaries, employees, and other agents, it transacts business in the State of North Carolina, contracts to supply goods and services in the State of North Carolina, regularly does and solicits business in the State of North Carolina, derives substantial revenue therefrom, and through various agreements with Defendants Appalachian Hospitality Management, Inc. and Barry Damon Mallatere, has the right to control, and from time to time does so exercise control, over numerous aspects of the operation of the Best Western Plus Blue Ridge Plaza Hotel located in Boone, Watauga County, North Carolina.
7. The Defendant, Appalachian Hospitality Management, Inc., is a corporation organized and existing under the laws of the State of North Carolina or some other state unknown to the Plaintiffs, which was formed to manage aspects of the various hotels and other properties owned by Defendant, AJD Investments, Inc. within the State of North Carolina. By and through its subsidiaries, employees, and other agents, Appalachian Hospitality Management, Inc. transacts business in the State of North Carolina, contracts to supply goods and services in the State of North Carolina, regularly does and solicits business in the State of North Carolina, derives substantial revenue therefrom, and through various agreements with Defendants AJD Investments, Inc. and Barry Damon Mallatere, has the right to control, and from time to time does so exercise control, over numerous aspects of the operation of the Best Western Plus Blue Ridge Plaza Hotel located in Boone, Watauga County, North Carolina.
8. That at all times herein complained of, Defendants Best Western International, Inc., AJD Investments, Inc., Appalachian Hospitality Management, Inc. and Barry Damon Mallatere were all doing business as the Best Western Plus Blue Ridge Plaza Hotel located at 840 East King Street in Boone, Watauga County, North Carolina.
9. The Defendant, Independence Oil & LP/Gas, Inc., is a corporation duly organized and existing pursuant to the laws of North Carolina or some other state unknown to the Plaintiffs with its principal place of business and corporate office in West Jefferson, Ashe County, North Carolina. By and through its subsidiaries, employees, and other agents, it transacts business in the State of North Carolina, contracts to supply goods and services in the State

of North Carolina, regularly does and solicits business in the State of North Carolina and derives substantial revenue therefrom.

10. The Defendant, Thomas Daniel Miller, is a citizen and resident of Fleetwood, Ashe County, North Carolina. Defendant Miller was the license qualifier for Independence Oil & LP/Gas, Inc.
11. At all times relevant to this action, Defendant Thomas Daniel Miller was an employee or agent of Independence Oil & LP/Gas, Inc. and was acting within the course and scope of his employment and/or agency.
12. The Defendant, Dale Thomas Winkler, Jr., d/b/a DJ's Heating Services, is a citizen and resident of Boone, Watauga County, North Carolina. DJ's Heating Services transacts business in the State of North Carolina, contracts to supply goods and services in the State of North Carolina, regularly does and solicits business in the State of North Carolina and derives substantial revenue therefrom.
13. The Defendant, Barry Damon Mallatere, is a citizen and resident of Boone, Watauga County, North Carolina. Defendant Mallatere is, upon information and belief, the principle owner, President and Manager of Defendant Appalachian Hospitality Management, Inc.
14. One or more of the parties, at all times pertinent hereto, resided in Mecklenburg County, North Carolina.
15. Mecklenburg County Superior Court is the proper trial division in this case as the amount in controversy exceeds the minimum jurisdictional limit of the Superior Court trial division.
16. Jurisdiction and venue are otherwise properly with this Honorable Court.

FACTS

17. In or before the year 2000, AJD Investments, Inc., and/or Appalachian Hospitality Management, Inc. entered into an agreement with Defendant Best Western International, Inc. to purchase a franchise and to build and operate a Best Western Plus Hotel to be located at 840 East King Street, in Boone, Watauga County, North Carolina.
18. The hotel building as originally designed and constructed included a heated indoor swimming pool. At the time the building was constructed, a propane fueled swimming pool heater was installed in an equipment room located adjacent to the pool area for the purpose of heating the water in the swimming pool to make it more comfortable for guests using the pool.

19. State and local building and mechanical codes, along with sound construction practices, required that the pool heater be vented to the outside of the building through the use of a double walled, powered vent stack.
20. From the time of its construction in 2000, to April, 2013, various repairs and alterations were made to the hotel building. These repairs resulted in various openings being created in an one hour rated fire wall that separated various guest rooms from common areas of the hotel.
21. State and local building codes required that all openings in the rated fire wall be sealed with suitable fire stop material immediately after repairs or alterations were completed.
22. Prior to 2011, AJD Investments, Inc. entered into agreement with Appalachian Hospitality Management, Inc. whereby Appalachian Hospitality Management, Inc. assumed primary responsibility for the day-to-day management of the various hotels owned by AJD Investments, Inc., including the Best Western Plus Blue Ridge Plaza Hotel.
23. Prior to October, 2011, Harold Robinson was an employee of Appalachian Hospitality Management, Inc. and worked in the maintenance department as a supervisor.
24. In or around October, 2011, Harold Robinson and two other maintenance staff employees of Appalachian Hospitality Management, Rich Moses and Steven Thigpen, replaced the propane gas pool heater located in the equipment room adjacent to the swimming pool area with a used Jandy Lite2, propane gas pool heater bearing serial number H06PB1224. The used replacement pool heater had been in operation at an outdoor pool located at The Sleep Inn, another hotel managed by Appalachian Hospitality Management, Inc.
25. State and local building codes and regulations, along with sound construction practices, required that all work performed in connection with the relocation of the pool heater be performed by a properly trained and licensed heating contractor. In addition, a permit and inspection of all work performed was required.
26. Neither Harold Robinson or the other Appalachian Hospitality Management maintenance workers were licensed heating contractors nor had they undergone the training required by the State of North Carolina to become licensed heating contractors. Therefore, all work performed by Appalachian Hospitality Management maintenance workers in connection with the relocation of the used Jandy pool heater was in violation of North Carolina law. Appalachian Management Hospitality maintenance workers failed to obtain proper permits or inspections from local governmental authorities at the time the work was performed because they were not properly licensed to perform the work.
27. Even though Jandy, the manufacturer of the pool heater "strongly recommends installation of suitable Carbon Monoxide detectors in the vicinity of this appliance **and in any adjacent**

occupied spaces," no detectors were installed by Appalachian Hospitality Management employees in those areas.

28. Carbon monoxide is an odorless, colorless, tasteless gas that is lethal in sufficient concentrations. Carbon monoxide is a natural byproduct of combustion and is produced by any gas-fired pool heater when it is operating.
29. Even though Jandy, the manufacturer of the pool heater states in the installation manual: "If the Lite2 is being installed to replace an existing pool heater, it is recommended that a new, appropriate venting system be installed with the new heater. However, if an existing venting system must be used, be sure to carefully inspect the venting system to ensure it is in good condition and continues to be appropriate for the Lite2 heater." Appalachian Hospitality Management employees failed to install a new vent system for the relocated pool heater and failed to adequately inspect the existing vent system to ensure that it was in proper working order and appropriate for the Jandy pool heater.
30. On information and belief, Appalachian Hospitality Management employees attempted to connect two different sizes and types of metal vent pipe together which created a gap approximately 3/4" to 1" wide in one or more of the vent pipe joints. The resulting gap in the vent pipe joint was covered with foil tape in violation of the North Carolina State Mechanical Code.
31. On information and belief, at or before the pool heater was replaced by Appalachian Hospitality Management employees, the original power venter failed. The pool heater unit would not operate once the power venter failed due to a safety interlock mechanism designed to prevent its operation in the event of a power venter failure.
32. On information and belief, at the time the original power venter failed, Appalachian Hospitality Management employees deliberately bypassed the pressure sensing safety switch rather than expend the time, effort and money required to properly repair or replace the power venter.
33. As a result of the failure of the power venter and the conscious decision not to repair or replace it, excessive condensation formed throughout the vent system. Appalachian Hospitality Management employees were aware that excessive condensation was occurring and attempted to stop condensate water leakage from the vent system through the use of mastic compound on the joints, an ice bucket placed to collect dripping water, and towels placed in the area of other leaks.
34. Appalachian Hospitality Management employees knew, or in the exercise of reasonable care should have known, that the presence of excessive condensation was likely to cause or accelerate corrosion within the vent system which would ultimately lead to leakage of dangerous exhaust gases into the hotel building thereby endangering building occupants.

35. On information and belief, the supply wires to the power venter were disconnected by Appalachian Hospitality Management employees and all safety mechanisms which were in place to prevent the unit from operating without the power venter functioning were bypassed.
36. In addition, Appalachian Hospitality Management employees failed to properly install a sediment trap in the gas line as recommended by Jandy and required by state and local building codes.
37. After the used pool heater was relocated to the Best Western Plus Blue Ridge Plaza Hotel by Appalachian Hospitality Management maintenance staff, the replacement pool heater was converted from propane gas to natural gas by Defendant Independence Oil & LP/Gas, Inc. in February, 2012.
38. The used Jandy Lite2 pool heater was not designed to be converted from propane to natural gas by the manufacturer and in fact, the manufacturer of the pool heater specifically indicated that it should not be so converted.
39. Propane and natural gas have different physical characteristics which make conversion of equipment from one to the other potentially dangerous if not properly performed. For example, propane is heavier than air and tends to sink to floor level while natural gas tends to rise towards the ceiling.
40. At the time the pool heater was converted, gas fire logs located in room 225 were also converted from propane to natural gas. Room 225 was equipped with a combustible gas detector and alarm which had been installed near the floor as is appropriate for a appliance using propane. An occupied structure using natural gas should have such devices installed near the ceiling as natural gas is lighter than air. Both Appalachian Hospitality Management and its contractor, Independence Oil and Gas/LP, failed to change the location or install new detectors following conversion of the fire logs and pool heater from propane to natural gas.
41. On or about April 13, 2013, Defendant Dale Thomas Winkler, Jr., doing business as DJ's Heating Service, was employed by Appalachian Hospitality Management maintenance staff to inspect the pool heater and to make any repairs necessary to ensure that it functioned properly. Upon information and belief, the maintenance staff was concerned that the heater was either inoperable due to mechanical or electrical failure or that the pilot light was inoperable for some other reason.
42. On or about April 13, 2013, Defendant Dale Thomas Winkler, Jr. began troubleshooting the problem with the pool heater and determined that the gas supply had been turned off by way of a shut-off valve located in a nearby ceiling. Defendant Dale Thomas Winkler, Jr., along with Appalachian Hospitality Management maintenance staff, turned on the gas supply to the unit, fired the heater and placed it into operation.

43. Defendant Dale Thomas Winkler, Jr. failed to inspect the exhaust venting system servicing the pool heater prior to placing the heater into operation despite open and obvious signs the heater had deteriorated to the point where it was dangerous to building occupants due to the potential for lethal exhaust gas leakage.
44. Simple observation of the pool heater by a properly trained and licensed heating contractor such as Defendant Dale Thomas Winkler, Jr. claimed to be, should cause the contractor to immediately conclude that the pool heater was a natural draft appliance due to the presence of a vent hood at the top of the heater. As a licensed heating contractor Defendant Dale Thomas Winkler, Jr. knew, or in the exercise of reasonable care should have known, that when a natural draft appliance is located indoors, it is required to be vented or exhausted either by a vent flue pipe extending higher than the roof line of the building, or by the use of a forced draft system or power venter. In addition, as a licensed heating contractor, Defendant Dale Thomas Winkler, Jr. knew, or in the exercise of reasonable care should have known, that a natural draft appliance draws air from the adjacent area in the room and discharges that air, as well as exhaust gases containing combustion byproducts from the flame, into the flue.
45. A natural draft appliance vented through the side wall of a building requires an appropriate power vent system which includes a pressure sensing switch. The pressure sensing switch acts as a safety mechanism which prevents the pool heater unit from igniting until the power venter pressure switch senses the fan is running and creating negative pressure in the vent system.
46. Even a cursory inspection of the vent system by Defendant Dale Thomas Winkler, Jr. would have revealed numerous holes and areas of deterioration in the vent system, an inoperable power venter exhaust fan, use of improper single duct vent pipe, mismatched vent pipe sizes and other open and obvious defects which would allow the leakage of potentially lethal exhaust fumes containing carbon monoxide into the hotel building.
47. Defendant Dale Thomas Winkler, Jr. knew, or in the exercise of reasonable care should have known, that the equipment room and the humid air in the room where the pool heater was located also contained common pool chemicals such as chlorine, which are highly corrosive to metal such as the vent pipes from the pool heater to the exterior of the building and further that corrosive air and gasses were being drawn into and through the pool heater and exhaust flue during its normal operation. Evidence of severe corrosion was plainly visible by simple visual observation of the openly visible portions of the pool heater and vent system.
48. Defendant Dale Thomas Winkler, Jr. knew, or in the exercise of reasonable care should have known, that an exhaust vent pipe in such a location was susceptible to severe corrosion and that any holes in or leakage from the flue would result in the discharge of potentially lethal

flue gasses and combustion by products inside the Best Western Plus Blue Ridge Plaza Hotel building thereby exposing its occupants to personal injury and potential death.

49. On or about April 13, 2013, a group of wires were hanging in the air in plain sight near the pool heater which were not connected to the pool heater in any way but were terminated with wire nuts instead. These wires had originally been installed to supply power for the power venter which had been previously disconnected. Evidence of that disconnection was readily apparent by even a cursory visual observation.
50. During all relevant times, the Jandy pool heater was vented through an exterior side wall of the Best Western Plus Blue Ridge Plaza Hotel building. Although required by state and local building codes, as well as sound building practices, there was no functioning power venter. In addition, the rise of the slope of the flue pipe from the pool heater to the exterior did not comply with the North Carolina State Mechanical Code.
51. As a licensed heating contractor Defendant Dale Thomas Winkler, Jr. knew, or in the exercise of reasonable care should know, that the vent system posed a significant danger to building occupants by observing the presence of a natural draft appliance, the corrosion plainly visible inside the equipment room and outside at the terminus of the flue pipe, the disconnected power venter wires, the manner in which the exhaust was discharging and the obvious lack of a vent system extending higher than the roof line of the hotel building.
52. As a result of the absence of both a power venter and a flue pipe or vent system extending above the roof line of the building, the pool heater exhaust venting system as it existed on April 13, 2013, was dependent upon an insufficient natural draft to vent dangerous byproducts of combustion, such as carbon monoxide gas, from the Best Western Plus Blue Ridge Plaza Hotel building.
53. The original but now non-functioning power venter was rated at approximately 75,000 BTU capacity while the used replacement pool heater which had been substituted at the Best Western Plus Blue Ridge Plaza Hotel by Appalachian Hospitality Management personnel had a capacity of 250,000 BTU's as clearly and plainly reflected on the equipment label. Thus, even had it been functioning properly, the power venter was unlikely to completely exhaust harmful gases created by the pool heater from the hotel building.
54. Despite the obvious deficiencies in the exhaust vent system and the existence of extremely hazardous conditions resulting therefrom, Defendant Dale Thomas Winkler, Jr. placed the pool heater into service, failed to instruct Appalachian Hospitality Maintenance staff to disable it, failed to call the gas utility company and advise them to shut off the gas, failed to replace the power venter, failed to connect the control wiring to the power venter, failed to properly inspect or evaluate the condition and efficacy of the venting system between the pool heater and the exterior of the building and left the pool heater in operation despite numerous open, obvious and readily observable hazards.

55. On April 16, 2013, Decedents Daryl D. Jenkins and Shirley M. Jenkins were guests in the Best Western Plus Blue Ridge Plaza Hotel and were assigned room 225 at the time of their check-in. Room 225 is located one floor above the pool equipment room which contained the relocated, used Jandy swimming pool heater and directly above the defective exhaust vent system that lead from the heater to the exterior of the building.
56. Both Daryl Jenkins and Shirley Jenkins died of acute carbon monoxide poisoning in room 225 on April 16, 2013. Autopsies were performed shortly thereafter and blood samples were obtained and submitted for toxicology studies. Lethal concentrations of carbon monoxide were found in their blood as a result of toxicology tests performed on June 1, 2013.
57. Over the course of time, alterations and repairs to the Best Western Plus Blue Ridge Plaza Hotel building had resulted in altered penetrations of the fire rated walls without adequate fire stopping, creating openings that eventually allowed the by-products of combustion from the pool heater to leak from the exhaust vent system, travel into and through a stud cavity in a wall and enter room 225.
58. The bathroom in room 225 was equipped with an exhaust fan that was set to run on a continuous basis. As a result, this exhaust fan was constantly pulling air from the room which created negative air pressure in the room, thereby drawing air into the room through any openings in the walls, ceilings or floors.
59. Evaluation of room 225 under conditions similar to the conditions at the time Defendant Dale Thomas Winkler, Jr. placed the pool heater back into operation revealed that carbon monoxide gas generated by the pool heater could enter room 225 in two ways: primarily from leakage of exhaust gases from defects in the pool heater vent system through openings in the floor near the fireplace logs that were located in the same stud cavity referenced above and secondarily from outside the building in the vicinity of the through-the-wall HVAC unit servicing room 225.
60. Subsequent investigation and inspection of the vent system between the pool heater and the outside of the Best Western Plus Blue Ridge Plaza Hotel building revealed that the vent pipe for the pool heater had multiple holes in both the double wall and the improperly used single wall vent pipe as a result of extensive, long-standing corrosion.
61. The severity and extent of the readily observable corrosion indicates that the corrosion and failure of the vent system had developed and existed over a substantial period of time, likely months to years prior to April, 2011.

FIRST CAUSE OF ACTION
(Defendant Best Western International, Inc.)

62. The allegations contained in paragraphs 1 through 61 of this Complaint are incorporated by reference as if fully set forth herein.
63. The Best Western brand was founded in 1946. By 1963, Best Western was the largest hotel chain in the industry, with 699 member hotels and 35,201 rooms. Since then, Best Western has established operations in more than 100 countries, with more than 4000 hotels, and remains the industry leader with respect to number of properties under a single brand. At the end of the 2014 fiscal year, Best Western had 2,070 hotels in North America alone.
64. Defendant Best Western International, Inc. offers and manages three franchise brands: Best Western, Best Western Plus, and Best Western Premier.
65. Defendant Best Western International, Inc. owns and operates a common website for all of its hotel brands and locations. It also owns and operates a common rewards program known as Best Western Rewards where members can earn points towards an extensive array of products and services, including free hotel nights, dining, retail, entertainment gift cards, merchandise and airline miles.
66. Defendant Best Western International, Inc. expends significant resources marketing the Best Western brand to the public and encouraging guest loyalty.
67. As the franchisor and brand manager, Best Western International, Inc. has the means, ability and right to control many aspects of the day-to-day operations of its brand hotels, including the right to require carbon monoxide detectors in guest rooms containing or located near fossil fuel burning appliances.
68. Defendant Best Western International, Inc. requires all Best Western franchisees to meet various brand standards it establishes. These standards include the appearance of the hotel building, signage, furnishings and appliances located within guest rooms and common areas and standards relating to security and safety of hotel guests and building occupants. For example, Best Western International requires all of its properties around the globe to provide 17 (14 internationally) frequently requested guest amenities and services.
69. In January 2008, Philip D. Prechtel, a 63-year-old retired engineer, died after inhaling carbon monoxide in his hotel room at the Best Western Plus Allentown Inn & Suites in Allentown, PA. Investigators determined that a makeshift canopy placed on the side of the hotel during a remodeling project trapped exhaust from propane-fired hot water heaters in the basement and pushed it back into the building. Several hotel guests were hospitalized as a result of the incident.

70. After the January 2008, incident at the Best Western Plus Allentown Inn & Suites, carbon monoxide detectors were installed in every room at Best Western hotels in the Lehigh Valley. When asked about the costs associated with installing the detectors, Larry Kolasensky, general manager at Best Western Allentown Inn and Suites, stated "There is no price tag on life."
71. In December 2009, a carbon monoxide leak was discovered at the Best Western Hotel located at the Detroit Metropolitan Airport in Romulus, Michigan after numerous occupants complained to the hotel staff about being ill, including some that had passed out. Firefighters were called to the hotel and assisted in evacuating the building.
72. On August 20, 2011, another carbon monoxide leak forced the temporary closure of the Best Western Plus Allentown Inn & Suites. Elevated carbon monoxide levels in the building set off carbon monoxide alarms which had been installed after the earlier incident at the same hotel. No one was injured.
73. In June 2011, multiple employees of the Agate Beach Best Western in Newport, Oregon became ill. High levels of carbon monoxide were detected in the basement of the hotel. Fire crews immediately evacuated the hotel and spent several hours containing the leak and airing out the building. Several hotel guests and employees were medically evaluated and treated for carbon monoxide exposure.
74. From 2010 through November 8, 2012, there were 30 incidents of fire departments or government officials finding elevated levels of carbon monoxide at hotels in the United States according to a USA TODAY analysis of more than 1,000 media reports and interviews with local fire departments.
75. In these 30 incidents, more than 1,300 people were evacuated, eight died, and at least 170 were affected by carbon monoxide, treated by medical personnel or hospitalized. These numbers are likely lower than the actual numbers of individuals affected because news media accounts often fail to state the total number of people evacuated or treated.
76. Lindell Weaver, a professor of medicine at the University of Utah, used similar research methods for a 2007 study that found 68 incidents involving 27 deaths and 772 people "poisoned" by carbon monoxide from 1989 through 2004 in hotels, motels and resorts. Once again, these numbers are likely lower than the actual numbers of individuals affected because news media accounts often fail to state the total number of people evacuated or treated.
77. In December 2010, five teenagers celebrating a birthday were killed in a guest room at the Presidente Hotel in Hialeah, Florida, after a car was left running in the motel's garage.
78. In February 2012, 44-year-old William J. Moran was found dead at the Holiday Inn Express in South Charleston, West Virginia. He was part of a construction crew working in the area,

and several of his coworkers staying at the same hotel also became sick that night. Investigators determined that a carbon monoxide leak in the hotel's swimming pool heater, which was located near Moran's room was the cause of the incident. West Virginia passed legislation requiring hotels to install carbon monoxide detectors as a result of this incident.

79. In December 2012, more than 30 people were transported to a hospital and the Best Western Inn & Suites in Greensburg, Kansas was evacuated after several children in the hotel swimming pool experienced difficulty breathing. The children had been exposed to high levels of carbon monoxide emitted from an improperly vented pool water heater
80. A 2012 report by the National Fire Protection Association disclosed that 81,100 non-fire carbon monoxide incidents were reported to U.S. fire departments in 2010.
81. Defendant Best Western International, Inc. owns, operates or franchises hotels in several states and countries that require carbon monoxide detectors in hotel buildings.
82. Defendant Best Western International, Inc. knew, or in the exercise of reasonable care should have known, that incidents involving carbon monoxide sickness or poisoning were occurring with alarming regularity throughout the hospitality industry.
83. Defendant Best Western International, Inc. knew, or in the exercise of reasonable care should have known, that installation of carbon monoxide detectors in critical areas of hotel buildings would eliminate altogether or greatly reduce the potential for incidents to occur involving carbon monoxide sickness or poisoning of hotel guests.
84. Defendant Best Western International, Inc. knew, or in the exercise of reasonable care should have known, that the failure to install carbon monoxide detectors in critical areas of hotel buildings would eventually result in carbon monoxide sickness or poisoning of hotel guests at one of its locations given the frequency with which these events were occurring.
85. Defendant Best Western International, Inc., acting by and through its officers, managers and directors, made a deliberate and conscious decision not to require the installation of carbon monoxide detectors in critical areas of its hotel buildings thereby exposing building occupants to an ongoing risk of carbon monoxide poisoning.
86. Through various agreements with Defendants AJD Investments, Inc., Appalachian Hospitality Management, Inc. and Barry Damon Mallatere, Defendant Best Western International, Inc. maintains the right to control, and from time to time exercises control, over numerous aspects of the appearance and operation of the Best Western Plus Blue Ridge Plaza Hotel located in Boone, Watauga County, North Carolina.
87. As the franchisor of the Best Western Plus Blue Ridge Plaza Hotel located at 650 King Street, Boone, North Carolina, Defendant Best Western International, Inc. had a non-

delegable duty to ensure that the building was safe for hotel guests and other members of the general public.

88. At all times relevant to this action, Defendant Best Western International, Inc., was negligent and/or grossly negligent, and its acts and omissions of negligence include, but are not limited, to the following:
- a. It failed to warn hotel guests and other occupants of the Best Western Plus Blue Ridge Plaza Hotel of the hidden danger created by the defective and dangerous pool heater exhaust vent system and the presence of deadly levels of carbon monoxide gas;
 - b. It failed to adequately inspect the Best Western Plus Blue Ridge Plaza Hotel building and to detect the presence of dangerous hidden conditions in the building including the lack of a proper exhaust vent system for the pool heater and inadequate fire stopping through rated firewalls;
 - c. It failed to establish, maintain and enforce adequate guest safety standards for its hotel properties, including the Best Western Plus Blue Ridge Plaza Hotel located in Boone, North Carolina;
 - d. It failed to establish, maintain and enforce adequate guest safety standards for its hotel properties, including the failure to require installation of carbon monoxide detectors in the pool equipment room, swimming pool area, guest rooms and other areas adjacent to the pool heater in the Best Western Plus Blue Ridge Plaza Hotel located in Boone, North Carolina as recommended by the pool heater manufacturer and as required by reasonable safety practices in the hotel and hospitality industry;
 - e. It failed to establish, maintain and enforce adequate guest safety standards for its hotel properties which would prohibit the use of unlicensed contractors to perform work on hotel buildings and the equipment located therein; and
 - f. And it was otherwise careless and negligent in other ways as may be revealed in discovery to be conducted in this action.
89. Through its advertising, promotional materials, website and rewards program, Defendant Best Western International, Inc. warranted that guest rooms in its hotel properties were safe and fit for their intended purpose and were habitable.
90. Defendant Best Western International, Inc. breached these implied warranties of fitness for a particular purpose and habitability by its failure to provide Daryl D. Jenkins and Shirley M. Jenkins a guest room which was, in fact, safe for its intended purpose of providing a place

to attend to their personal needs and sleep at night free from an unreasonable risk of death or personal injury.

91. Defendant Best Western International, Inc.'s negligence and breach of warranties as set forth above were a proximate cause of injuries to Daryl D. Jenkins and Shirley M. Jenkins and of their resulting deaths.

SECOND CAUSE OF ACTION

(Defendant AJD Investments, Inc.)

92. The allegations contained in paragraphs 1 through 91 of this Complaint are incorporated by reference as if fully set forth herein.
93. As the owner of the Best Western Plus Blue Ridge Plaza Hotel building located at 650 King Street, Boone, North Carolina, Defendant AJD Investments, Inc. had a non-delegable duty to ensure that the hotel building was safe for hotel guests and other members of the general public and free from hidden dangers.
94. At all times relevant to this action, Defendant Appalachian Hospitality Management, Inc. was an agent of Defendant AJD Investments, Inc. and was acting within the course and scope of its agency. Thus, Defendant AJD investments, Inc. is liable for the acts and omissions of Defendant Appalachian Hospitality Management, Inc. and its employees and/or agents based on the legal doctrine of *respondeat superior*.
95. At all times relevant to this action, Defendant AJD Investments, Inc. was negligent and grossly negligent by its own conduct, and its acts and omissions of negligence and gross negligence include, but are not limited, to the following:
- a. It failed to warn hotel guests and other occupants of the building of the hidden danger created by the defective and dangerous pool heater exhaust vent system and the presence of deadly levels of carbon monoxide gas;
 - b. It failed to adequately inspect the Best Western Plus Blue Ridge Plaza Hotel building and to detect the presence of dangerous hidden conditions in the building, including the lack of a proper vent system for the pool heater and inadequate fire stopping through rated firewalls;
 - c. It failed to repair or replace the electric power venter which was an essential part of the pool heater exhaust vent system when it became inoperable;
 - d. It failed to install carbon monoxide detectors in the pool equipment room, swimming pool area, guest rooms and other areas adjacent to the pool heater as recommended

by the pool heater manufacturer and as required by reasonable safety practices in the hotel and hospitality industry;

- e. It allowed unlicensed contractors to perform work on the Best Western Plus Blue Ridge Plaza Hotel building and the equipment located therein;
 - f. It allowed employees of Appalachian Hospitality Management, Inc. to perform work on the Best Western Plus Blue Ridge Plaza Hotel building and the equipment located therein without being properly licensed by the State of North Carolina and without obtaining proper permits and inspections from local government authorities;
 - g. It allowed Best Western Plus Blue Ridge Plaza Hotel building equipment to be modified in ways that were prohibited by the equipment manufacturer, particularly the conversion of the pool heater from propane to natural gas;
 - h. It allowed highly caustic and corrosive chemicals such as chlorine to be stored in the room containing the Jandy pool heater and other swimming pool mechanical equipment in violation of the manufacturers' instructions and reasonable practices within the hospitality industry; and
 - i. And it was otherwise careless and negligent in other ways as may be revealed in discovery to be conducted in this action.
96. Through its advertising and promotional materials, Defendant AJD Investments, Inc. warranted that guest rooms in the Best Western Plus Blue Ridge Plaza Hotel building were safe and fit for their intended purpose and were habitable.
97. Defendant AJD Investments, Inc. breached these implied warranties of fitness for a particular purpose and habitability by its failure to provide Daryl D. Jenkins and Shirley M. Jenkins a guest room which was, in fact, safe for its intended purpose of providing a place to attend to their personal needs and sleep at night free from an unreasonable risk of death or personal injury.
98. Defendant AJD Investments, Inc.'s negligence and breach of warranties as set forth above were a proximate cause of injuries to Daryl D. Jenkins and Shirley M. Jenkins and of their resulting deaths.

THIRD CAUSE OF ACTION

(Defendants Damon Barry Mallatere and Appalachian Hospitality Management, Inc.)

99. The allegations contained in paragraphs 1 through 98 of this Complaint are incorporated by reference as if fully set forth herein.

100. At all times relevant to this action, Defendant Damon Barry Mallatere was an employee and/or agent of Appalachian Hospitality Management, Inc. and was acting within the course and scope of his employment and/or agency. Thus, Defendant Appalachian Hospitality Management, Inc. is liable for the acts and omissions of Defendant Damon Barry Mallatere based on the legal doctrine of *respondeat superior*.
101. Upon information and belief, at all times relevant to this action, Defendant Damon Barry Mallatere was an officer, director or manager of Appalachian Hospitality Management, Inc.
102. At all times relevant to this action, Defendant Damon Barry Mallatere was the President of Appalachian Hospitality Management, Inc. and the General Manager of the Best Western Plus Blue Ridge Plaza Hotel.
103. Defendants Appalachian Hospitality Management, Inc. and Damon Barry Mallatere knew, or in the exercise of reasonable care should have known, that the room and the humid air in the room where the pool heater was located also contained common pool chemicals such as chlorine, which are highly corrosive to metal such as the vent pipes from the pool heater to the exterior of the building and further that corrosive air and gases were being drawn into and through the pool heater and exhaust flue during its normal operation. Evidence of severe corrosion was plainly visible simply by visual inspection of the openly visible portions of the pool heater and vent system.
104. At all times relevant to this action, Defendants Damon Barry Mallatere and Appalachian Hospitality Management, Inc. were negligent and grossly negligent, and their acts and omissions of negligence and/or gross negligence include, but are not limited, to the following:
 - a. They failed to warn hotel guests and other occupants of the Best Western Plus Blue Ridge Plaza Hotel building of the hidden danger created by the defective and dangerous pool heater vent system and the presence of deadly levels of carbon monoxide gas;
 - b. They failed to adequately inspect the Best Western Plus Blue Ridge Plaza Hotel building and to detect the presence of dangerous hidden conditions in the building including the lack of a proper vent system for the pool heater and inadequate fire stopping through rated firewalls;
 - c. They improperly stored highly caustic and corrosive chemicals such chlorine in the room containing the Jandy pool heater and other swimming pool mechanical equipment in violation of the manufacturers' instructions and reasonable practices within the hospitality industry;

- d. They failed to repair or replace the power venter contained in the pool heater vent system when it became an operable;
 - e. They failed to install carbon monoxide detectors in the pool equipment room, swimming pool area, guest rooms and other areas adjacent to the pool heater as recommended by the pool heater manufacturer and as required by reasonable safety practices in the hotel and hospitality industry;
 - f. They allowed unlicensed contractors to perform work on the hotel building and the equipment located therein;
 - g. They directed and allowed employees of Appalachian Hospitality Management, Inc. to perform work on the hotel building and the equipment located therein without being properly licensed by the state of North Carolina and without obtaining proper permits and inspections from local government authorities;
 - h. They allowed hotel building equipment to be modified in ways that were prohibited by the equipment manufacturer, particularly the conversion of the pool heater from propane to natural gas; and
 - i. And they were otherwise careless, negligent and grossly negligent in other ways as may be revealed in discovery to be conducted in this action.
105. Through their advertising and promotional materials, Defendants Damon Barry Mallatere and Appalachian Hospitality Management, Inc. warranted that guest rooms in the Best Western Plus Blue Ridge Plaza hotel were safe and fit for their intended purpose and were habitable.
106. Defendants Damon Barry Mallatere and Appalachian Hospitality Management, Inc. breached these implied warranties of fitness for a particular purpose and habitability by their failure to provide Daryl D. Jenkins and Shirley M. Jenkins a guest room which was in fact safe for its intended purpose of providing a place to attend to their personal needs and sleep at night free from unreasonable risk of death or personal injury.
107. Defendants Damon Barry Mallatere and Appalachian Hospitality Management, Inc.'s negligence and breach of warranties as set forth above were a proximate cause of injuries to Daryl D. Jenkins and Shirley M. Jenkins and of their resulting deaths.

FOURTH CAUSE OF ACTION

(Defendants Thomas Daniel Miller and Independence Oil & LP/Gas, Inc.)

108. The allegations contained in paragraphs 1 through 107 of this Complaint are incorporated by reference as if fully set forth herein.

109. At all times relevant to this action, Defendant Thomas Daniel Miller was an employee and agent of Defendant Independence Oil & LP/Gas, Inc., and was acting within the scope of his employment or agency relationship with Independence Oil & LP/Gas, Inc.
110. Independence Oil & LP/Gas, Inc. is vicariously liable to the Plaintiff for the negligence of its agent or employee, Defendant Thomas Daniel Miller, pursuant to the doctrine of *respondeat superior*.
111. As the license qualifier for Independence Oil & LP/Gas, Inc. Defendant Thomas Daniel Miller undertook to supervise the performance of various jobs requiring an active license, including the conversion of various appliances located within the Best Western Plus Blue Ridge Plaza Hotel from propane to natural gas.
112. That the Defendants, Independence Oil & LP/Gas, Inc. and Thomas Daniel Miller were negligent and their acts and omissions of negligence include, but are not limited to, the following:
 - a. They failed to properly supervise and/or perform the gas conversion work at the Best Western Plus Blue Ridge Plaza Hotel;
 - b. They performed work on gas fired appliances located in the Best Western Plus Blue Ridge Plaza Hotel which violated the minimum standards of the North Carolina State Fuel Gas Code;
 - c. They converted the Jandy propane gas pool heater to natural gas in violation of the manufacturer's installation and operation instructions;
 - d. They failed to properly convert the Jandy pool heater from propane to natural gas by not replacing the pilot, burner tray assembly and gas valve with the appropriate part as specified by the manufacturer;
 - e. They unreasonably and recklessly created a risk of personal injury or property damage; and
 - f. They were otherwise negligent and such other ways as may be revealed by discovery to be conducted in this action.
113. Defendants failure to exercise reasonable care and negligence as set forth above was a proximate cause of the injuries to Daryl D. Jenkins and Shirley M. Jenkins and of their resulting deaths.

FIFTH CAUSE OF ACTION

(Dale Thomas Winkler, Jr. d/b/a DJ's Heating Services)

114. The allegations contained in paragraphs 1 through 113 of this Complaint are incorporated by reference as if fully set forth herein.
115. At all times relevant to this action, Defendant Dale Thomas Winkler, Jr. d/b/a DJ's Heating Services was negligent and grossly negligent, and his acts and omissions of negligence include, but are not limited, to the following:
- a. Defendant Dale Thomas Winkler, Jr. placed the pool heater into service despite the obvious deficiencies in the pool heater exhaust vent system and the existence of extremely hazardous conditions as a result;
 - b. Defendant Dale Thomas Winkler, Jr. failed to instruct Appalachian Hospitality Management maintenance staff to disable the Jandy pool heater until a proper exhaust vent system was installed;
 - c. Defendant Dale Thomas Winkler, Jr. failed to contact the gas utility company and advise them to shut off the gas until a proper exhaust vent system was installed on the pool heater;
 - d. Defendant Dale Thomas Winkler, Jr. failed to repair or replace the power venter in the pool heater exhaust system prior to placing the pool heater back in operation;
 - e. Defendant Dale Thomas Winkler, Jr. failed to connect the control wiring to the power venter in the pool heater exhaust system prior to placing the pool heater back in operation;
 - f. Defendant Dale Thomas Winkler, Jr. failed to properly inspect or evaluate the condition and efficacy of the venting system between the pool heater and the exterior of the building prior to placing the pool heater back in operation;
 - g. Defendant Dale Thomas Winkler, Jr. left the pool heater in operation despite numerous open, obvious and readily observable safety hazards which exposed the occupants of the hotel building to serious personal injury or death;
 - h. Defendant Dale Thomas Winkler, Jr. performed work on the hotel building and the equipment located therein without being properly licensed by the state of North Carolina and without obtaining proper permits and inspections from local government authorities; and

- i. Defendant Dale Thomas Winkler, Jr. was otherwise careless, negligent and grossly negligent in such other ways as may be revealed in discovery to be conducted in this action.

Third Cause of Action Against Defendants

(Punitive Damages)

116. The allegations contained in paragraphs 1 through 115 of this Complaint are incorporated by reference as if fully set forth herein.
117. That at all times herein complained of, each of the Defendants exercised control and participated in the conduct constituting the aggravating factor giving rise to punitive damages in this case. That at all times herein complained of at least one officer, director or manager of Defendants participated in the conduct or condoned the conduct constituting the aggravating factor giving rise to punitive damages in this case.
118. That the conditions at the Best Western Plus Blue Ridge Plaza Hotel which violated the minimum standards of the North Carolina State Fuel Gas Code and Mechanical Code and which caused the deaths of Decedents existed for months or years.
119. The failure to correct such conditions and to consciously perform work in violation of state law were egregious, wrongful acts which constitute gross negligence and willful or wanton conduct which evidences a reckless disregard for the safety of others.
120. That the egregious, willful or wanton conduct of Defendants, their employee(s) or agent(s), while in the course and scope of their employment and/or agency as set forth above was a proximate cause of the injuries and damages sustained by Plaintiff.
121. That the Plaintiff is entitled to have and recover of Defendants, jointly and severally, punitive and exemplary damages in a sum in excess of Ten Thousand Dollars (\$10,000.00) for such egregious, wilful, wanton and reckless conduct.

DAMAGES

122. Paragraphs 1 through 121 are incorporated herein by reference as if set forth fully below.
123. As a direct and proximate result of the careless and negligent acts and/or omissions of the Defendants, the Decedents, Daryl D. Jenkins and Shirley M. Jenkins, sustained severe, painful, and fatal bodily injuries.
124. As a direct and proximate result of the careless and negligent acts and/or omissions of the Defendants the Decedents suffered and continued to suffer until their deaths, great pain of the body and mind.

125. The Plaintiff has incurred expenses for the funeral and burial services of the Decedents, the Decedents' family have lost their income or earning capacity, society, companionship, comfort, guidance, kindly offices, and advice.
126. That as a proximate result of all of the above, Plaintiff has been damaged for personal injuries to the Decedents and for their wrongful deaths by a sum in excess of Ten Thousand and no/100 Dollars (\$10,000.00).

WHEREFORE, Plaintiff respectfully prays the Court for relief as follows:

- A. That the Plaintiff have and recover of the Defendants, jointly and severally, for personal injuries and damages and wrongful death, a sum in excess of Ten Thousand Dollars (\$10,000.00), together with prejudgment interest from the date of the filing of this action and post-judgment interest until any verdict is paid, pursuant to North Carolina General Statutes §§ 24-1 and 24-5;
- B. That the Plaintiff have and recover of the Defendants, jointly and severally, punitive damages in a sum in excess of Ten Thousand Dollars (\$10,000.00), together with prejudgment interest from the date of the filing of this action and post-judgment interest until any verdict is paid, pursuant to North Carolina General Statutes §§ 24-1 and 24-5;
- C. That the Defendants be taxed with the costs of this action;
- D. That all issues of fact be tried by a jury; and
- E. For such other, further and different relief as the Court deems just and proper.

This the 9th day of February, 2015.



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